TITLE 4

ANIMALS

Chap.

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Cross references. — Criminal penalty for livestock theft, § 16-8-20. Criminal penalty for removal of collars or identifying items or marks on animals, § 16-9-71. Cruelty to animals, § 16-12-4. Protection of endangered species of wildlife, § 27-3-130 et seq. Regulation of importation, sale, etc., of animals and birds to be kept as pets, § 31-12-9. Control of rabies, T. 31, C. 19. Veterinarians and registered animal technicians generally, T. 43, C. 50. Liability of owner or keeper of vicious or dangerous animal for injuries caused by animal, § 51-2-7.

OPINIONS OF THE ATTORNEY GENERAL

The duties of the Commissioner of Agriculture are not all included in Title 4 and may be found in Titles 2, 10, 26, 43, and others. 1958-59 Op. Att'y Gen. p. 4.

CHAPTER 1

GENERAL PROVISIONS

Sec.
4-1-1. Definitions.
4-1-2. State veterinarian — Qualifications; term of office; assistants.
4-1-3. State veterinarian — Duties generally.
4-1-4. Presumption as to livestock killed or injured by poisons.
4-1-5. Use, possession, delivery, or sale of hog cholera vaccine, serum, or virus.
4-1-6. Obstruction, interference, or hindrance of duties.

4-1-1. Definitions.

As used in this title, the term:

(1) "Commissioner" means the Commissioner of Agriculture of the State of Georgia.

(2) "Department" means the Department of Agriculture of the State of Georgia.

4-1-2. State veterinarian — Qualifications; term of office; assistants.

(a) The Commissioner is empowered to employ a licensed veterinarian, with not less than five years' practical experience in the general practice of his profession, as state veterinarian. The state veterinarian shall hold his office for the same term as the Commissioner unless removed sooner at the direction of the Commissioner.

(b) The Commissioner may employ such other assistants as may be necessary in carrying out the duties imposed on him by this title.

(c) The Commissioner shall have the power to prescribe the powers, duties, and functions of the state veterinarian and his assistants. (Ga. L. 1910, p. 125, §§ 1-3; Ga. L. 1929, p. 336, § 1; Ga. L. 1931, p. 7, § 97; Code 1933, §§ 62-902, 62-903; Ga. L. 1935, p. 167, §§ 3, 4; Ga. L. 1937, p. 850, §§ 1, 3; Ga. L. 1941, p. 238, §§ 2-4; Ga. L. 1995, p. 10, § 4.)

Cross references. — License requirements for veterinarians, § 43-50-20 et seq.

Code Commission notes. — The title of the state veterinarian was changed to "chief veterinarian" pursuant to Ga. L. 1941, p. 238, § 2. However, the title was changed back to "state veterinarian" administratively and is so used in this Code section.

RESEARCH REFERENCES

Am. Jur. 2d. — 78 Am. Jur. 2d, Veterinarians, § 7.

4-1-3. State veterinarian — Duties generally.

The duties of the state veterinarian are to administer the business and affairs of the Animal Industry Division of the department. This includes enforcing the regulations and directing the programs designed to control and eradicate animal disease, directing the proper interstate movement of livestock, enforcing Article 3 of Chapter 2 of Title 26, the "Georgia Meat Inspection Act," promoting livestock marketing, and licensing and bonding livestock markets, dealers, and meat packers. (Ga. L. 1910, p. 125, § 2; Ga. L. 1931, p. 7, § 97; Code 1933, § 62-901; Ga. L. 1935, p. 167, §§ 2, 4; Ga. L. 1937, p. 850, § 2; Ga. L. 1941, p. 238, §§ 1, 4; Ga. L. 1984, p. 22, § 4.)

4-1-4. Presumption as to livestock killed or injured by poisons.

If livestock is killed or injured by poisoned crops or other poison on the property, there shall be a rebuttable presumption that the poisoning was done by the person in possession and charge of the property. (Orig. Code 1863, § 1403; Code 1868, § 1460; Code 1873, § 1447; Code 1882, § 1447; Civil Code 1895, § 1768; Civil Code 1910, § 2027; Code 1933, § 62-803.)

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, §§ 98, 109.

C.J.S. — 3B C.J.S., Animals, §§ 419, 420.

ALR. — Scienter as condition of liability for damage by trespassing animals other than dogs, 33 ALR 1305.

Rights and remedies as to chattels cast upon riparian land, 41 ALR 1015.

Liability for injury to trespassing stock from poisonous substances on the premises, 12 ALR3d 1103.

4-1-5. Use, possession, delivery, or sale of hog cholera vaccine, serum, or virus.

(a) It shall be unlawful for any person, firm, partnership, corporation, or association or any agency, department, or other political subdivision of a state, county, or municipal government or other entity to use, possess, sell, offer or hold for sale, deliver, distribute, introduce, or deliver for introduction into commerce hog cholera vaccine, serum, or virus in this state. A violation of this subsection shall constitute a misdemeanor.

(b) The Commissioner shall seize and destroy any hog cholera vaccine, serum, or virus found in this state. (Code 1933, §§ 62-1201, 62-1202, enacted by Ga. L. 1977, p. 280, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, § 26.

C.J.S. — 3B C.J.S., Animals, § 133.

4-1-6. Obstruction, interference, or hindrance of duties.

It shall be unlawful for any person to obstruct, interfere, or hinder the Commissioner, his or her designated agents and employees, an animal control officer, or a dog control officer in the lawful discharge of his or her official duties pursuant to this title. Any person convicted of a violation of this Code section shall be punished as provided in subsection (b) of Code Section 16-10-24. (Code 1981, § 4-1-6, enacted by Ga. L. 2000, p. 754, § 2.)

Editor's notes. — Ga. L. 2000, p. 754, § 1, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Animal Protection Act of 2000.'"

Law reviews. — For note on 2000 enactment of this Code section, see 17 Ga. St. U.L. Rev. 12 (2000).

CHAPTER 2

MARKS AND BRANDS

Sec.
4-2-1. Mark, brand, or tattoo registration — Certificates.
4-2-2. Mark, brand, or tattoo registration — Evidential value.
4-2-3. Mark, brand, or tattoo registration — Change.
4-2-4. Promulgation of rules and regulations.
4-2-5. Administration of chapter and rules and regulations.

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There is no requirement in this chapter that livestock must be marked or branded before moving; however, if livestock is marked or branded, that brand should be registered as provided by law. 1958-59 Op. Att'y Gen. p. 10.

4-2-1. Mark, brand, or tattoo registration — Certificates.

(a) Any person owning any livestock and desiring to register a mark, brand, or tattoo shall apply to the Commissioner for a certificate of mark, brand, or tattoo registration. Application for a certificate shall be made on forms provided by the department. Applications shall contain or be accompanied by such information as may be required by rule or regulation. In issuing certificates, the Commissioner shall not issue certificates to more than one person for the same or substantially identical marks, brands, or tattoos. There shall be no charge or fee for registration.

(b) Prior to July 1 of 1974 and on or before the same date every fifth year thereafter, the Commissioner shall purge from his lists of registrations the registrations of all marks, brands, or tattoos which the person to whom they are registered does not desire to retain as a registered mark, brand, or tattoo. Prior to removing a mark, brand, or tattoo from registration, the Commissioner shall, by registered or certified mail or statutory overnight delivery, notify the person to whom the mark, brand, or tattoo is registered that the registration will be canceled unless the Commissioner is notified within a period of three months from the date of mailing that such person desires to continue the registration of his mark, brand, or tattoo. If the Commissioner does not receive a reply within three months, he may cancel the registration of such mark, brand, or tattoo and may then reassign such mark, brand, or tattoo to any person seeking to register it, under such rules and regulations as may be prescribed by the Commissioner.

(c) It shall be the duty of the Commissioner to transmit a copy of any certificate of mark, brand, or tattoo registration to the judge of the probate court of the county of residence of the person to whom the certificate is issued or to the judge of the probate court of the county in which the animals to be marked, branded, or tattooed are located if the owner thereof is not a resident of this state. The judge of the probate court may record the certificate in a book kept by him for that purpose.

(d) No provision of this chapter shall affect or impair the validity of any mark, brand, or tattoo registered or recorded in the office of the Commissioner prior to April 1, 1974. (Ga. L. 1953, Nov.-Dec. Sess., p. 175, § 2; Code 1933, § 62-102, enacted by Ga. L. 1974, p. 1003, § 1; Ga. L. 1995, p. 244, § 3; Ga. L. 2000, p. 1589, § 3; Ga. L. 2008, p. 458, § 2/SB 364.)

Editor's notes. — Ga. L. 2000, p. 1589, § 16, not codified by the General Assembly, provides that the amendment to this Code section is applicable with respect to notices delivered on or after July 1, 2000.

OPINIONS OF THE ATTORNEY GENERAL

Methods of notification for registration and cancellation. — Commissioner of Agriculture may utilize either of the two following methods to comply with the statutory requirements: (1) mailing of registered notices to all names on the current registration list at least 90 days prior to the date set for cancellation of registered marks, brands, or tattoos; or (2) mailing of prenotice solicitations of intent to all registrants, to be followed by continuation of registration for those indicating affirmation of such action and by mailing of registered 90-day notices to those registrants not responding or responding negatively. 1974 Op. Att'y Gen. No. 74-87.

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, §§ 5, 7.

C.J.S. — 3B C.J.S., Animals, §§ 24, 27 et seq.

4-2-2. Mark, brand, or tattoo registration — Evidential value.

The fact that any livestock is marked, branded, or tattooed with a registered mark or brand shall constitute prima-facie evidence in any trial or proceeding that such livestock belongs to the person to whom the certificate of mark, brand, or tattoo registration for that particular mark, brand, or tattoo was issued. This Code section shall not apply to livestock marked or branded prior to April 1, 1974, unless the mark, brand, or tattoo was registered or recorded in the office of the Commissioner. (Orig. Code 1863, § 1395; Code 1868, § 1452; Code 1873, § 1439; Code 1882, § 1439; Civil Code 1895, § 1758; Civil Code 1910, § 2017; Code 1933, § 62-104; Code 1933, § 62-103, enacted by Ga. L. 1974, p. 1003, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, §§ 5, 7.
C.J.S. — 3B C.J.S., Animals, § 28 et seq.
ALR. — Identification of animals involved in conversion action, 51 ALR2d 1154.

4-2-3. Mark, brand, or tattoo registration — Change.

No registered mark, brand, or tattoo shall be changed so as to be of any use to the owner, unless permission is first granted by the Commissioner and the change is recorded. (Orig. Code 1863, § 1398; Code 1868, § 1455; Code 1873, § 1442; Code 1882, § 1442; Civil Code 1895, § 1761; Civil Code 1910, § 2020; Code 1933, § 62-107; Code 1933, § 62-104, enacted by Ga. L. 1974, p. 1003, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, §§ 5, 7.
C.J.S. — 3B C.J.S., Animals, §§ 24, 28 et seq.

4-2-4. Promulgation of rules and regulations.

The Commissioner is authorized to promulgate and adopt such rules and regulations as may be necessary or convenient to carry out this chapter. (Code 1933, § 62-105, enacted by Ga. L. 1974, p. 1003, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, § 7.
C.J.S. — 3B C.J.S., Animals, § 32.

4-2-5. Administration of chapter and rules and regulations.

It shall be the duty of the Commissioner to administer this chapter and any rules and regulations adopted pursuant to this chapter. (Ga. L. 1953, Nov.-Dec. Sess., p. 175, § 3; Code 1933, § 62-101, enacted by Ga. L. 1974, p. 1003, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, § 5.
C.J.S. — 3B C.J.S., Animals, §§ 24, 28 et seq.

CHAPTER 3

LIVESTOCK RUNNING AT LARGE OR STRAYING

Sec.
4-3-1. Legislative intent.
4-3-2. Definitions.
4-3-3. Permitting livestock to run at large or stray.
4-3-4. Impoundment of livestock running at large or straying.
4-3-5. Notice of impoundment and sale of livestock.
4-3-6. Redemption of livestock prior to sale.
4-3-7. Disposition of livestock not sold at auction.
4-3-8. Return and disposition of proceeds of sale.
4-3-9. Care of impounded animals; employment of guards, poundmasters, or other persons.
4-3-10. Fees for impounding, serving notice, care and feeding, advertising, and disposing of impounded animals.
4-3-11. County livestock pounds.
4-3-12. Permitting livestock to run at large or stray; releasing impounded livestock; penalty.

RESEARCH REFERENCES

ALR. — Liability of person, other than owner of animal or owner or operator of motor vehicle, for damage to motor vehicle or injury to person riding therein resulting from collision with domestic animal at large in street or highway, 21 ALR4th 132.

Liability of owner or operator of vehicle for damage to motor vehicle or injury to person riding therein resulting from collision with domestic animal at large in street or highway, 21 ALR4th 159.

Liability of owner of animal for damage to motor vehicle or injury to person riding therein resulting from collision with domestic animal at large in street or highway, 29 ALR4th 431.

Liability for damage to motor vehicle or injury to person riding therein from collision with runaway horse, or horse left unattended or untied in street, 49 ALR4th 653.

Liability for personal injury or death caused by trespassing or intruding livestock, 49 ALR4th 710.

Liability of governmental entity for damage to motor vehicle or injury to person riding therein resulting from collision between vehicle and domestic animal at large in street or highway, 52 ALR4th 1200.

4-3-1. Legislative intent.

There is found and declared a necessity for a uniform state-wide livestock law embracing all public roads in the state and all other property. (Ga. L. 1953, Jan.-Feb. Sess., p. 380, § 1; Ga. L. 1953, Nov.-Dec. Sess., p. 395, § 1; Ga. L. 1955, p. 633, § 1.)

JUDICIAL DECISIONS

Preemption of local laws. — O.C.G.A. § 4-3-1 specifically finds and declares a necessity for a uniform state-wide livestock law embracing all public roads in the state, therefore, it expressly preempts local laws on the subject by declaring the

need for uniformity. Hortman v. Guy, 242 Ga. App. 174, 529 S.E.2d 182 (2000).

Cited in Tennessee, Ala. & Ga. Ry. v. Andrews, 117 Ga. App. 164, 159 S.E.2d 460 (1968); Cotton v. State, 263 Ga. App. 843, 589 S.E.2d 610 (2003).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 1C Am. Jur. Pleading and Practice Forms, Animals, § 33.

Am. Jur. 2d. — 1C Am. Jur. Pleading and Practice Forms, Animals, § 33.

4-3-2. Definitions.

As used in this chapter, the term:

(1) "Livestock" means all animals of the equine, bovine, or swine class, including goats, sheep, mules, horses, hogs, cattle, and other grazing animals.

(2) "Owner" means any person, association, firm, or corporation, natural or artificial, owning, having custody of, or in charge of livestock.

(3) "Public roads" means any street, road, highway, or way, including the full width of the right of way, which is open to the use of the public for vehicular travel.

(4) "Running at large" or "straying" means any livestock which is not under manual control of a person and which is on any public roads of this state or on any property not belonging to the owner of the livestock, unless by permission of the owner of such property. (Ga. L. 1953, Jan.-Feb. Sess., p. 380, § 2; Ga. L. 1953, Nov.-Dec. Sess., p. 395, § 2; Ga. L. 1995, p. 244, § 4; Ga. L. 2008, p. 458, § 3/SB 364.)

JUDICIAL DECISIONS

"Owner" construed. — Landowner who allowed her cousin to keep his cattle on her property, provided he maintained the fence around the property, did not come within the statutory definition of an "owner." Evancho v. Baker, 196 Ga. App. 903, 397 S.E.2d 166 (1990).

Owner of a pasture who allowed her son to keep his horse in the pasture was not an "owner" of the horse as that term is defined in this Code section. Supchak v. Pruitt, 232 Ga. App. 680, 503 S.E.2d 581 (1998).

4-3-3. Permitting livestock to run at large or stray.

No owner shall permit livestock to run at large on or to stray upon the public roads of this state or any property not belonging to the owner of the livestock, except by permission of the owner of such property. (Ga. L. 1953, Jan.-Feb. Sess., p. 380, § 3; Ga. L. 1953, Nov.-Dec. Sess., p. 395, § 4.)

Cross references. — Cruelty to animals, § 16-12-4.

Law reviews. — For survey article on torts, see 34 Mercer L. Rev. 271 (1982).

JUDICIAL DECISIONS

Inference of owner's negligence from livestock running at large. — The mere fact that livestock is running at large permits an inference that the owner is negligent in permitting the livestock to stray; but when the owner introduces evidence that he has exercised ordinary care in the maintenance of the stock, that permissible inference disappears. Green v. Heard Milling Co., 119 Ga. App. 116, 166 S.E.2d 408 (1969); Wilkins v. Beverly, 124 Ga. App. 842, 186 S.E.2d 436 (1971).

O.C.G.A. § 4-3-3 is not a penal statute. — Appellate court held that O.C.G.A. § 4-3-3 was not a penal statute and it reversed the trial court's judgment convicting defendant and defendant's spouse of violating that statute. Cotton v. State, 263 Ga. App. 843, 589 S.E.2d 610 (2003).

Owner of a pasture who allowed her son to keep his horse in the pasture was not an "owner" of the horse as that term is defined in O.C.G.A. § 4-3-2(2) and, therefore, under no obligation to prevent the horse from escaping. Supchak v. Pruitt, 232 Ga. App. 680, 503 S.E.2d 581 (1998).

Evidence of ownership required. — Grant of summary judgment to defendant on plaintiff's claim for damages after his car hit a cow was proper because plaintiff failed to show that defendant owned the cow. Taylor v. Thompkins, 242 Ga. App. 789, 531 S.E.2d 360 (2000).

Negligence per se. — Where an owner through his negligence permits his livestock to stray or run at large upon the public highways of this state, he is not guilty of negligence per se. Porier v. Spivey, 97 Ga. App. 209, 102 S.E.2d 706 (1958) (decided under former Code 1933, § 62-601).

Liability for injury to livestock running at large. — Livestock running at large on a public road are trespassers, and a motorist is liable only for willful and wanton negligence in injuring the animal. Green v. Heard Milling Co., 119 Ga. App. 116, 166 S.E.2d 408 (1969).

Since the abolition of the open range by adoption of this section, loose livestock going upon the lands of others, including a railroad right-of-way, are trespassers, and the duty owed them by the landowner or the railroad company is not willfully or wantonly to injure them. Tennessee, Ala. & Ga. Ry. v. Andrews, 117 Ga. App. 164, 159 S.E.2d 460 (1968).

Testimony as to defendant's care in maintaining his pasture fence does not demand a verdict in his favor. Green v. Heard Milling Co., 119 Ga. App. 116, 166 S.E.2d 408 (1969).

No evidence of owners' negligence. — There was no evidence of a violation of O.C.G.A. § 4-3-3, and summary judgment for owners was proper in a driver's claim arising out of an accident in which the driver struck a cow because, inter alia, the evidence showed that the fencing surrounding the pasture where the cows were kept was in good repair and the gates were closed at the time of the driver's accident; evidence was presented that the fencing was sufficient to confine the cattle, that the owners monitored the fences regularly, and that, after leaving the scene of the accident, one of the owners confirmed that all of the gates were closed and that the fences remained in good condition. The driver did not present any admissible evidence to challenge these claims and accordingly there was no evidence of negligence committed by the owners, but only impermissible speculation. West v. West, 299 Ga. App. 643, 683 S.E.2d 153 (2009).

Charging that violation of section is negligence per se. — Charging jury to the effect that a violation of this section is negligence per se was reversible error. Lovell v. Howard, 182 Ga. App. 891, 357 S.E.2d 600 (1987).

Cited in Law v. Hulsey, 109 Ga. App. 379, 136 S.E.2d 161 (1964); Jackson v. State, 120 Ga. App. 417, 170 S.E.2d 751 (1969); Binford v. Bush, 125 Ga. App. 704, 188 S.E.2d 883 (1972); Caldwell v. Hunnicutt, 159 Ga. App. 102, 282 S.E.2d 665 (1981); Johns v. Marlow, 252 Ga. App. 79, 555 S.E.2d 756 (2001).

OPINIONS OF THE ATTORNEY GENERAL

Prohibition against free ranging of cattle. — The result of the prohibition of this section is the prohibiting of the free ranging of cattle. 1960-61 Op. Att'y Gen. p. 3.

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, § 34 et seq.

Am. Jur. Pleading and Practice Forms. — 1C Am. Jur. Pleading and Practice Forms, Animals, § 68.

C.J.S. — 3B C.J.S., Animals, §§ 263 et seq., 293, 295, 306, 313.

ALR. — Liability of interurban railroad for killing or injuring livestock running at large, 2 ALR 98; 25 ALR 1506.

Liability for trespass or damage by fowls, 14 ALR 745.

Liability of agister to owner for damages from escape of animals, 23 ALR 265.

Presumption and burden of proof in agistment cases, 23 ALR 276.

Liability for injury to trespassing stock from poisonous substances or other conditions on the premises, 33 ALR 448.

Scienter as condition of liability for damage by trespassing animals other than dogs, 33 ALR 1305.

Rights and remedies as to chattels cast upon riparian land, 41 ALR 1015.

What constitutes willful trespass by stock on land not inclosed by legal fence, 158 ALR 375.

Owner's liability, under legislation forbidding domestic animals to run at large on highways, as dependent on negligence, 34 ALR2d 1285.

Liability of person, other than owner of animal or owner or operator of motor vehicle, for damage to motor vehicle or injury to person riding therein resulting from collision with domestic animal at large in street or highway, 21 ALR4th 132.

Liability of owner or operator of vehicle for damage to motor vehicle or injury to person riding therein resulting from collision with domestic animal at large in street or highway, 21 ALR4th 159.

Liability of owner of animal for damage to motor vehicle or injury to person riding therein resulting from collision with domestic animal at large in street or highway, 29 ALR4th 431.

4-3-4. Impoundment of livestock running at large or straying.

(a) It shall be the duty of the sheriff, his deputies, or any other county law enforcement officer to impound livestock found to be running at large or straying. Owners or operators of farms may also impound such livestock, provided that the livestock is kept in a suitable place and cared for properly; such owners or operators shall receive the feed and care fee allowed in Code Section 4-3-10.

(b) If an owner or operator of a farm impounds livestock, it shall be his duty to notify the owner of such livestock immediately. If the owner of the livestock is unknown and is not determined within three days, the person who impounds the livestock shall notify the sheriff of such impoundment; and the sheriff shall transport the livestock as soon as possible to a county pound as provided for in Code Section 4-3-11. The sheriff shall then follow the procedure set out in this chapter as if he had originally impounded such livestock. (Ga. L. 1953, Jan.-Feb. Sess., p. 380, § 4; Ga. L. 1953, Nov.-Dec. Sess., p. 395, § 5.)

Law reviews. — For annual survey on local government law, see 61 Mercer L. Rev. 255 (2009).

JUDICIAL DECISIONS

Official immunity for death of animal during impoundment attempt. — Trial court did not err in finding that a sheriff's deputy was entitled to official immunity after killing an owner's bull while attempting to impound the bull because the deputy's actions were discretionary. To control a potentially dangerous animal pursuant to O.C.G.A. § 4-3-4(a), the deputy was required to make decisions concerning the safety of the deputy and others as circumstances—including the behavior of the animal—changed; under such changing circumstances, the deputy was required to exercise considerable deliberation and judgment, which rendered the deputy's actions discretionary. Todd v. Brooks, 292 Ga. App. 329, 665 S.E.2d 11 (2008), cert. denied, No. S08C1859, 2008 Ga. LEXIS 924 (Ga. 2008).

Cited in Jackson v. State, 120 Ga. App. 417, 170 S.E.2d 751 (1969).

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, § 37 et seq.

C.J.S. — 3B C.J.S., Animals, §§ 244 et seq., 309 et seq.

4-3-5. Notice of impoundment and sale of livestock.

(a) Upon the impounding of any livestock by the sheriff, his deputies, or any other law enforcement officers of the county, the sheriff shall forthwith serve written notice upon the owner, advising such owner of the location or place where the livestock is being held and impounded, the amount due as a result of such impounding, and that unless such livestock is redeemed within three days from that date the livestock shall be offered for sale. In the event the owner of such livestock is unknown or cannot be found, service upon the owner shall be obtained by publishing a notice once in a newspaper of general circulation where the livestock is impounded, Sundays and holidays excluded. If there is no such newspaper then service shall be obtained by posting the notice at the courthouse door and at two other conspicuous places within said county. Such notice shall be in substantially the following form:

"To Whom It May Concern:

You are hereby notified that the following described livestock (giving full and accurate description of same, including marks and brands) is now impounded at (giving location where livestock is impounded) and the amount due by reason of such impounding is _____ dollars. The above-described livestock will, unless redeemed within three days from the date of this notice, be offered for

sale at public auction to the highest bidder for cash.

_____ _____

Date Sheriff of _____ County, Georgia"

(b) Unless the impounded livestock is redeemed within three days from the date of the notice, the sheriff shall forthwith give notice of sale thereof, which shall be held not less than five days nor more than ten days, excluding Sundays and holidays, from the first publication of the notice of sale. The notice of sale shall be published in a newspaper of general circulation in the county where the livestock is impounded, excluding Sundays and holidays, and by posting a copy of such notice at the courthouse door. If there is no such newspaper, then notice shall be given by posting a copy at the courthouse door and at two other conspicuous places in the county. Such notice of sale shall be in substantially the following form:

"(Name of owner, if known, otherwise, 'To Whom It May Concern'), you are hereby notified that I will offer for sale and sell at public sale to the highest bidder for cash the following described livestock (giving full and accurate description of each head of livestock) at _____ _____ M. (the hours of sale to be between 11:00 A.M. and 2:00 P.M. eastern standard time or eastern daylight time, whichever is applicable) on the _____ day of _____ at the following place _____ (which place shall be where the livestock is impounded or at the place provided by the county commissioners for the taking up and keeping of such livestock) to satisfy a claim in the sum of _____ for fees, expenses for feeding and care, and costs hereof.

_____ _____

Date Sheriff of _____ County, Georgia"

(Ga. L. 1953, Jan.-Feb. Sess., p. 380, § 5.)

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, § 37 et seq.

C.J.S. — 3B C.J.S., Animals, §§ 248, 249, 250, 256, 257, 258, 309 et seq.

4-3-6. Redemption of livestock prior to sale.

The owner of any impounded livestock shall have the right at any time before sale thereof to redeem the livestock by paying to the sheriff all impounding expenses, including fees, keeping charges, and advertising or other costs incurred, which sum shall be deposited by the sheriff with the clerk of the superior court who shall pay all fees and costs as allowed in Code Section 4-3-10. In the event there is a dispute as to the amount of such costs and expenses, the owner may provide

bond, with sufficient sureties to be approved by the sheriff, in an amount to be determined by the sheriff, but not exceeding the fair cash value of such livestock, conditioned to pay such costs and damages. Within ten days thereafter the owner shall institute an action to have the dispute adjudicated by the court or referred to a jury if requested by either party to the action. (Ga. L. 1953, Jan.-Feb. Sess., p. 380, § 11.)

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1933, § 62-603 are included in the annotations for this Code section.

Recovery by possessory warrant. — When a mule owned by two persons, which by an agreement between the owners is in the possession of one of them, escapes and trespasses upon the land of the other person, the latter person acquires lawful possession of the mule by impounding the mule for a trespass and the other person cannot recover the mule by possessory warrant. Weatherby v. Gentry, 50 Ga. App. 618, 179 S.E. 170 (1935) (decided under former Code 1933, § 62-603).

Trover action. — If the jury finds that impounding of bull yearling was legal, and that the defendant had not held the animal beyond a reasonable time before instituting the required proceedings, the plaintiff could not prevail in a trover suit because there would have been no conversion at the time of the filing of the trover action. Hall v. Browning, 71 Ga. App. 194, 30 S.E.2d 345 (1944) (decided under former Code 1933, § 62-603).

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, § 37 et seq.

C.J.S. — 3B C.J.S., Animals, §§ 259 et seq., 309 et seq.

4-3-7. Disposition of livestock not sold at auction.

If there is no bidder for the livestock at the sale provided for in Code Section 4-3-5, the sheriff shall have the livestock killed and shall dispose of the carcass thereof; and, if there is any money received by him from the disposal, the same shall be disbursed in the manner provided for in Code Section 4-3-8. If there is no ready sale for the carcass, the sheriff shall deliver the carcass to a public institution of the county, state, or municipality within the county or to any private charitable institution, in this order, according to their needs. (Ga. L. 1953, Jan.-Feb. Sess., p. 380, § 7.)

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, § 37 et seq.

C.J.S. — 3B C.J.S., Animals, § 309 et seq.

4-3-8. Return and disposition of proceeds of sale.

(a) The sheriff, upon making a sale or other disposal as provided for in this chapter, shall forthwith make a written return thereof to the clerk of the superior court of such county, with a full and accurate description of the livestock sold or disposed of by him, to whom, and the sale price thereof, which report shall be filed by the clerk.

(b) At the time of making his return, the sheriff shall pay over to the clerk of the superior court the entire proceeds of the sale. The clerk of the superior court shall pay all costs and fees allowed in Code Section 4-3-10. If there is any balance remaining it shall be paid to the owner of such livestock, provided that the owner shall provide satisfactory proof of ownership to the board of county commissioners within 90 days from the date the sheriff reports the sale. If proof of ownership is not made within 90 days from the date the sheriff reports the sale, the clerk shall pay such proceeds into the fine and forfeiture fund of the county. The clerk shall keep a permanent record of all sales, disbursements, and distributions made under this chapter. If the amount realized from the sale or other disposition of the animal is insufficient to pay all fees, costs, and expenses as provided for in Code Section 4-3-10, the deficit shall be paid by the county from its fine and forfeiture fund. (Ga. L. 1953, Jan.-Feb. Sess., p. 380, § 8.)

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, § 37 et seq.

C.J.S. — 3B C.J.S., Animals, §§ 253, 256, 257, 258, 309 et seq.

4-3-9. Care of impounded animals; employment of guards, poundmasters, or other persons.

The sheriff shall have feed and water provided for impounded livestock not less than twice a day and shall see that all milk cows and milk goats are milked twice a day. The sheriff shall employ poundmasters, guards, or other persons as are necessary to protect, feed, care for, and have custody of the impounded animals. The sheriff shall be entitled to the fees allowed in Code Section 4-3-10 for such feed and care. (Ga. L. 1953, Jan.-Feb. Sess., p. 380, § 10.)

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, § 40.

C.J.S. — 3B C.J.S., Animals, §§ 313, 499.

ALR. — Liability for injury to trespassing stock from poisonous substances or other conditions on the premises, 33 ALR 448.

4-3-10. Fees for impounding, serving notice, care and feeding, advertising, and disposing of impounded animals.

The fees allowed for impounding, serving notice, care and feeding, advertising, and disposing of impounded animals shall be as follows:

(1) For impounding each animal, the sum of $10.00 and mileage as provided by law for the arrest and commitment of prisoners;

(2) For serving any notice and making return thereon, the sum of $7.50 and mileage provided by law for executing writs in actions at law and making return upon the same;

(3) For feed and care of impounded animals, the sum of $5.00 per day per animal;

(4) For advertising or posting notices of sale of impounded animals, the same as provided by law for advertising property for sale under process;

(5) For sale or other disposition of impounded animals, the sum of $5.00; and

(6) For report of sale of impounded animals, the sum of $2.50. (Ga. L. 1953, Jan.-Feb. Sess., p. 380, § 6; Ga. L. 1988, p. 325, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, § 38.

C.J.S. — 3B C.J.S., Animals, §§ 311 et seq.

ALR. — Implied agreement to pay for pasturage by owner of livestock which enters on another's land, 39 ALR 857.

4-3-11. County livestock pounds.

(a) The county commissioners of the several counties of Georgia shall establish and maintain pounds or suitable places for the keeping of any livestock taken up and impounded under this chapter until the same is sold, redeemed, or otherwise disposed of. In any case, the county commissioners shall provide truck transportation for the impounded animals.

(b) In those counties having no county commissioners, the judge of the probate court or other governing authority shall perform any functions or duties required of county commissioners under this chapter. (Ga. L. 1953, Jan.-Feb. Sess., p. 380, § 9; Ga. L. 1953, Nov.-Dec. Sess., p. 395, § 3.)

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, §§ 37, 38.

C.J.S. — 3B C.J.S., Animals, § 499 et seq.

4-3-12. Permitting livestock to run at large or stray; releasing impounded livestock; penalty.

Any owner of livestock who intentionally or knowingly permits the same to run at large or stray upon the public roads of this state or any property not belonging to the owner of the livestock unless by permission of the owner of such property, or any person who shall release livestock, after being impounded, without authority of the impounder, shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by imprisonment in the county jail not exceeding six months, or by fine not exceeding $500.00, or by both fine and imprisonment. (Ga. L. 1953, Jan.-Feb. Sess., p. 380, § 12; Ga. L. 1953, Nov.-Dec. Sess., p. 395, § 6.)

JUDICIAL DECISIONS

Relationship to other statutes. — Appellate court held that O.C.G.A. § 4-3-3 was not a penal statute and it reversed the trial court's judgment convicting defendant and defendant's spouse who were charged under § 4-3-3 instead of O.C.G.A. § 4-3-12. Cotton v. State, 263 Ga. App. 843, 589 S.E.2d 610 (2003).

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, § 34 et seq.

C.J.S. — 3B C.J.S., Animals, §§ 303, 304, 305, 307, 308.

ALR. — Scienter as condition of liability for damage by trespassing animals other than dogs, 33 ALR 1305.

Owner's liability, under legislation forbidding domestic animals to run at large on highways, as dependent on negligence, 34 ALR2d 1285.

Liability of owner of animal for damage to motor vehicle or injury to person riding therein resulting from collision with domestic animal at large in street or highway, 29 ALR4th 431.

CHAPTER 4

PREVENTION AND CONTROL OF DISEASE IN LIVESTOCK

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Control of Infectious or Contagious Diseases in Livestock

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4-4-181. Penalty.

Administrative rules and regulations. — Contagious diseases, Official Compilation of the Rules and Regulations of the State of Georgia, Rules of Georgia Department of Agriculture, Chapter 40-13-8.

RESEARCH REFERENCES

ALR. — Constitutionality of statute for control of diseases of livestock, 65 ALR 525.

ARTICLE 1

CONTROL OF INFECTIOUS OR CONTAGIOUS DISEASES IN LIVESTOCK

PART 1

GENERAL PROVISIONS

Cross references. — Use of sulfanilamide and sulfonamide drugs for control of livestock and poultry diseases, § 26-4-6.

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, § 27 et seq.

C.J.S. — 3B C.J.S., Animals, § 128 et seq.

4-4-1. Legislative intent.

Because of the existing and increasing possibility of the occurrences of highly contagious or infectious diseases which threaten to destroy the livestock of this state and because certain known agents and vectors are instrumental in the spread of certain highly contagious or infectious diseases in livestock, it is found and declared to be necessary to:

(1) Regulate the feeding of garbage;

(2) Regulate the rendering of the carcasses of dead domestic animals;

(3) Protect areas of this state free of disease by quarantine against the introduction of such diseases;

(4) Quarantine infected areas against the spread of such diseases therefrom; and

(5) Undertake to eradicate, control, suppress, and prevent such contagious or infectious diseases and make provisions therefor. (Ga. L. 1953, Jan.-Feb. Sess., p. 480, § 1.)

4-4-1.1. "Livestock" defined.

As used in this chapter, the term:

(1) "Livestock" means cattle, swine, equines, poultry, sheep, goats, nontraditional livestock, and ruminants.

(2) "Nontraditional livestock" means the species of Artiodactyla (even-toed ungulates) listed as bison, water buffalo, farmed deer, llamas, and alpacas that are held and possessed legally and in a manner which is not in conflict with the provisions of Chapter 5 of Title 27 dealing with wild animals. (Code 1981, § 4-4-1.1, enacted by Ga. L. 1986, p. 425, § 1; Ga. L. 1995, p. 244, § 5; Ga. L. 1997, p. 1395, § 1; Ga. L. 2008, p. 458, § 4/SB 364.)

4-4-2. Promulgation of rules and regulations.

The Commissioner of Agriculture is authorized to promulgate rules and regulations as may be necessary to effectuate the purpose of this article. (Ga. L. 1953, Jan.-Feb. Sess., p. 480, § 4.)

RESEARCH REFERENCES

C.J.S. — 3B C.J.S., Animals, §§ 127, 128.

4-4-2.1. Fees for services rendered to A.P.H.I.S. programs.

The Commissioner is authorized by rule or regulation to establish, impose, and provide for the collection of reasonable fees for services rendered by the department or its employees or agents in connection with federal programs administered by the United States Department of Agriculture, Animal and Plant Health Inspection Service pursuant to 5 U.S.C. Section 5542; 7 U.S.C. Section 1622; 19 U.S.C. Section 1306; 21 U.S.C. Sections 102 through 105, 111, 114, 114a, 134a, 134c, 134d, 134f, 136, and 136a; or 7 C.F.R. 2.22, 2.80, and 371.2(d) (1-1-99 Edition); provided, however, no fees shall be imposed or collected under this Code section for any services rendered for primates or wild animals. The fees so established shall be sufficient in amount to reimburse the state for the cost incurred by the department in providing and administering such services. (Code 1981, § 4-4-2.1, enacted by Ga. L. 2000, p. 878, § 1.)

4-4-3. Injunctions.

In addition to the remedies provided in this article and notwithstanding the existence of any adequate remedy at law, the Commissioner is authorized to apply to the superior court for an injunction. Such court shall have jurisdiction, upon hearing and for cause shown, to grant a temporary or permanent injunction, or both, restraining any person from violating or continuing to violate any of the provisions of this article or for failing or refusing to comply with the requirements of this article or any rule or regulation adopted by the Commissioner thereunder. An injunction issued under this Code section shall not require a bond. (Ga. L. 1956, p. 627, § 1.)

4-4-4. Administrative hearings and penalties.

(a) The Commissioner, in order to enforce this article or any orders, rules, or regulations promulgated pursuant thereto, may issue an administrative order imposing a penalty not to exceed $1,000.00 for each violation whenever the Commissioner, after a hearing, determines that any person has violated any provision of this article or any quarantines, orders, rules, or regulations promulgated thereunder.

(b) The initial hearing and any administrative review thereof shall be conducted in accordance with the procedure for contested cases in Chapter 13 of Title 50, the "Georgia Administrative Procedure Act." Any

person who has exhausted all administrative remedies available and who is aggrieved or adversely affected by any final order or action of the Commissioner shall have the right of judicial review thereof in accordance with Chapter 13 of Title 50. All penalties recovered by the Commissioner as provided for in this article shall be paid into the state treasury. The Commissioner may file in the superior court wherein the person under order resides or, if said person is a corporation, in the county wherein the corporation maintains its principal place of business or in the county wherein the violation occurred a certified copy of a final order of the Commissioner unappealed from or of a final order of the department affirmed upon appeal, whereupon said court shall render judgment in accordance therewith and notify the parties. Such judgment shall have the same effect, and all proceedings in relation thereto shall thereafter be the same, as though said judgment had been rendered in an action duly heard and determined by said court. The penalty prescribed in this Code section shall be concurrent, alternative, or cumulative with any and all other civil, criminal, or alternative rights, remedies, forfeitures, or penalties provided, allowed, or available to the Commissioner with respect to any violation of this article and any quarantines, orders, rules, or regulations promulgated pursuant thereto. (Ga. L. 1979, p. 1035, § 1; Ga. L. 1982, p. 3, § 4.)

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, § 27 et seq.

C.J.S. — 3B C.J.S., Animals, § 128 et seq.

4-4-5.

Reserved.

Editor's notes. — Ga. L. 2008, p. 575, § 1, effective July 1, 2008, redesignated former Code Section 4-4-5 as present Code Section 2-2-13.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2008, this Code section was reserved.

4-4-6. Penalty for introducing foreign animal disease; notice and reporting required for certain diseases; exception for bona fide research activities.

(a) Any person who knowingly introduces into this state any foreign animal disease or any animal disease, syndrome, chemical, poison, or toxin that may pose a substantial threat of harm to the animal industries in this state shall be guilty of a misdemeanor of a high and aggravated nature.

(b)(1) Any person who makes a clinical diagnosis or laboratory confirmation of or who reasonably suspects the presence or occur-

rence of any of the following diseases, syndromes, or conditions in animals shall report the same immediately to the state veterinarian or the United States Department of Agriculture area veterinarian in charge:

(A) African Horse Sickness;

(B) African Swine Fever;

(C) Avian Influenza;

(D) Classical Swine Fever (Hog Cholera);

(E) Contagious Bovine Pleuropneumonia (*Mycoplasma mycoides mycoides*);

(F) Contagious Ecthyma (Soremouth);

(G) Foot & Mouth Disease (FMD, any type);

(H) Heartwater (*Cowdria ruminantium*);

(I) Lumpy Skin Disease;

(J) Newcastle Disease (Exotic);

(K) Nipah Virus;

(L) Peste des Petits Ruminants;

(M) Plague (*Yersinia pestis*);

(N) Rift Valley Fever;

(O) Rinderpest;

(P) Screwworm (*Cochliomyia hominivorax, C. bezziana*);

(Q) Sheep Pox and Goat Pox;

(R) Swine Vesicular Disease;

(S) Vesicular or Ulcerative Conditions;

(T) Vesicular Exanthema; or

(U) Vesicular Stomatitis (VS, any type).

(2) Any person who reasonably suspects the presence or occurrence of any vesicular diseases, mucosal diseases, or abortion storms of unknown etiology in livestock; undiagnosed bovine central nervous system conditions; unusual number of acute deaths in livestock; unusual myiasis or acariasis (flies, mites, ticks, etc.) in animals; or any apparently highly infectious or contagious animal condition of unknown etiology shall report the same immediately to the state veterinarian or the United States Department of Agriculture area veterinarian in charge.

(3) Any person who makes a laboratory confirmation of any of the following diseases, syndromes, or conditions in animals shall report the same within 24 hours or by the close of the next business day, whichever last occurs, to the state veterinarian or the United States Department of Agriculture area veterinarian in charge:

(A) Akabane Virus Disease;

(B) Anthrax (*Bacillus anthracis*);

(C) Aujeszky's Disease (Pseudorabies);

(D) Avian Chlamydiosis (Psittacosis and Ornithosis, *Chlamydia psittaci*);

(E) Babesiosis (in livestock, any species);

(F) Bluetongue;

(G) Borna Disease;

(H) Bovine Spongiform Encephalopathy;

(I) Brucellosis (*Brucella. abortus, B. ovis, B. suis B. mellitensis*);

(J) Camel Pox Virus;

(K) Caseous Lymphadenitis (*Corynebacterium pseudotuberculosis*);

(L) Chronic Wasting Disease;

(M) *Clostridium perfringens* Epsilon Toxin;

(N) Coccidioidomycosis (*Coccidioides immitis*);

(O) Contagious Agalactia (*Mycoplasma agalactiae, M. capricolum capricolum, M. putrefaciens, M. mycoides mycoides, M. mycoides mycoides LC*);

(P) Contagious Caprine Pleuropneumonia (*Mycoplasma capricolum capripneumoniae*);

(Q) Contagious Equine Metritis (*Taylorella equigenitalis*);

(R) Dourine (*Trypanosoma equiperdum*);

(S) Enterovirus Encephalomyelitis (porcine);

(T) Ephemeral Fever;

(U) Epizootic Lymphangitis (*Histoplasma farciminosum*);

(V) Equine Encephalomyelitis (Eastern, Western, Venezuelan, West Nile Virus);

(W) Equine Infectious Anemia (EIA);

(X) Equine Morbillivirus (Hendra virus);

(Y) Equine Piroplasmosis (Babesiosis, *Babesia (Piroplasma) equi, B. caballi*);

(Z) Equine Rhinopneumonitis (Type 1 and 4);

(AA) Equine Viral Arteritis;

(BB) Feline Spongiform Encephalopathy;

(CC) Glanders (*Burkholderia [Pseudomonas] mallei*);

(DD) Hemorrhagic Septicemia (*Pasteurella multocida*);

(EE) Japanese Encephalitis Virus;

(FF) Ibaraki;

(GG) Infectious Laryngotracheitis (other than vaccine induced);

(HH) Infectious Petechial Fever (*Ehrlichia ondiri*);

(II) Louping Ill (Ovine encephalomyelitis);

(JJ) Maedi-Visna/Ovine Progressive Pneumonia;

(KK) Malignant Catarrhal Fever (Bovine Malignant Catarrh) (AHV-1, OHV-2);

(LL) Mange (in livestock) (*Sarcoptes scabiei* var *bovis* and *ovis, Psoroptes ovis, Chorioptes bovis, Psorergates bos* and *ovis*);

(MM) Menangle virus;

(NN) Melioidosis (*Burkholderia [Pseudomonas] pseudomallei*);

(OO) Nairobi Sheep Disease;

(PP) Paratuberculosis (*Mycobacterium avium paratuberculosis*);

(QQ) Perkinsosis (*Perkinsus marinus* and *P. olseni*);

(RR) Pullorum Disease (*Salmonella pullorum*);

(SS) Q Fever (*Coxiella burnetti*);

(TT) Rabbit Hemorrhagic Disease (Calicivirus disease);

(UU) Rabies;

(VV) Ricin Toxicosis (toxin from *Ricinis communis*);

(WW) Salmonellosis caused by Salmonella enteritidis;

(XX) Salmonellosis in equine (*Salmonella typhimurium, S. agona, S. anatum, etc.*);

(YY) Scrapie;

(ZZ) Shigatoxin;

(AAA) Staphylococcal Enterotoxins;

(BBB) Sweating Sickness;

(CCC) Theileriosis (*Theileria annulata, T. parva*);

(DDD) Transmissible Mink Encephalopathy;

(EEE) Transmissible Spongiform Encephalopathies (all types);

(FFF) Trypanosomiasis (*Trypanosoma congolense, T. vivax, T. brucei brucei, T. evansi*);

(GGG) Tuberculosis (*Mycobacterium. bovis, M. tuberculosis*);

(HHH) Tularemia (*Francisella tularensis*);

(III) Ulcerative Lymphangitis (*Corynebacterium pseudotuberculosis*); or

(JJJ) Wesselsbron Disease.

(4) Any person who makes a laboratory confirmation of any unusual presentation, unexplained increase in number of cases, or unusual trend of Botulism (*Clostridium botulinum* toxin), aflatoxin, or T-2 toxin in animals which such person reasonably suspects may be caused by bioterrorism as defined by Code Section 31-12-1.1 or epidemic or pandemic presentation and may pose a substantial threat of harm to the animal industries in this state shall report the same immediately to the state veterinarian or the United States Department of Agriculture area veterinarian in charge.

(5) Any person, including without limitation any veterinarian or veterinary diagnostic laboratory or practice personnel, person associated with any livestock farm, ranch, sales establishment, transportation, or slaughter facility, as well as any person associated with a facility licensed under Chapter 10 of this title, the "Bird Dealers Licensing Act," or under Article 1 of Chapter 11 of this title, the "Animal Protection Act," who shall fail to report any disease, syndrome, or condition specified in this subsection as required by this subsection shall be guilty of a misdemeanor.

(c) The Commissioner is authorized to declare certain other animal diseases and syndromes to be diseases requiring notice and to require the reporting thereof to the department in a manner and at such times as may be prescribed by the Commissioner. The department shall require that such data be supplied as is deemed necessary and appropriate for the prevention and control of certain diseases and syndromes as are determined by the Commissioner.

(d) Any person who reasonably suspects the intentional use of any chemical or nuclear agent, microorganism, virus, infectious substance,

or any component thereof, whether naturally occurring or bioengineered, to cause death, illness, disease, or other biological malfunction in an animal shall report such suspicion immediately to the state veterinarian or the United States Department of Agriculture area veterinarian in charge.

(e) All such reports and data submitted to the state veterinarian or the department pursuant to this Code section shall be deemed confidential and shall not be open to inspection by the public; provided, however, that the Commissioner may release such reports and data in statistical form, for valid research purposes, and for other purposes as deemed appropriate by the Commissioner.

(f) Any person, including, but not limited to, any veterinarian or veterinary diagnostic laboratory or practice personnel, person associated with any livestock farm, ranch, sales establishment, transportation, or slaughter facility, as well as any person associated with a facility licensed under Chapter 10 of this title, the "Bird Dealers Licensing Act," or under Article 1 of Chapter 11 of this title, the "Animal Protection Act," submitting reports or data in good faith in compliance with this Code section shall not be liable for any civil damages therefor.

(g) Any person who knowingly and willingly makes a false, fictitious, or fraudulent report in any matter within the jurisdiction of the state veterinarian or the department under this Code section shall be subject to the provisions of Code Section 16-10-20.

(h) This Code section shall not prohibit the conduct of any bona fide research activities by or on behalf of any accredited public or private college or university in this state, nor shall the reporting requirements of this Code section apply to persons performing such research activities. (Code 1981, § 4-4-6, enacted by Ga. L. 2002, p. 1386, § 1; Ga. L. 2003, p. 322, § 1.)

Law reviews. — For note on the 2002 enactment of this Code section, see 19 Ga. St. U.L. Rev. 1 (2002).

OPINIONS OF THE ATTORNEY GENERAL

Fingerprinting. — Offense arising under O.C.G.A. § 4-4-6 does not require fingerprinting. 2002 Op. Att'y Gen. No. 2002-7.

PART 2

FEEDING GARBAGE TO ANIMALS

4-4-20. "Garbage" defined.

The term "garbage," as used in this part, except as otherwise provided in this part, means all refuse matter, animal or vegetable; by-products of a restaurant, kitchen, or slaughterhouse; and every refuse accumulation of animal, fruit, or vegetable matter, liquid or otherwise. This term includes the word "swill" as commonly used. (Ga. L. 1953, Jan.-Feb. Sess., p. 480, § 6; Ga. L. 1971, p. 60, § 4.)

4-4-21. Feeding garbage to animals generally.

Except as otherwise provided in this part, it shall be unlawful for any person to feed garbage to animals; provided, however, that an individual may feed garbage to his own animals if he feeds them only with garbage from his own household. (Ga. L. 1953, Jan.-Feb. Sess., p. 480, § 2.)

RESEARCH REFERENCES

C.J.S. — 3B C.J.S., Animals, §§ 127, 128. 66 C.J.S., Nuisances, §§ 60, 87.

4-4-22. Feeding garbage to swine.

(a) As used in this Code section, the term:

(1) "Garbage" means any refuse matter or by-product which contains animal tissue or which has been mixed with any animal tissue, whether liquid or otherwise.

(2) "Person" means any individual, firm, partnership, corporation, or association or any agency, department, or other political subdivision of the state or any other entity.

(b) It shall be unlawful for any person to feed garbage to swine or to place garbage in such a position or location as to permit its consumption by swine, except as otherwise provided in this Code section. Persons who negligently or intentionally provide garbage or sources of garbage to other persons found to be feeding garbage to swine in violation of this part shall be deemed culpable and responsible for the violative acts of feeding as if they were the actual feeders of the garbage.

(c) This Code section shall not apply to any person who:

(1) Raises swine solely for slaughter and consumption on the farm or property on which the swine are raised;

(2) Does not purchase and import or permit the importation onto such farm or property on which swine are raised any swine, portion of the carcass of any swine, pork food product, or garbage containing any animal tissue, whether liquid or otherwise; and

(3) Does not sell, trade, exchange, export, or otherwise dispose of any swine, portion of the carcass of any swine, pork food product, or any garbage or refuse containing any portion thereof outside of such farm or property on which the swine are raised.

(d) Any person who violates any provision of this Code section shall be guilty of a misdemeanor. Each day in which such violation occurs shall constitute a separate offense. (Ga. L. 1971, p. 60, § 1; Ga. L. 1977, p. 225, § 1.)

RESEARCH REFERENCES

C.J.S. — 3B C.J.S., Animals, §§ 127, 128.

4-4-23. Licensing of garbage feeders.

No person shall feed garbage to swine without first applying for and obtaining a license from the Commissioner. There shall be no fee for such license, and it shall be valid until and unless revoked or canceled. The requirement of obtaining a license shall not apply to an individual feeding his own animals garbage from his own household. No license which will permit the feeding of any garbage, as that term is defined in subsection (a) of Code Section 4-4-22, to swine shall be issued to any person who does not meet the qualifications of subsection (c) of Code Section 4-4-22. (Ga. L. 1953, Jan.-Feb. Sess., p. 480, § 3; Ga. L. 1960, p. 939, § 1; Ga. L. 1971, p. 60, § 2.)

RESEARCH REFERENCES

C.J.S. — 3B C.J.S., Animals, §§ 127, 128.

ALR. — Right to enjoin business competitor from unlicensed or otherwise illegal acts or practices, 90 ALR2d 7.

4-4-24. Cancellation, suspension, or revocation of licenses.

Every licensed feeder of garbage who violates this part or the rules and regulations promulgated by the Commissioner pursuant thereto shall have his license revoked, canceled, or suspended, upon a notice and hearing. (Ga. L. 1953, Jan.-Feb. Sess., p. 480, § 5.)

RESEARCH REFERENCES

C.J.S. — 3B C.J.S., Animals, §§ 127, 128.

4-4-25. Administrative remedies.

Any person affected by this part or by any rule or regulation adopted pursuant thereto shall have and shall be required to exhaust the administrative remedies provided by Code Section 4-6-8. (Ga. L. 1953, Jan.-Feb. Sess., p. 480, § 7.)

4-4-26. Penalty for violations of part or rules or regulations promulgated thereunder.

Any person, firm, partnership, or corporation which violates any provision of this part or any rule or regulation made pursuant thereto shall be guilty of a misdemeanor. (Ga. L. 1953, Jan.-Feb. Sess., p. 480, § 8; Ga. L. 1956, p. 85, § 1.)

Part 3

Rendering and Disposal Plants

Cross references. — Regulation of business of buying, selling, or transporting dead, dying, or disabled animals or the carcasses of such animals generally, § 26-2-130 et seq.

Administrative rules and regulations. — Meat and poultry inspection, Official Compilation of the Rules and Regulations of the State of Georgia, Rules of Georgia Department of Agriculture, Chapter 40-10. Dead animal disposal, Official Compilation of the Rules and Regulations of the State of Georgia, Rules of Georgia Department of Agriculture, Chapter 40-13-5.

4-4-40. Definitions.

As used in this part, the term:

(1) "Carcasses of domestic animals" means all or any part or portions of any dead domestic animal not slaughtered for human consumption.

(2) "Collection center" means any approved facility where carcasses of domestic animals from state or federally licensed facilities are collected for loading into approved vehicles for delivery to a rendering plant.

(3) "Rendering plant" means a place of business or location or plant where the carcasses of domestic animals or packing house refuse or other refuse is purchased, received, or unloaded and where such carcasses or refuse is processed for the purpose of obtaining the hide,

skin, grease, residue, or any other by-product from such animals or refuse in any way whatsoever. (Ga. L. 1953, Jan.-Feb. Sess., p. 480, § 9; Ga. L. 1989, p. 1414, § 1.)

JUDICIAL DECISIONS

Cited in Bagwell & Steward, Inc. v. Bennett, 214 Ga. 780, 107 S.E.2d 824 (1959).

4-4-41. Licenses required; expiration; fee.

It shall be unlawful for any person, firm, partnership, or corporation to engage in the business of operating a rendering plant without first applying for and obtaining a license from the Commissioner of Agriculture. Each license shall expire on December 31 of each year, and each application for a license must be accompanied by a license fee of $5.00. (Ga. L. 1953, Jan.-Feb. Sess., p. 480, § 12; Ga. L. 1989, p. 1414, § 1.)

JUDICIAL DECISIONS

Cited in Bagwell & Steward, Inc. v. Bennett, 214 Ga. 780, 107 S.E.2d 824 (1959).

RESEARCH REFERENCES

C.J.S. — 3B C.J.S., Animals, §§ 127, 128.

4-4-42. Revocation, cancellation, or suspension of licenses.

Every licensed rendering plant which violates the laws of this state or the rules and regulations promulgated by the Commissioner pursuant thereto shall have its license revoked, canceled, or suspended upon a notice and hearing. (Ga. L. 1953, Jan.-Feb. Sess., p. 480, § 14; Ga. L. 1989, p. 1414, § 1.)

JUDICIAL DECISIONS

Cited in Bagwell & Steward, Inc. v. Bennett, 214 Ga. 780, 107 S.E.2d 824 (1959).

RESEARCH REFERENCES

C.J.S. — 3B C.J.S., Animals, §§ 127, 128.

4-4-43. Rendering plant requirements.

(a) It shall be unlawful for any person, firm, partnership, or corporation to operate a rendering plant unless the rendering plant:

(1) Is constructed according to blueprints approved by the Georgia Department of Agriculture; provided, however, that neither blueprints for nor alterations to facilities existing on July 1, 1989, shall be required except to the extent that alterations are necessary for compliance with the other provisions of this part, and to the extent that alterations are necessary for such compliance they shall be made not later than July 1, 1990;

(2) Has walls, floors, and ceilings of concrete or other impervious materials;

(3) Has ample hot water (140 degrees Fahrenheit) to facilitate cleaning of the building, equipment, and vehicles used to move products;

(4) Has adequate drainage constructed and maintained so that no liquid or other matter is permitted to escape therefrom unless into a sewage facility approved by the governmental authority having proper jurisdiction. The document showing approval of such sewage facility must be maintained at the plant for inspection review; and

(5) Is cleaned and sanitized daily to prevent odor and the accumulation of refuse.

(b) It shall be unlawful for any person, firm, partnership, or corporation to operate a rendering plant unless all vehicles used in the transportation of carcasses or refuse on public highways are of such construction as to prevent seepage or residue from escaping.

(c) Carcasses or refuse shall not be allowed to accumulate or be held for any period of time at any place other than a licensed slaughtering, processing, or rendering plant or any combination thereof. Such licensed facilities shall have a procedure approved by the department if they accumulate or hold carcasses or refuse for longer than one day's operation.

(d) Rodent and vermin control shall be diligently practiced with buildings and surrounding grounds kept clean and free of refuse, trash, and manure.

(e) All barrels used for transportation and storage of carcasses or refuse shall be clearly marked "INEDIBLE" with letters not less than two inches in height. (Ga. L. 1953, Jan.-Feb. Sess., p. 480, § 10; Ga. L. 1989, p. 1414, § 1.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1989, a comma was deleted following "plant" near the end of the first sentence of subsection (c) of this Code section.

JUDICIAL DECISIONS

Cited in Bagwell & Steward, Inc. v. Bennett, 214 Ga. 780, 107 S.E.2d 824 (1959).

RESEARCH REFERENCES

C.J.S. — 3B C.J.S., Animals, §§ 127, 128.

4-4-44. Collection center requirements.

(a) It shall be unlawful for any person, firm, partnership, or corporation to operate a collection center until it has applied for and obtained a written permit from the Commissioner to carry on such an operation.

(b) A collection center shall be located on a site in compliance with local zoning ordinances and shall have a sewage facility approved by the governmental authority having proper jurisdiction.

(c) A collection center shall be covered by a metal roof or other permanent type covering with sufficient screened ventilators to allow air flow yet prevent the entry of rodents, birds, and insects.

(d) A collection center shall have adequate drains in an impervious floor with adequate hot water (140 degrees Fahrenheit) to clean thoroughly the collection center premises.

(e) A collection center shall be cleaned and sanitized daily.

(f) The management of a collection center shall agree to hold inedible materials no longer than 24 hours.

(g) With respect to any requirements of subsections (a) through (d) of this Code section which relate solely to the physical construction or alteration of a collection center, the collection center operator shall have until July 1, 1990, to comply with such requirements. (Code 1981, § 4-4-44, enacted by Ga. L. 1989, p. 1414, § 1.)

Editor's notes. — Former Code Section 4-4-44 has been redesignated as Code Section 4-4-45 by Ga. L. 1989, p. 1414, § 1.

JUDICIAL DECISIONS

Cited in Bagwell & Steward, Inc. v. Bennett, 214 Ga. 780, 107 S.E.2d 824 (1959).

RESEARCH REFERENCES

C.J.S. — 3B C.J.S., Animals, §§ 127, 128.

ALR. — Liability of owner or occupant of premises to building or construction inspector coming upon premises in discharge of duty, 28 ALR3d 891.

4-4-45. Inspections; maintenance of records; maintenance of vehicles.

Every rendering plant shall be subject at all times to inspection by the Commissioner. Each such rendering plant shall keep and furnish the Commissioner such information as he may by rule or regulation require concerning the collection, transportation, distribution, and processing of the carcasses of dead domestic animals or packing house refuse and, further, shall keep and maintain sanitary at all times its vehicles used in the collection, transportation, and distribution of dead domestic animals and packing house refuse. (Ga. L. 1953, Jan.-Feb. Sess., p. 480, § 13; Code 1981, § 4-4-44; Code 1981, § 4-4-45, as redesignated by Ga. L. 1989, p. 1414, § 1.)

JUDICIAL DECISIONS

Cited in Bagwell & Steward, Inc. v. Bennett, 214 Ga. 780, 107 S.E.2d 824 (1959).

4-4-46. Administrative remedies.

Any person affected by this part or by any rule or regulation adopted pursuant to this part shall have and shall be required to exhaust the administrative remedies provided by Code Section 4-6-8. (Ga. L. 1953, Jan.-Feb. Sess., p. 480, § 15; Code 1981, § 4-4-45; Code 1981, § 4-4-46, as redesignated by Ga. L. 1989, p. 1414, § 1.)

4-4-47. Funding of inspection system for slaughtering establishments unable to qualify for federal inspection; adoption of grading standards for use in inspections of such establishments.

The Governor is authorized to make available to the department the funds necessary to provide an inspection system for those slaughtering establishments in this state which are unable to qualify for federal inspection. The department is authorized to adopt appropriate grading standards to be used in the inspection of such establishments so as to indicate on each carcass inspected the grade and quality thereof. (Ga. L. 1959, p. 191; Code 1981, § 4-4-46; Code 1981, § 4-4-47, as redesignated by Ga. L. 1989, p. 1414, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, § 47.

C.J.S. — 3B C.J.S., Animals, § 151.

4-4-48. Penalty for violations of part or rules or regulations promulgated thereunder.

Any person, firm, partnership, or corporation which violates any provision of this part or any rule or regulation made pursuant to this part shall be guilty of a misdemeanor. (Ga. L. 1953, Jan.-Feb. Sess., p. 480, § 11; Ga. L. 1956, p. 85, § 2; Code 1981, § 4-4-47; Code 1981, § 4-4-48, as redesignated by Ga. L. 1989, p. 1414, § 1.)

Part 4

Preventing Spread of Livestock Diseases

Cross references. — Powers and duties of Commissioner regarding inspection of cattle, sheep, horses, and other animals, before entry into slaughtering, packing, or other similar establishments, § 26-2-102.

Administrative rules and regulations. — Transportation, Official Compilation of the Rules and Regulations of the State of Georgia, Department of Agriculture, Chapter 40-13-1.

Interstate movement health requirements, Official Compilation of the Rules and Regulations of the State of Georgia, Department of Agriculture, Chapter 40-13-2.

Intrastate health requirements, Official Compilation of the Rules and Regulations of the State of Georgia, Department of Agriculture, Chapter 40-13-3.

4-4-60. Extermination of parasites and development of livestock industry under supervision and control of Commissioner; employment of inspectors and veterinarians; public report.

The work of exterminating the cattle fever tick, screwworm, and other parasites and of developing the livestock industry in this state shall be under the supervision and control of the Commissioner, who is authorized to employ persons qualified to act as livestock inspectors and supervising veterinarians. The Commissioner shall publish in print or electronically a detailed statement annually of the expenditures and progress of this work for free public distribution. (Ga. L. 1912, p. 22, § 2; Code 1933, § 62-1012; Ga. L. 2010, p. 838, § 10/SB 388.)

4-4-61. Duties of livestock inspectors and supervising veterinarians generally.

It shall be the duty of all livestock inspectors and supervising veterinarians employed by the Commissioner to enforce the provisions

of this part and any rule, regulation, or order made pursuant thereto. (Ga. L. 1912, p. 22, § 3; Code 1933, § 62-1013.)

4-4-62. Right of entry of inspectors.

The Commissioner or any duly authorized livestock inspector is authorized and empowered, in the discharge of the duties imposed upon him by this part, to enter the premises or any barn or building where livestock are temporarily or permanently kept in this state. (Ga. L. 1909, p. 131, § 6; Civil Code 1910, § 2078; Code 1933, § 62-1008.)

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, § 27.

C.J.S. — 3B C.J.S., Animals, § 130 et seq.

4-4-63. Appointment of federal livestock inspectors as state livestock inspectors.

The Commissioner may appoint or commission federal veterinarians or livestock inspectors to work as state livestock inspectors, provided that they shall act without pay from the state. (Ga. L. 1909, p. 131, § 9; Civil Code 1910, § 2081; Code 1933, § 62-1010.)

JUDICIAL DECISIONS

Acceptance of federal regulation. — The Act from which this section was taken amounts to an acceptance of the regulations and methods of the Secretary of Agriculture of United States. Thornton v. United States, 2 F.2d 561 (5th Cir. 1924), aff'd, 271 U.S. 414, 46 S. Ct. 585, 70 L. Ed. 1013 (1926).

Cited in Gill v. Cox, 163 Ga. 618, 137 S.E. 40 (1927).

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, § 26.

C.J.S. — 3B C.J.S., Animals, § 127.

4-4-64. Establishment and maintenance of quarantine lines for protection of livestock generally.

(a) As used in this Code section, the term "animal" means the domestic animals and livestock of this state, including poultry.

(b) In addition to any other quarantine and inspection duties imposed by law, the Commissioner shall establish quarantine lines against the introduction of any animals, any animal carcasses or parts thereof, any biological products or preparations, or any live viruses or other disease vectors when in his judgment such a quarantine is necessary for the protection of the livestock of this state from any

contagious or infectious disease. The Commissioner is authorized to make such rules and regulations as he may deem necessary to prevent, suppress, control, and eradicate such contagious or infectious diseases. The Commissioner may allow the movement into the quarantined area of the types of animals or products against which quarantine is imposed when, after inspection, he is satisfied that the animals or products being moved into the quarantined area are free of disease or that they will be handled so as not to introduce or spread disease. (Ga. L. 1953, Jan.-Feb. Sess., p. 480, § 16.)

Cross references. — Quarantine powers of Commissioner pertaining to control of equine diseases, § 4-4-120.

OPINIONS OF THE ATTORNEY GENERAL

Contract with university for veterinary services. — Georgia Department of Agriculture may contract with Department of Veterinary Medicine at University of Georgia to provide certain veterinary services to livestock owners in conjunction with the brucellosis and tuberculosis testing and eradication programs. 1980 Op. Att'y Gen. No. 80-62.

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, § 27 et seq.

C.J.S. — 3B C.J.S., Animals, §§ 128, 134 et seq.

4-4-65. Maintenance of quarantine along state borders to prevent introduction of parasites or diseases into state.

The Commissioner shall provide and maintain an effective quarantine along the borders of Georgia by the use of patrols or in such other manner as in his judgment will prevent the introduction of cattle fever tick, screwworm, or other parasites or other contagious or infectious diseases into the state. (Ga. L. 1924, p. 78, § 1; Code 1933, § 62-1019.)

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, § 26.

C.J.S. — 3B C.J.S., Animals, § 127.

4-4-66. Movement of cattle infested with parasites.

The movement of cattle infested with cattle fever tick, screwworm, or other parasites into, within, or through the state at any time or for any purpose, except as provided for in this part, is prohibited. (Ga. L. 1918, p. 256, § 1; Code 1933, § 62-1014.)

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, § 27 et seq.

C.J.S. — 3B C.J.S., Animals, §§ 138, 139, 154, 155.

4-4-67. Establishment of quarantines in areas in which livestock affected with or exposed to contagious or infectious disease; transportation of livestock within and from quarantined areas.

(a) The Commissioner or any duly authorized livestock inspector is authorized and required to quarantine any stall, lot, yard, pasture, field, farm, premises, packing house, rendering plant, town, city, militia district, county, or any part thereof or the whole of the state when he shall determine that livestock in such place or places are affected with, exposed to, or suspected of being exposed to a contagious or infectious disease or with anything which might cause such disease. The Commissioner or any livestock inspector shall provide written or printed notice of the establishment of such quarantine to the owners or keepers of such livestock and to the proper officers of railroad, steamboat, motor vehicle, or other transportation companies doing business in or through the quarantined territory.

(b) No such transportation company shall receive for transportation or shall transport livestock from any quarantined area to any nonquarantined area, except as provided for in this part. No person, company, corporation, or other entity shall drive or cause to be driven or permit to go astray any livestock from any quarantined area to any nonquarantined area, except as provided for in this part.

(c) Livestock may be moved within a quarantined area or removed from a quarantined area only under and in compliance with the rules and regulations of the Commissioner. It shall be unlawful to move livestock within or from a quarantined area in any other manner or under any conditions other than those prescribed by the rules and regulations of the Commissioner. (Ga. L. 1909, p. 131, §§ 3, 4; Civil Code 1910, §§ 2075, 2076; Code 1933, §§ 62-1005, 62-1006; Ga. L. 1953, Jan.-Feb. Sess., p. 480, § 17.)

JUDICIAL DECISIONS

Cited in Talmadge v. Sutton, 175 Ga. 811, 166 S.E. 240 (1932).

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, § 27 et seq.

C.J.S. — 3B C.J.S., Animals, §§ 129 134 et seq.

4-4-68. Employment of veterinary surgeon or expert.

(a) When the Commissioner receives a request to investigate, treat, or otherwise prevent the spread of an infectious or contagious disease affecting the livestock of a county, he shall employ a competent veterinary surgeon or expert to investigate the causes of the disease, to treat the same, and otherwise prevent its spread.

(b) The Commissioner is authorized to fix the compensation of the veterinary surgeon or expert. (Ga. L. 1905, p. 121, § 1; Civil Code 1910, § 2069; Code 1933, § 62-1011; Ga. L. 1956, p. 332, § 1.)

JUDICIAL DECISIONS

Cited in Talmadge v. Sutton, 175 Ga. 811, 166 S.E. 240 (1932).

RESEARCH REFERENCES

C.J.S. — 3B C.J.S., Animals, §§ 128, 134 et seq.

4-4-69. Regulation of manufacture and use of disease vectors.

(a) As used in this Code section, the term "disease vector" means any agent or material which has the power to produce or spread disease in livestock.

(b) No experimental or research work, except at or under the direction of the College of Veterinary Medicine of the University of Georgia, the Georgia Poultry Improvement Association Laboratory, the College of Agricultural and Environmental Sciences of the University of Georgia, and the state agricultural experiment stations, shall be carried on in this state with any live virus or any other disease vector. No such virus or disease vector shall be manufactured or distributed in this state except under permit issued by the Commissioner and conditioned, as in his judgment necessary, to prevent the spread of such disease.

(c) This Code section shall not apply to the county health departments, the Department of Public Health, the United States Department of Health and Human Services, accredited medical and dental colleges and universities, approved hospitals, approved medical centers, or foundations engaged in medical research, diagnosis, or treatment of the diseases of man. (Ga. L. 1953, Jan.-Feb. Sess., p. 480, § 18; Ga. L. 1995, p. 10, § 4; Ga. L. 2009, p. 453, § 1-4/HB 228; Ga. L. 2011, p. 705, § 6-3/HB 214.)

The 2011 amendment, effective July 1, 2011, substituted "Department of Public Health" for "Department of Community Health" in subsection (c).

Law reviews. — For article on the 2011 amendment of this Code section, see 28 Ga. St. U.L. Rev. 147 (2011). For article, "Health: Department of Public Health," see 28 Ga. St. U.L. Rev. 147 (2011).

OPINIONS OF THE ATTORNEY GENERAL

This section is directed at monitoring the spread of disease in livestock. 1975 Op. Att'y Gen. No. 75-23.

General prohibition on distribution and manufacture. — The regulation of live viruses established in this section entails a general prohibition on the distribution and manufacture of such viruses except under permit issued by the Commissioner of Agriculture, in accordance with any conditions he might direct. 1975 Op. Att'y Gen. No. 75-23.

Limitation on authority of Commissioner to issue permits. — The authority of the Commissioner of Agriculture to issue permits for the manufacture and distribution of certain live viruses and disease vectors, and of biologicals does not empower the Commissioner to prohibit distribution of certain vaccines to certain individuals. 1975 Op. Att'y Gen. No. 75-23.

Authorization of department to impound live rabies vaccine. — The Department of Agriculture is not authorized to impound live rabies vaccine in order to preclude the distribution of the vaccine to individuals other than licensed veterinarians. 1975 Op. Att'y Gen. No. 75-23.

RESEARCH REFERENCES

C.J.S. — 3B C.J.S., Animals, § 128.

4-4-70. Conduct of programs to eradicate contagious or infectious diseases generally.

Whenever it is determined by the Commissioner, in cooperation with the United States Department of Agriculture, that a contagious or infectious disease should be eradicated, the Commissioner is authorized to take whatever steps are necessary to eradicate the disease. Owners, renters, or persons in possession of livestock or premises infected with such a disease shall be required to disinfect the premises and to destroy the cause or causes of the contagious or infectious disease, including the destruction of those livestock on the premises, under the supervision and direction of the Commissioner or his duly authorized representative. The cost of destroying the cause or causes or sources of infection of a contagious or infectious disease which is sought to be eradicated shall be borne by the owner, renter, or person in possession of the infected or quarantined premises. However, when budget conditions permit or when federal matching funds are available, the Commissioner may participate in the cost of eradication and is authorized to expend such funds as are available. (Ga. L. 1953, Jan.-Feb. Sess., p. 480, § 21.)

JUDICIAL DECISIONS

Authority of Commissioner to issue and withdraw payment for destruction of livestock. — If the Commissioner of Agriculture has authority to issue an order making payment for herds of swine destroyed by cholera but is allowed by statute to destroy swine infected with cholera, without making payment therefor, then an order notifying all owners of garbage-fed swine that hereafter no further payments would be made because of the continued outbreak of cholera, was perfectly legal and one of the rights conferred upon the Commissioner by statute. Irvin v. Woodliff, 125 Ga. App. 214, 186 S.E.2d 792 (1971).

The Commissioner of Agriculture is empowered to destroy livestock under certain conditions, such as when herds of swine are infected with cholera, and the Commissioner is authorized (but not required) to make payment to those whose herds are destroyed. Irvin v. Woodliff, 125 Ga. App. 214, 186 S.E.2d 792 (1971).

OPINIONS OF THE ATTORNEY GENERAL

Contract with university for veterinary services. — Georgia Department of Agriculture may contract with Department of Veterinary Medicine at University of Georgia to provide certain veterinary services to livestock owners in conjunction with the brucellosis and tuberculosis testing and eradication programs. 1980 Op. Att'y Gen. No. 80-62.

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, § 27 et seq.

C.J.S. — 3B C.J.S., Animals, § 128 et seq.

4-4-71. Cooperation of Commissioner with other officials in establishing quarantine lines.

The Commissioner shall cooperate with officials of other states and with the secretary of agriculture of the United States in establishing quarantine lines. (Ga. L. 1899, p. 97, § 3; Civil Code 1910, § 2072; Code 1933, § 62-1002; Ga. L. 1953, Jan.-Feb. Sess., p. 480, § 20.)

OPINIONS OF THE ATTORNEY GENERAL

Authorization to assist federal government in expenditure of funds. — Department of Agriculture is authorized to join in with the federal government in the expenditure of funds to disinfect and clean up premises which have been infected with vesicular diseases. 1952-53 Op. Att'y Gen. p. 3.

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, § 27 et seq.

C.J.S. — 3B C.J.S., Animals, § 134 et seq.

4-4-72. Indemnification of owners of livestock destroyed in eradication of diseases.

(a) The Commissioner is authorized, in cooperation with the United States Department of Agriculture, to indemnify the owner of livestock destroyed in eradicating any infectious or contagious disease, upon such basis and appraisal as the federal government prescribes; but in no event shall the state pay more than one-half of the indemnity and cost incident to the eradication.

(b) In the case of public stockyards, meat packing establishments, slaughterhouses, community sales, and licensed garbage feeders, the state shall not pay in participation with the United States Department of Agriculture more than one-third of the indemnity and cost incident to the eradication. However, the Commissioner may make indemnity payments inapplicable to garbage feeders if in any case he finds the feeding of garbage to be a source of such disease.

(c) Any person, firm, partnership, or corporation which shall violate any quarantine law or rule and regulation thereunder shall be ineligible for indemnity.

(d) The Commissioner is authorized, in the eradication of any infectious or contagious disease, to indemnify the owner of livestock destroyed in eradicating the disease in those instances in which the United States Department of Agriculture cannot participate in the payment of the indemnity.

(e) The limits on the amount of payment to be made by the state as set out in this Code section shall have no application to payments in excess of such limits authorized by law for the purpose of elimination of swine mycobacteriosis. (Ga. L. 1953, Jan.-Feb. Sess., p. 480, § 22; Ga. L. 1957, p. 488, § 1; Ga. L. 1979, p. 1032, § 12.)

JUDICIAL DECISIONS

Denial of compensation not violative of constitutional prohibition. — Laws enacted in pursuance of police power to benefit the health of the public, which may result in the destruction of private property, and which do not provide for any payment therefor to the owner, are not violative of the constitutional inhibition against taking private property for a public use without compensation. Irvin v. Woodliff, 125 Ga. App. 214, 186 S.E.2d 792 (1971).

Payment pursuant to this section is a benefit. — Making of a payment pursuant to this section must be classified as a "benefit" — and the rule therefore is within the exception made by § 50-13-2(6)(I), and as to which, no permission to sue the state is given under the Administrative Procedure Act. Irvin v. Woodliff, 125 Ga. App. 214, 186 S.E.2d 792 (1971).

Order by the Commissioner as to payment for destroyed herds of swine pursuant to Ga. L. 1957, p. 488, § 1 (see O.C.G.A. § 4-4-72) was a benefit under Ga. L. 1965, p. 283, §§ 2-4 (see O.C.G.A. § 50-13-2(6)(I)). Irvin v. Woodliff, 125 Ga. App. 214, 186 S.E.2d 792 (1971).

While every benefit is not an indemnity,

necessarily, every indemnity is a benefit. Irvin v. Woodliff, 125 Ga. App. 214, 186 S.E.2d 792 (1971).

Authority to issue and withdraw payment for destruction of livestock. — If the Commissioner of Agriculture has authority to issue an order making payment for herds of swine destroyed by cholera but is allowed by statute to destroy swine infected with cholera, without making payment therefor, then an order notifying all owners of garbage-fed swine that hereafter no further payments would be made because of the continued outbreak of cholera, was perfectly legal and one of the rights conferred upon the Commissioner by statute. Irvin v. Woodliff, 125 Ga. App. 214, 186 S.E.2d 792 (1971).

Commissioner of Agriculture is empowered to destroy livestock under certain conditions, such as where herds of swine are infected with cholera, and the Commissioner is authorized (but not required) to make payment to those whose herds are destroyed. Irvin v. Woodliff, 125 Ga. App. 214, 186 S.E.2d 792 (1971).

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, § 27 et seq.

C.J.S. — 3B C.J.S., Animals, § 128 et seq.

4-4-73. Transfer of state funds to eradication programs for purposes of matching federal funds.

For the purpose of matching available federal funds where state funds are insufficient, the Governor may transfer money from any available funds in the state treasury to a program of eradication of a contagious or infectious disease, which program is supported by federal funds, contingent on matching state funds. The money so transferred shall be repaid to the fund from which it was taken when money becomes available for that purpose by legislative appropriation or otherwise. (Ga. L. 1953, Jan.-Feb. Sess., p. 480, § 23.)

OPINIONS OF THE ATTORNEY GENERAL

Contract with university for veterinary services. — Georgia Department of Agriculture may contract with Department of Veterinary Medicine at University of Georgia to provide certain veterinary services to livestock owners in conjunction with the brucellosis and tuberculosis testing and eradication programs. 1980 Op. Att'y Gen. No. 80-62.

4-4-74. Penalty for violation of quarantine.

Any person, firm, partnership, or corporation which violates any quarantine provision, rule, or regulation established by the Commissioner under the authority of law for the protection of the livestock and domestic animals of this state shall be guilty of a misdemeanor. (Ga. L. 1953, Jan.-Feb. Sess., p. 480, § 19.)

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, § 27.

C.J.S. — 3B C.J.S., Animals, § 179 et seq.

4-4-75. Interfering with Commissioner or livestock inspectors.

Any person who shall forcibly resist, oppose, assault, prevent, impede, or interfere with the Commissioner or any duly authorized livestock inspector in the execution of his duties or on account of the execution of such duty shall be guilty of a misdemeanor. (Ga. L. 1909, p. 131, § 6; Penal Code 1910, § 583; Code 1933, § 62-9911.)

JUDICIAL DECISIONS

Evidence sufficient to show violation. — Where the evidence showed that the accused stood in front of the dipping vat with a stick and beat back the cows and said that he would not allow then to be dipped if a paint mark was put on them, the accused had violated this section. Green v. State, 28 Ga. App. 1, 110 S.E. 427 (1921).

4-4-76. Importation of diseased livestock.

Any person who shall knowingly import within the limits of this state any livestock with contagious diseases, except distemper, shall be guilty of a misdemeanor. (Ga. L. 1901, p. 82, §§ 1, 2; Penal Code 1910, § 581; Code 1933, § 62-9910.)

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, §§ 31, 32.

C.J.S. — 3B C.J.S., Animals, §§ 154, 155.

Part 5

Live Poultry Dealers, Brokers, and Market Operators

OPINIONS OF THE ATTORNEY GENERAL

Fingerprintable offenses. — A violation of any Code section in this part is an offense for which those charged with a violation are to be fingerprinted. 1987 Op. Att'y Gen. No. 87-21.

4-4-80. Definitions.

As used in this part, the term:

(1) "Dealer" or "broker" means any person, firm, or corporation engaged in the business of buying live poultry of any kind for resale or in selling live poultry of any kind bought for the purpose of resale.

Every agent acting for or on behalf of any dealer, broker, or poultry market operator is a dealer or broker, provided that any farmer acquiring poultry solely for the purpose of rearing and feeding such poultry as a part of his or her farm operations is not a "dealer" or "broker."

(2) "Person" means any person, firm, corporation, association, cooperative, or combination thereof.

(3) "Poultry" means domestic fowl including, but not limited to, water fowl such as geese and ducks; birds which are bred for meat and egg production, exhibition, or competition; game birds such as pheasants, partridge, quail, and grouse, as well as guinea fowl, pigeons, doves, peafowl; ratites; and all other avian species.

(4) "Poultry market operator" means any person engaged in the business of operating public auctions or sales of live poultry or of operating barns and yards for the containment of live poultry held for the purpose of auction or sale.

(5) "Sales establishment" means any yard, barn, or other premises where live poultry is offered for sale, auction, or exchange. (Code 1981, § 4-4-80, enacted by Ga. L. 1987, p. 525, § 1; Ga. L. 1995, p. 244, § 6; Ga. L. 2008, p. 458, § 5/SB 364.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1987, "pigeons" was substituted for "pidgeons" in paragraph (3).

4-4-81. Infected or diseased poultry — Sale, auction, transfer, or movement; inspection; reports; diagnosis.

No dealer, broker, poultry market operator, or other person shall sell, auction, transfer, or move any poultry which is infected or exposed to a highly infectious or contagious disease or which has been placed under quarantine by the authority of the Commissioner. Until all such poultry has been inspected by a veterinarian approved by the Commissioner, no dealer, broker, or poultry market operator shall sell, auction, transfer, or move any poultry which has been infected, which is suspected of being infected, or which is likely to have been exposed to infection. Any such poultry shall be reported to the department. Representative specimens of such poultry shall be submitted to a state diagnostic laboratory for diagnosis. (Code 1981, § 4-4-81, enacted by Ga. L. 1987, p. 525, § 1.)

4-4-82. License requirement; records requirement; transportation equipment; disposal of dead poultry.

(a) No poultry market operator shall engage in or carry on such business without first applying for and obtaining a license from the

Commissioner. No poultry dealer or broker shall engage in or carry on such business without first applying for and obtaining a license from the Commissioner. There shall be a fee of $35.00 per annum for such license. Any fees collected pursuant to this Code section shall be retained pursuant to the provisions of Code Section 45-12-92.1.

(b) The license of any licensed dealer, broker, or poultry market operator violating this part or any rule or regulation adopted by the Commissioner pursuant to this part shall be subject to revocation, cancellation, or suspension following a notice and hearing.

(c) No dealer, broker, or poultry market operator shall buy, store, or otherwise receive any poultry without first recording the name and address of the person or persons from whom the poultry is received, the number and type of such poultry, and the motor vehicle license tag number of the vehicle used by the person or persons to transport the poultry. The dealer, broker, or poultry market operator shall also keep records of the name and address of the person or persons buying such poultry. These records shall be maintained for two years. All records shall be subject to review by the Commissioner or a representative or employee of the department.

(d) Any dealer, broker, or poultry market operator who transports live poultry shall keep all cages, coops, trucks, and trailers clean and sanitary. All equipment used to transport live poultry shall be cleaned and disinfected after each use.

(e) Each dealer, broker, and poultry market operator shall properly dispose of dead poultry in accordance with Code Section 4-5-5. (Code 1981, § 4-4-82, enacted by Ga. L. 1987, p. 525, § 1; Ga. L. 2006, p. 216, § 1/HB 1213; Ga. L. 2010, p. 9, § 1-15/HB 1055.)

4-4-82.1. Limitation on slaughter of live poultry.

No dealer, broker, poultry market operator, or employee or contractor thereof or any person acquiring live poultry from any of them shall slaughter, other than for humane euthanasia or disease control, any poultry that are on the premises of the dealer or broker or on the premises of a sales establishment. (Code 1981, § 4-4-82.1, enacted by Ga. L. 2006, p. 216, § 2/HB 1213.)

4-4-83. Quarantines; rules and regulations for disease control; confiscation, destruction, or disposal of diseased poultry, eggs, chicks, or stock.

(a) In the control, suppression, prevention, and eradication of poultry diseases, the Commissioner or any duly authorized inspector or employee of the department acting under the authority of this part or

any other poultry law of this state is authorized to quarantine any premises or any area when he shall determine that any poultry in such place or places is infected with a contagious or infectious disease, that the unsanitary condition of such place or places might cause the spread of such disease, or that the owner or occupant of such place or places has not observed sanitary practices.

(b) The Commissioner is authorized to promulgate and adopt rules and regulations prescribing sanitary standards and requirements for the prevention, control, suppression, and eradication of poultry diseases in this state. Such regulations shall be no less adequate for the protection of the poultry industry and the public health than those regulations of the secretary of agriculture of the United States.

(c) The Commissioner is authorized, in his discretion, to confiscate, destroy, or otherwise dispose of any poultry, hatching eggs, chicks, or breeding stock which is infected with any contagious or infectious diseases. (Code 1981, § 4-4-83, enacted by Ga. L. 1987, p. 525, § 1; Ga. L. 2013, p. 141, § 4/HB 79.)

The 2013 amendment, effective April 24, 2013, part of an Act to revise, modernize, and correct the Code, revised language in the last sentence of subsection (b).

4-4-84. Penalties.

Any dealer, broker, or poultry market operator who violates any provision of this part or any quarantine order issued by the Commissioner under the authority of this part or any other law of this state for the protection of the general public in the prevention of poultry diseases shall be guilty of a misdemeanor. (Code 1981, § 4-4-84, enacted by Ga. L. 1987, p. 525, § 1.)

ARTICLE 2

BOVINE DISEASES

4-4-90. Purpose of article.

The purpose of this article is to safeguard public health by controlling and, if practical, eradicating any and all diseases of cattle which are communicable to man. (Ga. L. 1937, p. 591, § 1.)

4-4-91. "Qualified veterinarians" defined.

The term "qualified veterinarians," as used in this article, means veterinarians approved by the Commissioner and the secretary of agriculture of the United States to administer tuberculin tests to cattle

intended for interstate shipment. (Ga. L. 1927, p. 348, § 4; Code 1933, § 62-1104.)

4-4-92. Duty of Commissioner to eradicate tuberculosis; county appropriations; right of entry to test cattle; assistance by owners of cattle.

(a) It shall be the duty of the Commissioner to eradicate tuberculosis in cattle. The Commissioner shall have full and complete authority and responsibility in all livestock sanitary control work.

(b) To enable the Commissioner to eradicate bovine tuberculosis effectively and to aid him in establishing a modified accredited tuberculosis-free area, in conformity with the rules and regulations promulgated by the United States Animal Health Association and adopted by the secretary of agriculture, United States Department of Agriculture, the authority having charge of county affairs of any county in which the state and federal governments jointly engage in a tuberculosis eradication campaign may appropriate such sums as they may deem adequate and necessary to aid in this work. The Commissioner or his duly authorized agent is empowered to enter upon any premises, barn, lot, or any other place where cattle are kept, for the purpose of applying tests with tuberculin to ascertain whether or not the cattle so tested are affected with tuberculosis. The owners or keepers of such cattle shall render such reasonable assistance as may be required to enable the Commissioner or his agent to apply the test with accuracy and promptness. (Ga. L. 1927, p. 348, § 1; Code 1933, § 62-1101.)

OPINIONS OF THE ATTORNEY GENERAL

Contract with university for veterinary services. — Georgia Department of Agriculture may contract with Department of Veterinary Medicine at University of Georgia to provide certain veterinary services to livestock owners in conjunction with the brucellosis and tuberculosis testing and eradication programs. 1980 Op. Att'y Gen. No. 80-62.

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, § 27 et seq.

C.J.S. — 3B C.J.S., Animals, § 130 et seq.

4-4-93. Notice to owners; testing; branding of infected cattle; slaughter.

(a) If the Commissioner receives information or has reason to believe that tuberculosis exists in any cattle, he shall promptly notify the

owner or owners and shall arrange to have such cattle tested by a qualified veterinarian.

(b) All cattle which shall react to a tuberculin test shall immediately after such reaction be branded on the left jaw with the letter "T," such letter to be not less than two inches in length; and in addition such reactors shall be tagged in the left ear with a special tag to be adopted by the Commissioner. All cattle so identified shall be slaughtered within a period of 14 days immediately following such reaction, such slaughter to be under the direction of the Commissioner in a slaughterhouse where federal or competent local meat inspection is maintained. The owners of such reactors to the tuberculin test shall be indemnified for such cattle, as provided for in this article. (Ga. L. 1927, p. 348, § 2; Code 1933, § 62-1102.)

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, § 27 et seq.

C.J.S. — 3B C.J.S., Animals, § 130 et seq.

4-4-94. Indemnification of owners.

Before having such reacting cattle slaughtered, the Commissioner shall notify the owner of his findings as to the condition of the cattle. The owner shall be indemnified in an appropriate amount, to be determined by the Commissioner using the standards set forth in Code Section 4-4-72, from available funds. (Ga. L. 1927, p. 348, § 3; Code 1933, § 62-1103.)

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, § 27 et seq.

C.J.S. — 3B C.J.S., Animals, § 130 et seq.

4-4-95. Use or sale of veterinary tuberculin.

No person, firm, or corporation shall administer veterinary tuberculin, except qualified veterinarians. No person, firm, or corporation shall sell, offer for sale or distribution, or keep on hand any veterinary tuberculin, except qualified veterinarians, licensed druggists, or others lawfully engaged in the sale of veterinary biological products. (Ga. L. 1927, p. 348, § 4; Code 1933, § 62-1104.)

Cross references. — Use of drugs of the sulfanilamide or sulfonamide group for use in control of livestock diseases, § 26-4-6.

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, § 27 et seq.

C.J.S. — 3B C.J.S., Animals, § 130 et seq.

4-4-95.1. Transport of cattle; segregation of cattle with brucellosis; removal or alteration of cattle identification; rules and regulations; sale of infected cattle.

(a) As used in this Code section, the term:

(1) "Cattle" or "cow" means bovine animals, such as cows, bulls, steers, heifers, and bison.

(2) "Person" means any individual, partnership, corporation, association, or other entity.

(b) It shall be unlawful for any person to transport or cause to be transported into the State of Georgia any cattle:

(1) Unless each cow is accompanied by a health certificate containing such information and in such form as may be provided for by rules and regulations of the Commissioner or unless each such cow is listed on an accompanying waybill and is transported directly to a federally approved or state approved slaughtering establishment and is not allowed to come into contact with any other cattle in this state until its arrival at such establishment;

(2) Which are infected with brucellosis, unless such cattle are transported directly to a federally approved or state approved slaughtering establishment and are not allowed to come into contact with any other cattle in this state until their arrival at such establishment or unless a permit has been issued by the Commissioner allowing the importation or movement of such cattle and all conditions of such permit are complied with by the person transporting such cattle; or

(3) Which originate from a quarantined herd or a quarantined area, unless the Commissioner has issued a permit authorizing the importation or movement of such cattle and all conditions of such permit are complied with by the person transporting such cattle.

(c) It shall be unlawful for any person to move any cattle within this state in violation of any quarantine order imposed by the Commissioner or to allow any cow which such person knows or, through the use of reasonable inquiry, should know is from a quarantined herd or area to come into contact with any other cattle, except as authorized by a permit issued by the Commissioner or as authorized in rules and regulations adopted by the Commissioner.

(d)(1) Any person violating subsection (b) or (c) of this Code section for the first time on or after July 1, 1985, shall be guilty of a

misdemeanor and, upon conviction thereof, shall be punished by a fine not to exceed $100.00 for each cow transported or moved in violation of subsection (b) or (c) of this Code section, or in lieu of prosecution such person may be issued a warning by the Commissioner.

(2) Any person violating subsection (b) or (c) of this Code section for a second time on or after July 1, 1985, shall be guilty of a misdemeanor of a high and aggravated nature.

(3) Any person violating subsection (b) or (c) of this Code section for a third or subsequent time on or after July 1, 1985, shall be guilty of a felony and, upon conviction thereof, shall be punished by a fine not to exceed $10,000.00 or imprisonment for not less than one year nor more than three years, or both.

(e) Any person who owns or has custody or control over any cattle infected with brucellosis or which are known reactor animals to an official brucellosis test shall segregate such cattle in such manner that they cannot come into contact with other cattle or spread such brucellosis infection to other cattle. Any person who fails to take such action within 30 days following an order from the Commissioner to do so shall be guilty of a misdemeanor and each day of continued failure to comply with such order shall constitute a separate offense.

(f) Any person who removes, defaces, alters, or otherwise changes any official permanent mark, brand, tattoo, tag, or other means of identification on any cow for which a health certificate or permit or official test has been issued or performed under this chapter or the rules and regulations of the Commissioner or which has a known brucellosis infection or is a known reactor animal to an official brucellosis test shall be guilty of a felony and, upon conviction thereof, shall be punished by a fine not to exceed $10,000.00 or by imprisonment for not less than one year nor more than three years, or both.

(g) The Commissioner is authorized to adopt rules and regulations, issue orders and permits, and impose quarantines when such actions are authorized or required by federal or state law or are appropriate to prevent the introduction or spread of brucellosis into or within this state, any area thereof, or any cattle located therein.

(h) Any person who knowingly sells any cow within this state which is infected with brucellosis or which such person knows or, through the use of reasonable inquiry, should know is from a quarantined herd or area and who sells such cow without disclosing such fact to the purchaser, prior to the consummation of the sale, shall be liable for all reasonable and foreseeable damages incurred by the purchaser as a proximate result of the purchaser mixing such cow with other cattle owned or under the control of the purchaser. (Code 1981, § 4-4-95.1, enacted by Ga. L. 1985, p. 704, § 1.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1985, a misspelling of "accompanying" was corrected in paragraph (1) of subsection (b).

4-4-96. Applicability of article to anthrax and brucellosis.

This article shall apply to the control and, if possible, the eradication of anthrax and brucellosis as well as to the eradication of bovine tuberculosis. (Ga. L. 1937, p. 591, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, § 27 et seq.

C.J.S. — 3B C.J.S., Animals, § 130 et seq.

4-4-96.1. Injunctions.

In addition to the remedies provided in this article and notwithstanding the existence of any adequate remedy at law, the Commissioner is authorized to apply to the superior court for an injunction. Such court shall have jurisdiction, upon hearing and for cause shown, to grant a temporary or permanent injunction, or both, restraining any person from violating or continuing to violate any of the provisions of this article or for failing or refusing to comply with the requirements of this article or any rule or regulation adopted by the Commissioner under this article. An injunction issued under this Code section shall not require a bond. (Code 1981, § 4-4-96.1, enacted by Ga. L. 1991, p. 361, § 1.)

4-4-97. Penalty for violations of article.

Any person violating any provision of this article shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not less than $25.00 for each offense. (Ga. L. 1927, p. 348, § 6; Code 1933, § 62-9914.)

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, § 31 et seq.

C.J.S. — 3B C.J.S., Animals, § 146 et seq.

ARTICLE 3

EQUINE DISEASES

Administrative rules and regulations. — The Equine Act of 1969, Official Compilation of the Rules and Regulations of the State of Georgia, Rules of Georgia Department of Agriculture, Chapter 40-16-3.

RESEARCH REFERENCES

ALR. — Keeping horses as nuisance, 27 ALR3d 627.

4-4-110. Short title.

This article may be cited as the "Georgia Equine Act." (Ga. L. 1969, p. 1021, § 1.)

4-4-111. Definitions.

As used in this article, the term:

(1) "Bond" means a written instrument, issued or executed by a bonding, surety, or insurance company licensed to do business in this state, guaranteeing that the person bonded shall faithfully fulfill the terms of the contract of purchase and guarantee the payment of the purchase price of all equines purchased by him, made payable to the Commissioner for the benefit of persons sustaining loss resulting from the nonpayment of the purchase price or the failure to fulfill the terms of the contract of purchase.

(2) "Dealer" or "broker" means any person, firm, or corporation engaged in the business of buying equines of any kind for resale or in selling equines of any kind bought for the purpose of resale or in buying equines of any kind for slaughter; and every agent acting for or on behalf of any dealer or broker or livestock market operator is, for the purpose of this article, a dealer or broker; provided, however, that any persons acquiring equines for the purpose of using them as a part of their operations or for pleasure only are exempt from the definition herein applicable to dealer or broker.

(3) "Equine" includes horses, mules, asses, and any other members of the Equidae species.

(4) "Livestock market operator" means any person, firm, or corporation engaged in the business of operating public auctions or sales of equines or of operating barns and yards for the containment of equines held for the purpose of auction or sale.

(5) "Special sale" means any sale by a dealer, broker, or livestock market operator held at a time other than a regularly scheduled time; provided, however, that any sale by any individual of his own entire stock of equines or part thereof on his own premises shall not be considered a special sale. (Ga. L. 1969, p. 1021, § 2.)

4-4-112. Sale, auction, transfer, or moving of equines.

No dealer, broker, or livestock market operator shall sell, auction, transfer, or move any equines which are infected with any infectious or

contagious disease or which have been placed under quarantine by the authority of the Commissioner. No dealer, broker, or livestock market operator shall sell, auction, transfer, or move any equines which are infected with or which are suspected of being infected with or which are likely to have been exposed to an infectious or contagious disease until all such equines have been inspected by a veterinarian approved by the Commissioner. No dealer, broker, or livestock market operator shall sell, auction, transfer, or move any equines from any barn, yard, or premises unless all sanitary practices and precautions prescribed by the rules and regulations of the Commissioner have been observed in such premises, barn, or yard. (Ga. L. 1969, p. 1021, § 3.)

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, § 27 et seq.

C.J.S. — 3B C.J.S., Animals, § 128 et seq.

ALR. — Elements and measure of damages for breach of warranty in sale of horse, 91 ALR3d 419.

4-4-113. Licensing and bonding requirements generally.

(a) No livestock market operator engaged in the sale of equines shall engage in or carry on such business without first applying for and obtaining a license from the Commissioner; no equine dealer or broker who buys or sells through a livestock market operator shall engage in or carry on such business without first applying for and obtaining a license from the Commissioner, provided that such licenses shall be permanent until canceled, suspended, revoked, or surrendered; such licenses shall be nontransferable and free of charge. Any person, firm, or corporation commencing operation of a new sales establishment for the sale of equines at auction and any dealer or broker commencing such a business shall, prior to obtaining a license, post a bond as required by this Code section. The provisions of this Code section requiring the posting of a bond shall not apply to any authorized agent of a person, firm, or corporation having posted the bond required by this Code section, when such agent is acting for and on behalf of such principal.

(b) No person shall operate a sales establishment for the sale of equines at auction unless he has then in force a bond in an amount calculated as follows:

(1) If the annual sales of the establishment are $2,600,000.00 or less, the amount of the bond shall be one fifty-second of the amount of annual sales but not less than $10,000.00;

(2) If the annual sales of the establishment are more than $2,600,000.00, the amount of the bond shall be $50,000.00 plus one

fifty-second of the amount of annual sales in excess of $2,600,000.00 times a factor of 0.20; or

(3) An amount calculated under paragraph (1) or (2) of this subsection, if not a multiple of $5,000.00, shall be rounded to the nearest higher multiple of $5,000.00.

(c) No dealer or broker shall purchase equines at any sales establishment or directly from producers unless he has then in force a bond in an amount calculated as follows:

(1) Determine a number which is the number of days during the preceding year on which the dealer or broker did business;

(2) Divide the total dollar value of livestock purchased by the dealer or broker during the preceding year by the lesser of:

(A) One-half of the number determined under paragraph (1) of this subsection; or

(B) One hundred thirty;

(3) Adjust the amount obtained under paragraph (2) of this subsection as follows:

(A) If the amount obtained under paragraph (2) of this subsection is $10,000.00 or less then the amount of the bond shall be $10,000.00;

(B) If the amount obtained under paragraph (2) of this subsection is more than $10,000.00 but not more than $75,000.00 then that amount shall be the amount of the bond; or

(C) If the amount obtained under paragraph (2) of this subsection is more than $75,000.00 then the amount of the bond shall be the sum of $75,000.00 plus 10 percent of the amount by which the amount obtained under paragraph (2) of this subsection exceeds $75,000.00; and

(4) An amount calculated under paragraph (3) of this subsection, if not a multiple of $5,000.00, shall be rounded up to the nearest multiple of $5,000.00.

(d) Any equine dealer, broker, or sales establishment operator who would otherwise be required by this Code section to post a bond and who has posted a current livestock dealer's, broker's, or sales establishment's bond under Chapter 6 of this title shall not be required to post any bond under this Code section if such livestock dealer's, broker's, or sales establishment's bond, in addition to meeting all requirements of Chapter 6 of this title, meets the requirements of paragraph (1) of Code Section 4-4-111.

(e) In calculating amounts of bonds under this Code section, the total amount of annual sales or annual purchases for the preceding calendar year shall be used; but, if an applicant for a license does not have an annual sales history, the Commissioner shall estimate the amount of annual sales or annual purchases which will occur.

(f)(1) As used in this subsection, the term "special sale" means any sale of equines, except a regular sale at an establishment and any sale by a farmer of equines owned by the farmer, with payment made directly to the farmer.

(2) The Commissioner is authorized to prescribe rules and regulations for the operation of special sales. No person shall hold a special sale without obtaining a permit therefor from the Commissioner or his duly authorized representative, which shall be granted without charge upon submission of proof satisfactory to the Commissioner that the person applying for the permit is bonded in an amount equal to one-fourth of the anticipated proceeds of the sale; provided, however, such bond shall be not less than $10,000.00 and not more than $150,000.00 in amount.

(3) Associations holding sales of equines consigned by members of the association only shall not be required to procure a bond if the directors of the association accept full responsibility for financial obligations of sale and release the Commissioner, in writing, from any responsibility. (Ga. L. 1969, p. 1021, § 4; Ga. L. 1984, p. 389, § 1; Ga. L. 1985, p. 149, § 4.)

4-4-114. Suspension, cancellation, or revocation of licenses.

Every licensed dealer, broker, livestock market operator, or other person subject to this article who shall violate this article or rules and regulations established by the Commissioner pursuant to this article shall have his license revoked, canceled, or suspended, upon a notice and hearing. (Ga. L. 1969, p. 1021, § 15.)

4-4-115. Inspections; maintenance of equines by persons to whom article applies.

The Commissioner is authorized to have inspections conducted of the equines, of any premises where equines are kept or sold, or of any licensed dealer, broker, livestock market operator, or any other individual to whom this article is applicable. Any licensed dealer, broker, livestock market operator, or any other individual subject to this article shall maintain equines in good, healthy condition. (Ga. L. 1969, p. 1021, § 5.)

4-4-116. Sales of equines to be in compliance with article, rules, and regulations.

No dealer, broker, livestock market operator, or other individual to whom this article is applicable shall hold or conduct any sale of equines, whether a regular sale or a special sale, without complying with the terms of this article and all rules and regulations promulgated under this article. (Ga. L. 1969, p. 1021, § 7.)

4-4-117. Veterinary services at equine sales; fees.

All licensed dealers, brokers, livestock market operators, or other individuals to whom this article is applicable shall furnish at all sales, including special sales, the services of a licensed, accredited veterinarian, who shall provide veterinary services necessary and consistent for animal health. Such veterinarian shall be paid reasonable fees for services rendered by the person on whose behalf such services are rendered. (Ga. L. 1969, p. 1021, § 8; Ga. L. 1996, p. 351, § 1.)

RESEARCH REFERENCES

ALR. — Elements and measure of damages for breach of warranty in sale of horse, 91 ALR3d 419.

4-4-118. Use of drugs, tranquilizers, and medications which result in misrepresentation in sale of equines.

The Commissioner may enact, promulgate, and enforce rules and regulations prohibiting or regulating the use of drugs, tranquilizers, or medications which he determines may conceal defects, falsely enhance the appearance of quality, or otherwise result in misrepresentation in the sale of equines. Such regulations may provide for tests to determine the presence of such drugs, tranquilizers, or medications in equines within a reasonable period prior to sale and may provide for the cost of such tests to be paid by the buyer. (Ga. L. 1972, p. 818, § 1.)

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Misrepresentations in Sale of Animal, 35 POF2d 607.

4-4-119. Certification of health of animals transported into state.

The Commissioner is authorized to require any person, firm, or corporation transporting an equine into this state from any other state

to furnish him with a certificate from an accredited veterinarian from the state of origin of such equine, certifying that such equine has not recently been exposed to any contagious or infectious disease, that the animal's temperature is normal, and that the animal is free of any contagious or infectious disease. (Ga. L. 1969, p. 1021, § 12.)

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, § 27.

C.J.S. — 3B C.J.S., Animals, §§ 128, 129.

4-4-120. Quarantines.

In the control, suppression, prevention, and eradication of equine diseases, the Commissioner or any duly authorized representative acting under his authority is authorized and required to quarantine an animal, premises, or any area when he shall determine that equines in such place or places are infected with a contagious or infectious disease, that the unsanitary condition of such place or places might cause the spread of such disease, that the animal has or has been exposed to any contagious or infectious disease, or that the owner or occupant of such place or places is not observing sanitary practices prescribed under the authority of this or any other equine law of this state. (Ga. L. 1969, p. 1021, § 6.)

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, § 27.

C.J.S. — 3B C.J.S., Animals, § 134 et seq.

4-4-121. Eradication programs.

(a) Whenever it is determined by the Commissioner that a contagious or infectious disease should be eradicated, the Commissioner is authorized to take whatever steps are necessary to eradicate the disease. Owners, renters, or persons in possession of equines or premises infected with such a disease are required to disinfect the premises and to destroy the cause or causes of the contagious or infectious disease, including the destruction of those equines within the premises, under the supervision and direction of the Commissioner or his duly authorized representative.

(b) The cost of destroying the cause or causes or sources of infection of a contagious or infectious disease which is sought to be eradicated shall be borne by the owner, renter, or person in possession of the infected equines or premises; except that, when budget conditions permit, the Commissioner may participate in the cost of eradication and

is authorized to expend such funds as are available. (Ga. L. 1969, p. 1021, § 9.)

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, § 27 et seq.

C.J.S. — 3B C.J.S., Animals, § 128 et seq.

4-4-122. Indemnification for equines eradicated.

The Commissioner is authorized, to the extent of funds available, in the eradication of any infectious or contagious disease, to indemnify the owner of equines destroyed in eradicating the disease, upon such basis and appraisal as the Commissioner may prescribe, provided that any person, firm, partnership, or corporation which shall violate any quarantine or rule or regulation under this article shall be ineligible for indemnity. (Ga. L. 1969, p. 1021, § 10.)

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, § 29.

C.J.S. — 3B C.J.S., Animals, § 140 et seq.

4-4-123. Establishment of compounds and research programs to control or eradicate equine infectious anemia.

(a) Any person, firm, corporation, company, cooperative, association, or other entity is authorized to set up or establish compounds at various places in the state where animals may be taken in order to control, suppress, prevent, and eradicate the equine disease known as "equine infectious anemia" (also known as swamp fever, EIA, and slow fever). It shall be unlawful to establish or operate any such compound without a license issued by the Commissioner. The Commissioner is authorized to issue licenses and to establish, promulgate, and adopt rules, regulations, and standards governing the establishment, construction, design, maintenance, and operation of such compounds. The fee for such licenses shall be $25.00 per annum, and such licenses shall be renewable annually.

(b) The Commissioner is authorized to establish research programs for the purpose of developing a vaccine or method for the control or eradication of such equine disease in this state. (Ga. L. 1975, p. 1138, § 1.)

4-4-124. Transfer of state funds for use in programs to eradicate contagious or infectious diseases; repayment of funds.

Whenever a program of eradication of a contagious or infectious disease requires funds in excess of funds available for the purpose of

eradicating such disease, the Governor may transfer from any available funds in the state treasury such sum of money as may be necessary to meet such emergency; and such money so transferred shall be repaid to the fund from which transferred when money becomes available for that purpose by a legislative appropriation or otherwise. (Ga. L. 1969, p. 1021, § 11.)

4-4-125. Promulgation of rules and regulations.

The Commissioner is authorized to formulate, adopt, promulgate, and enforce rules and regulations for the purpose of implementing this article. (Ga. L. 1969, p. 1021, § 13.)

4-4-126. Injunctions.

The Commissioner is authorized to seek an injunction against any person, firm, or corporation to which this article is applicable for violation of any provision of this article or any rules or regulations promulgated thereunder. The superior court of the county in which venue is proper shall have jurisdiction upon hearing and for cause shown to grant a temporary or permanent injunction restraining any person from committing such violation, notwithstanding the existence of an adequate remedy at law. (Ga. L. 1969, p. 1021, § 16.)

4-4-127. Penalty for violations of article, rules, or regulations.

Any dealer, broker, livestock market operator, or other person subject to this article who violates any provision of this article, any quarantine provision, or any rule or regulation established by the Commissioner under the authority of this or other laws for the protection of the general public in the prevention of equine diseases shall be guilty of a misdemeanor. (Ga. L. 1969, p. 1021, § 14.)

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, § 27.

C.J.S. — 3B C.J.S., Animals, § 179 et seq.

ARTICLE 4

SWINE MYCOBACTERIOSIS INDEMNIFICATION

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, § 27 et seq.

C.J.S. — 3B C.J.S., Animals, § 128 et seq.

4-4-140. Short title.

This article may be cited as the "Georgia Swine Mycobacteriosis Indemnification Act." (Ga. L. 1979, p. 1032, § 1.)

4-4-141. Purpose of article.

Swine mycobacteriosis poses a serious potential health threat to the people of this state. The swine farmers of this state have experienced and are experiencing serious economic losses due to the condemnation of swine infected with mycobacteriosis under the laws of this state. It is in the best interest of this state to seek the speedy eradication of swine mycobacteriosis in this state, while ensuring a supply of swine meat products in this state, and to provide for indemnification to those persons having swine condemned because such swine are infected with swine mycobacteriosis. (Ga. L. 1979, p. 1032, § 2.)

4-4-142. Definitions.

As used in this article, all terms shall have the meanings ascribed to them in Code Section 26-2-62. (Ga. L. 1979, p. 1032, § 3.)

4-4-143. Indemnification for condemned swine — Generally.

(a) The Commissioner is authorized to pay to any animal food manufacturer the actual cost paid by such animal food manufacturer for any swine condemned by reason of infection with swine mycobacteriosis.

(b) In the event that swine infected with mycobacteriosis are passed after inspection under restriction of cooking, the payment authorized by this article may equal but shall not exceed 75 percent of the actual cost paid for such swine. (Ga. L. 1979, p. 1032, § 4.)

4-4-144. Indemnification for condemned swine — Proof of Georgia origin required.

No payment shall be made under this article unless the party receiving such payment shall first provide such proof as is satisfactory to the Commissioner that the swine for which payment is being made originated from a Georgia farm and that payment to the farmer for such swine has not and shall not be reduced by reason of the condemnation of such swine. (Ga. L. 1979, p. 1032, § 5.)

4-4-145. Indemnification for condemned swine — Cooperation of person receiving payment required.

No payment shall be made under this article unless the person receiving such payment shall first sign, in a form agreeable to the

Commissioner, an agreement to comply with the recommendations of the Commissioner for the control and eradication of swine mycobacteriosis. (Ga. L. 1979, p. 1032, § 6.)

4-4-146. Indemnification for condemned swine — Release required.

No payment shall be made under this article unless the person receiving such payment shall first sign, in a form agreeable to the Commissioner, an agreement that the payment made under this article is accepted as payment in full for the swine for which such payment is made. (Ga. L. 1979, p. 1032, § 7.)

4-4-147. Elimination of disease at farm of origin.

The Animal Industry Division of the department shall take all steps necessary or appropriate to eliminate swine mycobacteriosis from the farm of origin of the swine for which compensation is paid under this article. (Ga. L. 1979, p. 1032, § 11.)

4-4-148. Promulgation of rules and regulations.

The Commissioner is authorized to promulgate, from time to time, such rules and regulations as are necessary to effectuate the purpose of this article. (Ga. L. 1979, p. 1032, § 8.)

4-4-149. Cooperation among state and federal agencies.

The department is authorized and directed to cooperate with and seek the cooperation of all appropriate state and federal agencies in administering this article. The Commissioner is authorized and directed to take all steps reasonably necessary to ascertain whether any federal funds are or may become available to carry out the purposes of this article and, in the event that such funds are or become available, is authorized and directed to take all reasonable steps necessary to obtain and accept such funds. (Ga. L. 1979, p. 1032, § 9; Ga. L. 2013, p. 141, § 4/HB 79.)

The 2013 amendment, effective April 24, 2013, part of an Act to revise, modernize, and correct the Code, substituted "The department" for "The State Department of Agriculture" in the first sentence.

4-4-150. Conduct of scientific research.

Scientific research necessary or appropriate to carry out the purposes of this article shall be carried out under the direction of the Advisory

Board of the College of Veterinary Medicine of the University of Georgia. (Ga. L. 1979, p. 1032, § 10.)

4-4-151. Injunctions.

In addition to the remedies provided in this article and notwithstanding the existence of any adequate remedy at law, the Commissioner is authorized to apply to the superior court for an injunction. Such court shall have jurisdiction, upon hearing and for cause shown, to grant a temporary or permanent injunction, or both, restraining any person from violating or continuing to violate any of the provisions of this article or for failing or refusing to comply with the requirements of this article or any rule or regulation adopted by the Commissioner under this article. An injunction issued under this Code section shall not require a bond. (Code 1981, § 4-4-151, enacted by Ga. L. 1991, p. 361, § 2.)

ARTICLE 5

DEER FARMING

4-4-170. Purpose.

The purpose of this article is to provide for the production of farmed deer as an agricultural operation and to provide for the importation, production, and control and eradication of disease in farmed deer. (Code 1981, § 4-4-170, enacted by Ga. L. 1997, p. 1395, § 2.)

4-4-171. Definitions.

As used in this article, the term:

(1) "Deer farming" means the agricultural operation of raising and production of farmed deer for the commercial production of food and fiber.

(2) "Farmed deer" means fallow deer (Dama dama), axis deer (Axis axis), sika deer (Cervus nippon), red deer and elk (Cervus elaphus), reindeer and caribou (Rangifer tarandus), and hybrids between these farmed deer species raised for the commercial sale of meat and other parts or for the sale of live animals. Those cervids which are indigenous to this state, including white-tailed deer, and those members of the order Artiodactyla which are considered to be inherently dangerous to human beings and are described in subparagraph (a)(1)(F) of Code Section 27-5-5 shall be classified as unacceptable species and shall not be included within the definition of farmed deer. Deer that may be under the authority of Title 50, Part 23,

Subpart c of the Code of Federal Regulations, the Convention on International Trade in Endangered Species of Wild Fauna and Flora, 27 U. ST. 108, TIAS 8249, must meet the requirements set forth in the federal Endangered Species Act of 1973, as amended, 16 U.S.C. Section 1531 et seq. (Code 1981, § 4-4-171, enacted by Ga. L. 1997, p. 1395, § 2.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1999, "Section" was inserted in the last sentence of paragraph (2).

4-4-172. Deer-farming license; records; facilities.

(a) No person shall possess, buy, import, or transport farmed deer or engage in or carry on the business of deer farming without first applying for and obtaining a deer-farming license from the Commissioner of Agriculture. A deer-farming license shall be valid from the date of issuance to March 31 of the following calendar year. A deer-farming license will not be issued by the Commissioner to any deer-farming operation which has not been inspected and approved by the Department of Natural Resources, provided that any facility expansion must be reapproved prior to renewal of a deer-farming license.

(b) The license of any deer farm operator violating this article or any rule or regulation adopted by the Commissioner pursuant to this article shall be subject to revocation, cancellation, or suspension following notice and hearing. A deer-farming license of any licensee whose facility does not meet the definition of an agricultural operation shall be revoked, and such license may be revoked if the licensee violates any provision of Title 27, relating to wild animals. Any farmed deer must be disposed of within 45 days of revocation of any deer-farming license.

(c) Deer farm operators shall maintain inventory records of their deer herds, including natural additions, purchased additions, sales, and deaths. Records shall be kept in accordance with specifications of the Commissioner and shall be subject to review by the Commissioner or a representative or employee of the department.

(d) Deer farm operators shall construct and maintain premises and facilities used in deer farming in accordance with rules established by the Commissioner and in accordance with subparagraph (A) of paragraph (1) of Code Section 27-5-6, provided that:

(1) The facility must be constructed of such material and of such strength as appropriate for the animals involved;

(2) Housing facilities shall be structurally sound and shall be maintained in good repair to protect and contain the animals;

(3) The facilities shall be designed in such manner, including the inclusion of barriers of sufficient dimensions and conformation, to

safeguard both the animals and the public against injury or the transmission of diseases by direct contact; and

(4) Any portion of such facility within which farmed deer are maintained shall be surrounded by a fence with a minimum height of eight feet with the bottom six feet made of woven mesh and constructed of a design, strength, gauge, and mesh approved by the department, after consultation with the Department of Natural Resources, and which is sufficient to prevent escape of farmed deer and to prevent white-tailed deer from entering. Supplemental wire to attain a height of eight feet may be smooth, barbed, or woven wire of a gauge and mesh approved by the department with strands no more than six inches apart. All trees and other structures which pose a threat to the integrity of the fencing shall be removed unless fencing is constructed so as to prevent the breach of the fence from the fall of a tree or structure.

(e) It shall be the duty of the Department of Agriculture to inspect an applicant's facilities and to transmit a copy of any application for a deer-farming license to the Department of Natural Resources. The Department of Natural Resources shall inspect the applicant's facilities and shall report to the Department of Agriculture within 30 days of receipt of the application. It also shall be the duty of the Department of Agriculture to transmit a copy of any license issued pursuant to this article to the Department of Natural Resources. It also shall be the duty of the Department of Agriculture to notify the Department of Natural Resources of the revocation, nonrenewal, cancellation, or lapse of any license issued pursuant to this article. All such notifications shall be made in writing and shall be made as promptly as possible, but in no event shall such notification be given more than 72 hours after the event giving rise to the requirement of notice.

(f) For purposes other than agricultural operations, farmed deer species must be held under a wild animal license pursuant to Chapter 5 of Title 27. Anyone holding, possessing, importing, or transporting farmed deer without a deer-farming license or a wild animal license is in violation of Title 27. (Code 1981, § 4-4-172, enacted by Ga. L. 1997, p. 1395, § 2.)

4-4-173. Health and transportation requirements.

Health and transportation requirements for any Artiodactyla (even-toed ungulates) must meet the health requirements established by rule or regulation of the Georgia Department of Agriculture. Those animals specifically used for deer farming must meet the requirements of the Uniform Methods and Rules of the Code of Federal Regulations for Tuberculosis and Brucellosis in Cervidae. (Code 1981, § 4-4-173, enacted by Ga. L. 1997, p. 1395, § 2.)

4-4-174. Escaped deer or cervid.

Any farmed deer or cervid which escapes from a licensed deer farm shall be subject to the jurisdiction of the Department of Natural Resources and may be treated as an escaped wild animal which is subject to the provisions of Chapter 5 of Title 27, except that, while such animal is roaming freely outside the enclosure of any licensed deer farm, the owner of such farmed deer or cervid shall have 48 hours from the time the escape is detected to recapture such animal and return it to the licensed deer farm. As a condition for maintaining a deer-farming license, it shall be the duty of the owner or operator of a licensed deer farm to notify the Department of Natural Resources immediately upon discovery of the escape of a farmed deer. When such notice has been given, no legal hunter shall be held liable for killing or wounding an escaped deer. (Code 1981, § 4-4-174, enacted by Ga. L. 1997, p. 1395, § 2.)

4-4-175. Compliance with departments.

Deer farm operators shall allow the entry onto the deer farm of representatives of the Department of Agriculture, the Department of Natural Resources, or other departments or agencies having authority or duties involving farmed deer or wild animals to ensure compliance with applicable federal and state laws. (Code 1981, § 4-4-175, enacted by Ga. L. 1997, p. 1395, § 2.)

4-4-176. Application.

The provisions of this article shall not apply to any facility at which any animal which would otherwise qualify as a farmed deer is intentionally commingled with any species which is classified as and subject to regulation as a wild animal under the provisions of Chapter 5 of Title 27. (Code 1981, § 4-4-176, enacted by Ga. L. 1997, p. 1395, § 2.)

4-4-177. Rules and regulations.

The Commissioner of Agriculture is authorized to promulgate rules and regulations as may be necessary to effectuate the purpose of this article. Such rules and regulations shall be promulgated after consultation with the Department of Natural Resources and shall be designed to ensure the health and safety of wildlife and prevent the spread of animal diseases between wildlife, wild animals, domestic animals, farmed deer, and people. It shall be the duty of the Commissioner, the Department of Agriculture, the Board of Natural Resources, the commissioner of natural resources, and the Department of Natural Resources to communicate and consult on matters of mutual concern so as

to ensure the health and safety of farmed deer, wildlife, wild animals, domestic animals, and people and to prevent, control, and eradicate animal diseases within this state. (Code 1981, § 4-4-177, enacted by Ga. L. 1997, p. 1395, § 2.)

4-4-178. Injunctions.

In addition to the remedies provided in this article and notwithstanding the existence of any adequate remedy at law, the Commissioner is authorized to apply to the superior court for an injunction. Such court shall have jurisdiction, upon hearing and for cause shown, to grant a temporary or permanent injunction, or both, restraining any person from violating or continuing to violate any of the provisions of this article or for failing or refusing to comply with the requirements of this article or any rule or regulation adopted by the Commissioner pursuant to this article. An injunction issued under this Code section shall not require a bond. (Code 1981, § 4-4-178, enacted by Ga. L. 1997, p. 1395, § 2.)

4-4-179. Administrative hearings; penalty.

(a) The Commissioner, in order to enforce this article or any orders, rules, or regulations promulgated pursuant to this article, may issue an administrative order imposing a penalty not to exceed $1,000.00 for each violation whenever the Commissioner, after a hearing, determines that any person has violated any provision of this article or any quarantines, orders, rules, or regulations promulgated pursuant to this article.

(b) The initial hearing and any administrative review thereof shall be conducted in accordance with the procedure for contested cases in Chapter 13 of Title 50, the "Georgia Administrative Procedure Act." Any person who has exhausted all administrative remedies available and who is aggrieved or adversely affected by any final order or action of the Commissioner shall have the right of judicial review thereof in accordance with Chapter 13 of Title 50. All penalties recovered by the Commissioner as provided for in this article shall be paid into the state treasury. The Commissioner may file in the superior court wherein the person under order resides or, if said person is a corporation, in the county wherein the corporation maintains its principal place of business or in the county wherein the violation occurred a certified copy of a final order of the Commissioner unappealed from or of a final order of the department affirmed upon appeal, whereupon said court shall render judgment in accordance therewith and notify the parties. Such judgment shall have the same effect, and all proceedings in relation thereto shall thereafter be the same, as though said judgment had been

rendered in an action duly heard and determined by said court. The penalty prescribed in this Code section shall be concurrent, alternative, or cumulative with any and all other civil, criminal, or alternative rights, remedies, forfeitures, or penalties provided, allowed, or available to the Commissioner with respect to any violation of this article and any quarantines, orders, rules, or regulations promulgated pursuant thereto. (Code 1981, § 4-4-179, enacted by Ga. L. 1997, p. 1395, § 2.)

4-4-180. Release.

It shall be unlawful for any person intentionally to release a farmed deer from captivity or to import, transport, sell, transfer, or possess a farmed deer in such a manner as to cause its release or escape from captivity. If a person imports, transports, sells, transfers, or possesses a farmed deer in such a manner as to pose a reasonable possibility that such farmed deer may be released accidentally or escape from captivity, the department may revoke the license of such person. (Code 1981, § 4-4-180, enacted by Ga. L. 1997, p. 1395, § 2.)

4-4-181. Penalty.

Any person violating the provisions of this article shall be guilty of a misdemeanor. (Code 1981, § 4-4-181, enacted by Ga. L. 1997, p. 1395, § 2.)

OPINIONS OF THE ATTORNEY GENERAL

Fingerprinting of offenders. — An offense covered by O.C.G.A. § 4-4-181 is not currently designated as an offense requiring fingerprinting. 1997 Op. Att'y Gen. No. 97-330.

CHAPTER 5

DISPOSAL OF DISEASED, DISABLED, OR DEAD ANIMALS

Sec.
4-5-1. Short title.
4-5-2. "Dead animals" defined.
4-5-3. Abandonment of dead animals; requirements as to disposal generally; disposal in wells, open pits, or surface waters or on private or public property; disposal in city or county landfill.
4-5-4. Removal and disposition of dead animals within highway rights of way generally.
4-5-5. Methods of disposal of dead animals.
4-5-6. Destruction of diseased and disabled animals which have been abandoned.
4-5-7. Disposal of dead animals and waste material; approval by Commissioner.
4-5-8. Restriction upon transportation of dead animals or parts thereof into state.
4-5-9. Prohibition or restriction on transport of dead animals; permit issuance.
4-5-10. Promulgation of rules and regulations.
4-5-11. Penalty for violations of chapter or rules or regulations promulgated thereunder.

Cross references. — Regulation of facilities for handling, disposing of, and other activities concerning solid waste, § 12-8-20 et seq. Regulation by Commissioner of business of buying, selling, or transporting in commerce dead and dying animals, etc., animals or carcasses of such animals, § 26-2-130 et seq.

Administrative rules and regulations. — Dead animals, Official Compilation of the Rules and Regulations of the State of Georgia, Rules of Georgia Department of Agriculture, Chapter 40-16-2.

RESEARCH REFERENCES

ALR. — Validity, construction, and application of statutes, ordinances, and other regulations relating to transportation or disposal of carcasses of dead animals not slaughtered for food, 121 ALR 732.

Liability for killing or injuring, by motor vehicle, livestock or fowl on highway, 55 ALR4th 822.

4-5-1. Short title.

This chapter shall be known and may be cited as the "Dead Animal Disposal Act." (Ga. L. 1969, p. 1018, § 1.)

4-5-2. "Dead animals" defined.

As used in this chapter, the term "dead animals" means the carcasses, parts of carcasses, fetuses, embryos, effluent, or blood of livestock, including, without limitation, cattle, swine, sheep, goats, poultry, ratites, equine, and alternative livestock; pet animals associated with pet dealers, kennels, animal shelters, or bird dealers licensed by the Georgia Department of Agriculture; animals processed by commercial facilities which process animals for human consumption; and animals associated with wildlife exhibitions. (Ga. L. 1969, p. 1018, § 2; Ga. L. 1973, p. 569, § 1; Ga. L. 1995, p. 244, § 7; Ga. L. 2002, p. 1397, § 1.)

4-5-3. Abandonment of dead animals; requirements as to disposal generally; disposal in wells, open pits, or surface waters or on private or public property; disposal in city or county landfill.

(a) It shall be unlawful for any person who owns or is caring for an animal which has died or has been killed to abandon the dead animal. Such person shall dispose of the dead animal as provided for in this chapter or in rules and regulations adopted pursuant to this chapter. Dead animals shall not be abandoned in wells, open pits, or surface waters of any kind on private or public land.

(b) No person shall dispose of a dead animal on the land of another without the permission of the owner of the land.

(c) Arrangements must be made with a city or county official in order to dispose of a dead animal in a city or county landfill. (Ga. L. 1969, p. 1018, § 3; Ga. L. 1973, p. 569, § 2; Ga. L. 2002, p. 1397, § 2.)

4-5-4. Removal and disposition of dead animals within highway rights of way generally.

(a) As used in this Code section, the term "dead animals" means the carcasses or parts of carcasses of all animals, regardless of whether they are considered to be farm livestock, poultry, equines, domesticated animals, pets, or any other type of animal and shall include all such animals regardless of the cause of death of such animals.

(b) Any other provision of this chapter to the contrary notwithstanding, it shall be the duty of the Department of Transportation to remove and dispose of the carcasses of all dead animals found within the rights of way of all highways within the state maintained either totally or in part from state funds. Such carcasses or parts of carcasses shall be disposed of in a manner consistent with this chapter. (Ga. L. 1974, p. 404, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, §§ 21, 47.

C.J.S. — 3B C.J.S., Animals, § 151. 66 C.J.S., Nuisances, § 56.

4-5-5. Methods of disposal of dead animals.

Methods which can be used for disposal of dead animals are burning, incineration, burial, rendering, or any method using appropriate disposal technology which has been approved by the Commissioner of Agriculture. Disposal of dead animals by any of the approved methods must be completed within 24 hours after death or discovery. Dead animals that are buried must be buried at least three feet below the ground level, have not less than three feet of earth over the carcass, and must not contaminate ground water or surface water. (Ga. L. 1969, p. 1018, § 5; Ga. L. 2000, p. 1297, § 1; Ga. L. 2002, p. 1397, § 3.)

Law reviews. — For note on the 2000 amendment of this Code section, see 17 Ga. St. U.L. Rev. 22 (2000).

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, §§ 21, 47.

C.J.S. — 3B C.J.S., Animals, § 151. 66 C.J.S., Nuisances, § 56.

4-5-6. Destruction of diseased and disabled animals which have been abandoned.

For the purpose of putting a speedy end to the suffering of hopelessly diseased and disabled animals, any person finding any abandoned domestic animal which is diseased or injured past recovery may apply to any magistrate of the county, who may summarily decide whether such animal should be destroyed, after giving notice to the owner, if known, whenever such notice can be given without defeating the object of this Code section. The order authorizing the destruction of such animal shall not defeat the owner's claim for damages against the person destroying or procuring the destruction of such animal. (Ga. L. 1878-79, p. 183, § 2; Code 1882, § 4612(b); Civil Code 1895, § 1755; Civil Code 1910, § 2014; Code 1933, § 62-211; Ga. L. 1983, p. 884, § 4-1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, § 39 et seq.

Am. Jur. Proof of Facts. — Justifiable Destruction of Animal, 37 POF2d 711.

C.J.S. — 3B C.J.S., Animals, § 244 et seq.

ALR. — Constitutionality of statute or ordinance providing for destruction of animals, 8 ALR 67; 56 ALR2d 1024.

Constitutionality of "dog laws," 49 ALR 847.

Right to and measure of compensation for animals or trees destroyed to prevent spread of disease or infection, 67 ALR 208.

Validity of statute or ordinance providing for destruction of dogs, 56 ALR2d 1024.

Measure, elements, and amount of damages for killing or injuring cat, 8 ALR4th 1287.

Construction of provisions of statute or ordinance governing occasion, time, or manner of summary destruction of domestic animals by public authorities, 42 ALR4th 839.

4-5-7. Disposal of dead animals and waste material; approval by Commissioner.

(a) Public livestock sales markets, livestock slaughter establishments, poultry dealers, poultry sales establishments, pet dealers, kennels, bird dealers, animal shelters, and stables licensed by the Georgia Department of Agriculture shall have a written, approved method and place for the disposal of all dead animals and all accessory waste material involved in the handling of dead animals which die on or within the premises of such establishments.

(b) The Commissioner of Agriculture shall approve the methods and places for disposal of such dead animals and may establish procedures, methods, and permits for disposal of dead animals. (Ga. L. 1969, p. 1018, § 4; Ga. L. 2002, p. 1397, § 4.)

Cross references. — Inspection of sanitary conditions of establishments in which meat and meat food products are prepared, § 26-2-100 et seq. Duties of Commissioner of Agriculture to investigate sanitary conditions of slaughtering, meat-canning, etc., establishments, § 26-2-108. Compliance with regulations to prevent diseased animals from being used for human food purposes, § 26-2-130.

Administrative rules and regulations. — Disposal of diseased or otherwise adulterated carcasses, Official Compilation of the Rules and Regulations of the State of Georgia, Rules of Georgia Department of Agriculture, Chapter 40-10-1.11.

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, §§ 21, 47.

C.J.S. — 3B C.J.S., Animals, § 151. 66 C.J.S., Nuisances, § 56.

4-5-8. Restriction upon transportation of dead animals or parts thereof into state.

Dead animals or parts thereof, raw or unrendered, except green salted hides, shall not be allowed to enter the State of Georgia except by written permit issued by the Georgia Department of Agriculture; provided, however, that licensed research institutes, accredited colleges or state colleges and universities, and departments of municipal gov-

ernments may transport and receive dead animals for research or investigational purposes only. (Ga. L. 1969, p. 1018, § 7.)

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, §§ 21, 47.
C.J.S. — 3B C.J.S., Animals, § 151. 66 C.J.S., Nuisances, § 56.
ALR. — Applicability of state Anti-trust Act to interstate transaction, 24 ALR 787.

4-5-9. Prohibition or restriction on transport of dead animals; permit issuance.

The Commissioner of Agriculture may prohibit or restrict, at his or her discretion, and issue permits for the hauling or transportation of dead animals or types of dead animals and order the destruction thereof in accordance with this chapter. (Ga. L. 1969, p. 1018, § 6; Ga. L. 1973, p. 569, § 3; Ga. L. 2002, p. 1397, § 5.)

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, § 27 et seq.
C.J.S. — 3B C.J.S., Animals, § 128 et seq.

4-5-10. Promulgation of rules and regulations.

The Commissioner of Agriculture is authorized to promulgate rules and regulations to implement and accomplish the purposes of this chapter. (Ga. L. 1969, p. 1018, § 8; Ga. L. 2002, p. 1397, § 6.)

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, §§ 21, 47.
C.J.S. — 3B C.J.S., Animals, § 151. 66 C.J.S., Nuisances, § 56.

4-5-11. Penalty for violations of chapter or rules or regulations promulgated thereunder.

Any person, firm, partnership, or corporation which violates any provision of this chapter or any rule or regulation made pursuant thereto shall be guilty of a misdemeanor. (Ga. L. 1969, p. 1018, § 9.)

JUDICIAL DECISIONS

Cited in Collins v. State, 160 Ga. App. 680, 288 S.E.2d 43 (1981).

CHAPTER 6

LIVESTOCK DEALERS AND AUCTIONS

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Livestock Dealers

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4-6-42. Surety bond — Generally.
4-6-43. Surety bond — Dealers and brokers generally.
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4-6-48. Report of dishonor of a check or draft issued in payment for livestock.
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4-6-49.1. Denial of licenses; Commissioner's right to require disclosures and examine records and accounts; dealers purchasing livestock for cash only; financial statement.
4-6-50. Livestock weighed at sales establishment; certified public weigher.
4-6-51. Isolation of employees of sales establishments during conduct of sale.
4-6-52. Special sales.
4-6-53. Injunctions [Repealed].
4-6-54. Use of persuader in loading or handling of livestock.
4-6-55. Penalty for violation of chapter or rules or regulations promulgated thereunder [Repealed].

Cross references. — Criminal penalty for livestock theft, § 16-8-20. Sale or disposition of livestock or swine belonging to state, § 50-16-80.

Administrative rules and regulations. — Livestock auctions, Official Compilation of the Rules and Regulations of the State of Georgia, Rules of Georgia Department of Agriculture, Chapter 40-13-4.

ARTICLE 1

LIVESTOCK DEALERS

Cross references. — Duty of Commissioner to inspect cattle, sheep, swine, and other animals before entry into slaughtering, packing, or similar establishments, § 26-2-102.

OPINIONS OF THE ATTORNEY GENERAL

Livestock buying stations, assembly or concentration points. — Livestock buying stations and livestock assembly or concentration points are subject to licensing and disease control inspection by the Commissioner of Agriculture or the Commissioner's authorized livestock inspectors. 1973 Op. Att'y Gen. No. 73-64.

4-6-1. Definitions.

As used in this chapter, the term:

(1) "Bond" means a written instrument issued or executed by a bonding, surety, or insurance company licensed to do business in this state, guaranteeing that the person bonded shall faithfully fulfill the terms of the contract of purchases and guarantee the payment of the purchase price of all livestock purchased by him, made payable to the Commissioner for the benefit of persons sustaining loss resulting from the nonpayment of the purchase price or the failure to fulfill the terms of the contract of purchase.

(2) "Cash" includes only currency, cashier's checks, and money orders.

(3) "Dealer" is synonymous with the term "broker" and means any person, firm, or corporation, including a packer, engaged in the business of buying livestock of any kind for resale or in selling livestock of any kind bought for the purpose of resale or in buying livestock of any kind for slaughter. Every agent acting for or on behalf of any dealer, broker, or livestock market operator is a dealer or broker.

(A) Farmers acquiring livestock solely for the purpose of grazing and feeding as a part of their farm operations are not encompassed by the definition of "dealer" or "broker"; and

(B) Packers whose total annual purchases of livestock are less than $50,000.00 who buy only from licensed dealers and licensed

sales establishments are not included in the definition of "dealer" or "broker."

(4) "Livestock" means cattle, swine, equines, sheep, and goats of all kinds and species.

(5) "Livestock market operator" means any person, firm, or corporation engaged in the business of operating a sales establishment, public auctions or sales of livestock, or barns and yards for the containment of livestock held for the purpose of auction or sale.

(6) "Person" means any person, firm, corporation, association, cooperative, or combination thereof.

(7) "Sales establishment" means any yard, barn, or other premises where livestock is sold at auction. (Ga. L. 1952, p. 184, § 1; Ga. L. 1983, p. 1161, § 1; Ga. L. 1995, p. 244, § 8; Ga. L. 1996, p. 351, § 1; Ga. L. 2008, p. 458, § 6/SB 364.)

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, § 1.

C.J.S. — 3B C.J.S., Animals, § 1.

4-6-2. Sale, auction, transfer, or movement of infected livestock.

No dealer, broker, or livestock market operator shall sell, auction, transfer, or move any livestock which are infected with any disease or which have been placed under quarantine by the authority of the Commissioner. Until all such livestock have been inspected by a veterinarian approved by the Commissioner, no dealer, broker, or livestock market operator shall sell, auction, transfer, or move any livestock which have been infected, which are suspected of being infected, or which are likely to have been exposed to infection. No dealer, broker, or livestock market operator shall sell, auction, transfer, or move any livestock from any barn, yard, or premises unless all sanitary practices and precautions prescribed by the rules and regulations of the Commissioner have been observed in the premises, barn, or yard. (Ga. L. 1952, p. 184, § 2; Ga. L. 1983, p. 1161, § 1.)

Cross references. — Making of implied warranties by companies auctioning cattle, hogs, or sheep, § 11-2-316.

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, § 27 et seq.

C.J.S. — 3B C.J.S., Animals, § 128 et seq.

ALR. — Extent of liability of seller of livestock infected with communicable disease, 14 ALR4th 1096.

4-6-3. Licenses — Required; fee; term; bonding.

No livestock market operator shall engage in or carry on such business without first applying for and obtaining a license from the Commissioner. No livestock dealer or broker who buys or sells through a livestock market operator or directly from producers shall engage in or carry on such business without first applying for and obtaining a license from the Commissioner. There shall be no fee for such license. No such license shall be issued to any person unless the applicant therefor furnishes to the Commissioner the required bond. The bonds shall be executed by a surety corporation authorized to transact business in this state and approved by the Commissioner. Any and all bond applications shall be accompanied by a certificate of "good standing" issued by the Commissioner of Insurance. If any company issuing a bond shall be removed from doing business in this state, it shall be the duty of the Commissioner of Insurance to notify the Commissioner of Agriculture within 30 days. Such bonds shall be upon forms prescribed by the Commissioner and shall be conditioned to secure the faithful performance of such person's obligations as a livestock market operator, livestock dealer, or livestock broker under this article and the rules and regulations prescribed under this article. Whenever the Commissioner shall determine that a previously approved bond has for any cause become insufficient, the Commissioner may require an additional bond or bonds to be given, conforming with the requirements of this Code section. Unless the additional bond or bonds are given within the time fixed by written demand therefor, or if the bond of a dealer, broker, or livestock market operator is canceled, then the license of such person shall immediately be revoked by operation of law without notice or hearing. (Ga. L. 1952, p. 184, § 3; Ga. L. 1958, p. 386, § 1; Ga. L. 1982, p. 3, § 4; Ga. L. 1982, p. 1804, § 1; Ga. L. 1983, p. 1161, § 1; Ga. L. 1999, p. 800, § 5.)

Cross references. — Exemption from municipal property taxes and license fees for sale or introduction into municipality of agricultural products raised in state, § 48-5-356.

Administrative rules and regulations. — Licensing and bonding requirements, Official Compilation of the Rules and Regulations of the State of Georgia, Rules of Georgia Department of Agriculture, Chapter 40-13-7.

OPINIONS OF THE ATTORNEY GENERAL

Bond requirement as condition precedent to purchase livestock at auction. — There is nothing in Ga. L. 1952, p. 184, § 3 (see now O.C.G.A. § 4-6-3) or Ga. L. 1956, p. 501, § 3 (see now O.C.G.A. § 4-6-43) to prohibit the individual operator of a livestock auction from requiring a bond or such other security that the operator may require as a condition of permitting the buyer to purchase livestock at the auction. 1958-59 Op. Att'y Gen. p. 3.

Single license for buying stations appropriate. — When buying stations are operated under the name and auspices of a membership organization, if these

various operations are in fact owned or operated by a single person, firm, or corporation, a single license covering the operation of all such stations would be appropriate. 1973 Op. Att'y Gen. No. 73-64.

RESEARCH REFERENCES

ALR. — Failure to procure occupational or business license or permit as affecting validity or enforceability of contract, 30 ALR 834; 42 ALR 1226; 118 ALR 646.

Right to enjoin business competitor from unlicensed or otherwise illegal acts or practices, 90 ALR2d 7.

Single or isolated transactions as falling within provisions of commercial or occupational licensing requirements, 93 ALR2d 90.

Recovery back of money paid to unlicensed person required by law to have occupational or business license or permit to make contract, 74 ALR3d 637.

4-6-4. Licenses — Revocation, cancellation, or suspension.

Every licensed dealer, broker, and livestock market operator who shall violate this chapter or rules and regulations established by the Commissioner pursuant to this chapter shall have his license revoked, canceled, or suspended, upon a notice and hearing. (Ga. L. 1952, p. 184, § 5; Ga. L. 1983, p. 1161, § 1.)

4-6-5. Maintenance of records.

No dealer, broker, or livestock market operator shall buy, store, or otherwise receive any livestock without first recording the name and address of the person or persons bringing in the livestock and recording the license tag number of the vehicle used by the person or persons to transport the livestock. (Ga. L. 1963, p. 541, § 1; Ga. L. 1983, p. 1161, § 1.)

4-6-6. Quarantine of premises; promulgation of rules and regulations prescribing sanitary standards.

(a) In the control, suppression, prevention, and eradication of livestock diseases, the Commissioner or any duly authorized livestock inspector acting under the authority of this or any other livestock law of this state is authorized and required to quarantine any premises or any area when he shall determine that livestock in such place or places are infected with a contagious or infectious disease, that the unsanitary condition of such place or places might cause the spread of such disease, or that the owner or occupant of such place or places is not observing sanitary practices.

(b) The Commissioner is authorized and empowered to adopt and promulgate rules and regulations prescribing the sanitary standards and requirements for the prevention, control, suppression, and eradication of livestock diseases in this state, such regulations to be no less

adequate for the protection of the livestock industry and public health than those of the secretary of agriculture of the United States Department of Agriculture. (Ga. L. 1952, p. 184, § 6; Ga. L. 1983, p. 1161, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, § 27 et seq.

C.J.S. — 3B C.J.S., Animals, §§ 128 et seq., 134 et seq.

4-6-7. Rules and regulations — Promulgation and enforcement generally.

The Commissioner is authorized to formulate, adopt, promulgate, and enforce rules and regulations for the purpose of carrying this chapter into effect. (Ga. L. 1952, p. 184, § 4; Ga. L. 1983, p. 1161, § 1.)

RESEARCH REFERENCES

C.J.S. — 3B C.J.S., Animals, § 128.

4-6-8. Rules and regulations — Administrative remedies of persons aggrieved by promulgation or enforcement.

Any person affected by any rule or regulation adopted and promulgated by the Commissioner pursuant to any statute conferring such authority upon him, who believes that the Commissioner, in the promulgation of such rules and regulations or in the enforcement thereof, has gone beyond the authority vested in him by law or who believes that the Commissioner has exceeded any power which the legislature of this state under the Constitution of the United States or the Constitution of Georgia conferred upon him, is given the right to protest or object in writing to such rule or regulation or any act done by the Commissioner pursuant to such rule or regulation, as he may believe violates the legal and constitutional authority of the Commissioner, by pointing out in what respect and for what reasons he contends the act, rules, or regulations to be improper or illegal. The Commissioner is required to consider every such objection and afford the aggrieved party opportunity to submit evidence and argument in support of his protest; and if, in his judgment, the protest is in whole or in part well founded, the Commissioner shall take such corrective measures as are necessary to give the aggrieved party relief in every respect from any illegal or unconstitutional requirement. This Code section is expressly made an administrative remedy and every person affected by any rule, regulation, or act of the Commissioner is required to exhaust this remedy before pursuing any other remedy, provided that nothing contained in this chapter shall be construed to deny any applicant for a license any existing right to a review by the court of the

Commissioner's action as now provided by law. (Ga. L. 1952, p. 184, § 8; Ga. L. 1983, p. 1161, § 1.)

RESEARCH REFERENCES

ALR. — Hearsay in proceeding for suspension or revocation of license to conduct business or profession, 142 ALR 1388.

4-6-9. Injunctions.

In addition to the remedies provided in this chapter and notwithstanding the existence of an adequate remedy at law, the Commissioner is authorized to apply to the superior courts of this state for injunctions. Such courts shall have the jurisdiction, for good cause shown, to grant temporary or permanent injunctions or temporary restraining orders restraining or enjoining any person, firm, corporation, or association from violating or continuing to violate this chapter or any rule or regulation promulgated pursuant to this chapter. Such injunction or order shall be issued without bond and may be granted notwithstanding the fact that the violation constitutes a criminal act and notwithstanding the pendency of any criminal prosecution for the same violation. (Ga. L. 1972, p. 745, § 2; Ga. L. 1983, p. 1161, § 1.)

4-6-10. Penalty for violations of chapter or rules or regulations.

(a) Any dealer, broker, or livestock market operator who violates any of the provisions of this chapter, any quarantine provision, or any rule or regulation established by the Commissioner under the authority of this or any other law for the protection of the general public in the prevention of livestock diseases shall be guilty of a misdemeanor.

(b) Any dealer, broker, or livestock market operator who violates Code Section 4-6-5, relating to maintenance of records, for a third or subsequent time shall be guilty of a felony and, upon conviction thereof, shall be punished by a fine not to exceed $10,000.00 or by imprisonment for not less than one nor more than three years, or both, and any person so convicted shall have any license issued under this article permanently revoked and shall be ineligible to apply for a subsequent license under this article.

(c) Any dealer, broker, or livestock market operator who violates Code Section 4-6-2, relating to the sale, auction, or transfer of known infected livestock, or Code Section 4-6-6, relating to quarantines, for the third or subsequent time shall be guilty of a felony and, upon conviction thereof, shall be punished by a fine not to exceed $10,000.00 or by imprisonment for not less than one nor more than three years, or both, and any person so convicted shall have any license issued under this

article permanently revoked and shall be ineligible to apply for a subsequent license under this article. (Ga. L. 1952, p. 184, § 7; Ga. L. 1983, p. 1161, § 1; Ga. L. 1985, p. 704, § 2.)

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, § 27.

C.J.S. — 3B C.J.S., Animals, § 179 et seq.

4-6-11. Liability of purchaser or seller of leased livestock to owner or lessor of livestock.

A person who purchases leased livestock from or a commission merchant who sells leased livestock for the lessee of such livestock shall not be liable to the owner or lessor of such livestock unless the livestock are clearly marked or branded with a mark or brand registered by the owner or lessor with the department and, prior to the purchase or sale, the purchaser or commission merchant has received written notice of the owner's or lessor's ownership interest in such livestock and of the owner's or lessor's mark or brand. (Code 1981, § 4-6-11, enacted by Ga. L. 1991, p. 752, § 1; Ga. L. 1992, p. 1642, § 1.)

ARTICLE 2

CUSTODIAL ACCOUNTS FOR LIVESTOCK SELLERS

4-6-20. Short title.

This article may be cited as the "Custodial Account for Livestock Sellers Act." (Ga. L. 1966, p. 350, § 1; Ga. L. 1983, p. 1161, § 1.)

4-6-21. Maintenance of custodial accounts; deposits; commingling of funds.

Every operator of a sales establishment for the sale of livestock at auction shall maintain a custodial account in a national or state-chartered bank located in this state and within 100 miles of the sales establishment. Every such operator shall deposit in such account the gross proceeds received from the sale of livestock handled on a commissioned or agency basis, which account shall be designated "Custodial Account for Shippers' Proceeds." Other funds of the depositor shall not be commingled in such account with funds required to be deposited in this account. (Ga. L. 1966, p. 350, § 2; Ga. L. 1983, p. 1161, § 1; Ga. L. 1984, p. 22, § 4.)

4-6-22. Payments from custodial accounts.

No check shall be drawn on the custodial account nor any funds withdrawn from the account, except for payment of proceeds due the

livestock seller or for legally authorized fees or charges incurred by or owing to the sales establishment. No bank holding such an account shall pay a check on such account or honor a withdrawal from such account unless the sales establishment files a certificate that the check or withdrawal is for one of the purposes authorized in this Code section. The certificate may be printed on the face of the check above the signature. (Ga. L. 1966, p. 350, § 3; Ga. L. 1983, p. 1161, § 1.)

4-6-23. Penalty for failure to deposit proceeds of sale in custodial account.

Failure to deposit the proceeds received from the sale of livestock in a custodial account as required by Code Section 4-6-21, misuse of such funds, or payment by a bank of funds held in a custodial account without the certificate required by Code Section 4-6-22 shall constitute a misdemeanor. (Ga. L. 1966, p. 350, § 4; Ga. L. 1983, p. 1161, § 1.)

ARTICLE 3

LIVESTOCK AUCTIONS

Cross references. — Making of implied warranties by companies auctioning cattle, hogs, and sheep, § 11-2-316. Sales by auction generally, § 11-2-328. Auctions of wild animals, § 27-5-11. Regulation of business of auctioneers generally, T. 43, C. 6.

Administrative rules and regulations. — Auction markets, Official Compilation of the Rules and Regulations of the State of Georgia, Rules of Georgia Department of Agriculture, Animal Health Division, Chapter 40-13-6.

Licensing and bonding requirements, Official Compilation of the Rules and Regulations of the State of Georgia, Rules of Georgia Department of Agriculture, Animal Health Division, Licensing, Chapter 40-13-7.01.

RESEARCH REFERENCES

ALR. — Withdrawal of property from auction sale, 37 ALR2d 1049.

4-6-40. Definitions.

Reserved. Repealed by Ga. L. 1983, p. 1161, § 1, effective July 1, 1983.

Editor's notes. — This Code section was based on Ga. L. 1956, p. 501, § 1.

4-6-41. Administration of chapter; promulgation of rules and regulations.

Reserved. Repealed by Ga. L. 1983, p. 1161, § 1, effective July 1, 1983.

Editor's notes. — This Code section was based on Ga. L. 1956, p. 501, § 7.

4-6-42. Surety bond — Generally.

(a) No person shall operate a sales establishment for the sale of livestock at auction unless he has then in force a bond in an amount calculated as follows:

(1) If the annual sales of the establishment are $2,600,000.00 or less, the amount of the bond shall be one fifty-second of the amount of annual sales but not less than $10,000.00; or

(2) If the annual sales of the establishment are more than $2,600,000.00, the amount of the bond shall be $50,000.00 plus one fifty-second of the amount of annual sales in excess of $2,600,000.00 times a factor of 0.20.

(b) An amount calculated under subsection (a) of this Code section, if not a multiple of $5,000.00, shall be rounded to nearest higher multiple of $5,000.00. (Ga. L. 1956, p. 501, § 2; Ga. L. 1958, p. 309, § 1; Ga. L. 1959, p. 296, § 1; Ga. L. 1982, p. 1804, § 2; Ga. L. 1983, p. 1161, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 7 Am. Jur. 2d, Auctions & Auctioneers, § 5.
C.J.S. — 7A C.J.S., Auctions & Auctioneers, §§ 13, 14, 15, 44, 45.
ALR. — Validity of statute or ordinance which requires liability or indemnity insurance or bond as condition of license for conducting business or profession, 120 ALR 950.

4-6-43. Surety bond — Dealers and brokers generally.

(a) No dealer or broker shall purchase livestock at any sales establishment or directly from producers unless he has then in force a bond in an amount calculated as follows:

(1) Determine a number which is the number of days during the preceding year on which the dealer or broker did business;

(2) Divide the total dollar value of livestock purchased by the dealer or broker during the preceding year by the lesser of:

(A) One-half of the number determined under paragraph (1) of this subsection; or

(B) One hundred thirty; and

(3) Adjust the amount obtained under paragraph (2) of this subsection as follows:

(A) If the amount obtained under paragraph (2) of this subsection is $10,000.00 or less then the amount of the bond shall be $10,000.00;

(B) If the amount obtained under paragraph (2) of this subsection is more than $10,000.00 but not more than $75,000.00 then that amount shall be the amount of the bond; or

(C) If the amount obtained under paragraph (2) of this subsection is more than $75,000.00 then the amount of the bond shall be the sum of $75,000.00 plus 10 percent of the amount by which the amount obtained under paragraph (2) of this subsection exceeds $75,000.00.

(b) An amount calculated under subsection (a) of this Code section, if not a multiple of $5,000.00, shall be rounded up to the nearest multiple of $5,000.00.

(c) This Code section shall not be applicable to nor shall a bond be required of a dealer who purchases livestock at sales establishments for cash only. No livestock market operator shall permit a dealer or broker who is not properly licensed and bonded to purchase livestock other than for cash. (Ga. L. 1956, p. 501, § 3; Ga. L. 1958, p. 309, § 2; Ga. L. 1959, p. 296, § 2; Ga. L. 1970, p. 530, § 1; Ga. L. 1982, p. 1804, § 3; Ga. L. 1983, p. 1161, § 1; Ga. L. 1984, p. 22, § 4.)

Editor's notes. — The 1984 amendment, effective February 3, 1984, directed that "One hundred thirty" be substituted for "130" in subparagraph (a)(1)(B). The Act should have directed that the change be made in subparagraph (a)(2)(B) instead, and this Code section has been edited accordingly.

OPINIONS OF THE ATTORNEY GENERAL

Intent and purpose of section. — It was not the intent and purpose of the livestock bonding law to supersede or alter any arrangements that might be made between the seller and buyer to satisfy payment of the purchase price; there is still the basic duty of the seller to satisfy oneself that the purchaser can pay for the livestock purchased. 1958-59 Op. Att'y Gen. p. 3.

Department does not have the authority to require a bond in excess of the amounts provided herein. 1958-59 Op. Att'y Gen. p. 3.

Bond requirement as condition precedent to purchase livestock at auction. — There is nothing in Ga. L. 1952, p. 184, § 3 (see O.C.G.A. § 4-6-3) or Ga. L. 1956, p. 501, § 3 (see O.C.G.A. § 4-6-43) to prohibit the individual operator of a livestock auction from requiring a bond or such other security that the operator may require as a condition of permitting the buyer to purchase livestock at the auction. 1958-59 Op. Att'y Gen. p. 3.

RESEARCH REFERENCES

Am. Jur. 2d. — 12 Am. Jur. 2d, Bonds, §§ 4, 22.

C.J.S. — 11 C.J.S., Bonds, § 33.

4-6-44. Surety bond — Annual sales and purchases.

In calculating amounts of bonds under Code Sections 4-6-42 and 4-6-43, the total amount of annual sales or annual purchases for the preceding calendar year shall be used; but, if an applicant for a license does not have an annual sales history, the Commissioner shall estimate the amount of annual sales or annual purchases which will occur. (Code 1981, § 4-6-44, enacted by Ga. L. 1983, p. 1161, § 1.)

Editor's notes. — The 1983 Act, effective July 1, 1983, repealed former Code Section 4-6-44, based on Ga. L. 1956, p. 501, § 4, and Ga. L. 1981, Ex. Sess., p. 8 (Code enactment act), which dealt with the number of bonds required under former Code Sections 4-6-42 and 4-6-43, and enacted the present Code section.

4-6-45. Surety bond — Acceptance of insurance coverage as satisfaction of bonding requirements.

Reserved. Repealed by Ga. L. 1983, p. 1161, § 1, effective July 1, 1983.

Editor's notes. — This Code section was based on Ga. L. 1959, p. 296, § 5, and Ga. L. 1981, Ex. Sess., p. 8 (Code enactment act).

4-6-46. Maintenance of records and accounts; inspections.

Sales establishments for the sale of livestock at auction shall maintain such accounts and records as will at all times disclose the names of the sellers or consignors, the amount due and payable to each from the custodial account for shippers' proceeds, and the legally authorized fees and charges due the establishment. Sales establishments shall make such records available for inspection by the Commissioner or his agents during any business hours. (Ga. L. 1966, p. 350, § 5; Ga. L. 1983, p. 1161, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 7 Am. Jur. 2d, Auctions & Auctioneers, 2 et seq., 34.

C.J.S. — 7A C.J.S., Auctions & Auctioneers, §§ 1, 2.

4-6-47. When payment for livestock purchased due; disposition of proceeds; methods of payment.

Payment for livestock purchased at auction shall be made on the same date of the purchase of the livestock, except that persons regu-

lated by the provisions of the federal Packers and Stockyards Act may make payment by placing in the mail a check on the day following the date of purchase. The proceeds from the sale of livestock shall be deposited by the livestock sales establishment in the custodial account not later than the next banking day following the date of sale or receipt of payment by mail. Payment for livestock purchased at auction shall be made by cash, check, draft, or transfer of funds by wire. No loans shall be made from the custodial account of any livestock sales establishment to any purchaser of livestock at that sales establishment. (Ga. L. 1971, p. 71, § 1; Ga. L. 1978, p. 2061, § 1; Ga. L. 1983, p. 1161, § 1.)

U.S. Code. — The Packers and Stockyards Act, referred to in this Code section, is codified as 7 U.S.C. § 181 et seq.

Administrative rules and regulations. — Payment for livestock purchased at auction, Official Compilation of the Rules and Regulations of the State of Georgia, Rules of Georgia Department of Agriculture, Chapter 40-13-11.

4-6-48. Report of dishonor of a check or draft issued in payment for livestock.

It shall be the duty and responsibility of each livestock sales establishment to report to the Commissioner within 24 hours after having knowledge that a check or draft issued in payment for livestock has been dishonored; and it shall be the duty and responsibility of the Commissioner to notify all licensed sales establishments of the fact of such dishonor of any such check or draft issued in payment for livestock. (Ga. L. 1971, p. 71, § 2; Ga. L. 1983, p. 1161, § 1.)

Administrative rules and regulations. — Payment for livestock purchased at auction, Official Compilation of the Rules and Regulations of the State of Georgia, Rules of Georgia Department of Agriculture, Chapter 40-13-11.

4-6-49. Annual reports of sales and purchases; proof of compliance with bonding requirements.

It shall be the duty of each sales establishment to report to the Commissioner not later than the last day of the third month following the close of the establishment's fiscal year the total sales of such establishment for the preceding fiscal year. It shall be the duty of each dealer to report to the Commissioner not later than the last day of the third month following the close of the dealer's fiscal year the total purchases of such dealer for the preceding fiscal year. The Commissioner may prescribe the form of such reports. At the time the report is made, each sales establishment and dealer shall submit proof to the Commissioner of compliance with the bonding requirements of this chapter. The failure to submit the information required in this Code section shall be sufficient grounds to revoke the license of any such sales

establishment or dealer. (Ga. L. 1959, p. 296, § 4; Ga. L. 1983, p. 1161, § 1; Ga. L. 1999, p. 800, § 6.)

4-6-49.1. Denial of licenses; Commissioner's right to require disclosures and examine records and accounts; dealers purchasing livestock for cash only; financial statement.

(a) No license shall be issued to or allowed to be maintained by any sales establishment or dealer if:

(1) Any beneficial interest in the business of the sales establishment or dealer is directly or indirectly owned by a defaulter; or

(2) Any defaulter is employed in a management position by the sales establishment or dealer.

(b) As used in this Code section, the term "defaulter" means any person who has within the past five years been employed in a managerial position by or owned any beneficial interest in the business of a sales establishment or dealer which business has ceased operations without satisfying all liabilities of the business either from assets of the business or from any bond or bonds.

(c) The Commissioner shall have full authority to require disclosure from licensees and applicants of information sufficient to determine whether the licensee or applicant is qualified to be licensed under this Code section. The Commissioner shall have full authority to examine the records and accounts of all licensees in order to determine whether any proceeds of the business are being paid to any defaulter.

(d) This Code section shall not prohibit the Commissioner from allowing a defaulter to operate as a dealer who purchases livestock for cash only.

(e) All applicants for licensure shall submit to the Commissioner a current financial statement; and all licensees shall submit a current financial statement annually. (Code 1981, § 4-6-49.1, enacted by Ga. L. 1982, p. 1804, § 4; Ga. L. 1983, p. 1161, § 1.)

Cross references. — Provisions regarding powers of Commissioner relating to sale of livestock at auction, § 10-2-52.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the provisions, decisions under former Ga. L. 1956, p. 501 are included in the annotations for this Code section.

Obligation of commissioner as trustee under terms of bond. — Under the terms of the bond required by Ga. L. 1956, p. 501, which named the Commissioner as trustee, the law obligated the Commissioner when there was a default

in its provisions to collect the bond or any necessary part thereof to pay the claim of any person from whom the principal had purchased livestock and failed to pay for the same; or where the aggregate claims of several similarly situated exceeded the amount of the bond to collect it in full and disburse the proceeds pro rata among several claimants. Campbell v. Benton, 217 Ga. 368, 122 S.E.2d 223 (1961) (decided under former Ga. L. 1956, p. 501).

Bond is purely statutory. — Bond dealt with in Ga. L. 1956, p. 501 is purely and strictly a statutory one — a bond which a livestock dealer or broker is required by law to execute and deposit with Georgia's Commissioner of Agriculture before the dealer or broker can obtain a license or permit to deal in livestock. The validity of a bond given in compliance with a statute, and which meets the requirements of the statute is not affected or its nature changed by the inclusion in the bond of a condition that is either unauthorized or is repugnant to the statute. Campbell v. Benton, 217 Ga. 368, 122 S.E.2d 223 (1961) (decided under former Ga. L. 1956, p. 501).

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the provisions, opinions under Ga. L. 1956, p. 501 are included in the annotations for this Code section.

Inapplicable to sale of baby chicks. — The sale of baby chicks is not subject to either Ga. L. 1956, p. 501 or Ga. L. 1956, p. 617, § 1 (see O.C.G.A. § 2-9-1) inasmuch as such sales are not within the provisions of these acts; no law would provide protection for those selling baby chicks to Georgia dealers and producers insofar as a bond is concerned, specifically providing protection therefor. 1958-59 Op. Att'y Gen. p. 3 (decided under former Ga. L. 1956, p. 501).

RESEARCH REFERENCES

Am. Jur. 2d. — 7 Am. Jur. 2d, Auctions & Auctioneers, §§ 1 et seq., 34.

C.J.S. — 7A C.J.S., Auctions & Auctioneers, § 1 et seq.

4-6-50. Livestock weighed at sales establishment; certified public weigher.

All livestock weighed at a sales establishment shall be weighed by a certified public weigher who has complied with Article 2 of Chapter 2 of Title 10. Each such weigher shall obtain a seal and upon request shall impress the seal upon the scale ticket of the livestock weighed. (Ga. L. 1956, p. 501, § 5; Ga. L. 1958, p. 309, § 3. Ga. L. 1983, p. 1161, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 79 Am. Jur. 2d, Weights & Measures, §§ 19, 20.

C.J.S. — 94 C.J.S., Weights & Measures, § 6.

4-6-51. Isolation of employees of sales establishments during conduct of sale.

Each sales establishment shall make adequate provision to isolate, insofar as practicable, the auctioneer, weigher, clerk, and any other employee who has any duty in regard to making any record of the sale.

No person shall be permitted to converse with any such employee while the employee is performing any duty in connection with the sale. (Ga. L. 1956, p. 501, § 6; Ga. L. 1983, p. 1161, § 1.)

4-6-52. Special sales.

(a) As used in this Code section, "special sale" means any livestock sale, except a regular sale at an establishment and any sale by a farmer of livestock owned by the farmer, with payment made directly to the farmer.

(b) The Commissioner is authorized to prescribe rules and regulations for the operation of special sales. No person shall hold a special sale without obtaining a permit therefor from the Commissioner or his duly authorized representative, which shall be granted without charge upon submission of proof satisfactory to the Commissioner that the person applying for the permit is bonded in an amount equal to one-fourth of the anticipated proceeds of the sale; provided, however, such bond shall be not less than $10,000.00 and not more than $150,000.00 in amount.

(c) Associations holding sales of animals consigned by members of the association only shall not be required to procure a bond if the directors of the association accept full responsibility for financial obligations of sale and release the Commissioner, in writing, from any responsibility.

(c.1) Georgia 4-H clubs and Georgia Future Farmers of America chapters shall not be required to procure a bond.

(d) Any person who violates this Code section shall be guilty of a misdemeanor. (Ga. L. 1959, p. 296, § 6; Ga. L. 1978, p. 1467, § 1; Ga. L. 1982, p. 1804, § 5; Ga. L. 1983, p. 1161, § 1; Ga. L. 1998, p. 218, § 1.)

Administrative rules and regulations. — Special sales, Official Compilation of the Rules and Regulations of the State of Georgia, Rules of Georgia Department of Agriculture, Chapter 40-13-5.

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Misrepresentation in Sale of Animal, 35 POF2d 607.

4-6-53. Injunctions.

Reserved. Repealed by Ga. L. 1983, p. 1161, § 1, effective July 1, 1983.

Editor's notes. — This Code section was based on Ga. L. 1959, p. 296, § 3.

4-6-54. Use of persuader in loading or handling of livestock.

It shall be unlawful for any person to use any persuader other than an electric prod or canvas flap in the loading or handling of livestock in a public sales establishment. (Ga. L. 1959, p. 172, § 1; Ga. L. 1983, p. 1161, § 1.)

4-6-55. Penalty for violation of chapter or rules or regulations promulgated thereunder.

Repealed by Ga. L. 1983, p. 1161, § 1, effective July 1, 1983.

Editor's notes. — This Code section was based on Ga. L. 1956, p. 501, § 8.

CHAPTER 7

HATCHERY OPERATORS AND DEALERS

Sec.
4-7-1. Designation of official state agency for administration of national improvement plans; participation by hatcheries and the like in national plans; state plan; use of certain words in advertising or offering of hatching eggs, chicks, poults, or breeding stock.
4-7-2. Pullorum disease control.
4-7-3. Licenses.
4-7-4. Reports of contagious diseases; inspection of premises.
4-7-5. Use of sulfaguanidine and sulfathiazole.
4-7-6. Shipments of hatching eggs, chicks, poults, poultry breeding stock, or birds of any species into state.
4-7-7. Effect of chapter on Commissioner's authority to control and eradicate livestock and poultry diseases.
4-7-8. Penalty for violations of chapter; disposal of hatching eggs or birds not in compliance with chapter.

Cross references. — Regulation of sales of eggs, § 26-2-260 et seq.

Administrative rules and regulations. — Poultry processing, Official Compilation of the Rules and Regulations of the State of Georgia, Rules of Georgia Department of Agriculture, Chapter 40-10-2. Poultry flock, hatchery and dealer regulations, Official Compilation of the Rules and Regulations of the State of Georgia, Rules of Georgia Department of Agriculture, Chapter 40-13-10-.03.

Law reviews. — For annual survey of law of business associations, see 38 Mercer L. Rev. 57 (1986).

OPINIONS OF THE ATTORNEY GENERAL

Enforcement not infringement of any constitutional right. — Enforcement will operate on all persons alike and will not infringe upon any right guaranteed any person under the Constitution of Georgia or under the Constitution of the United States. 1945-47 Op. Att'y Gen. p. 15.

4-7-1. Designation of official state agency for administration of national improvement plans; participation by hatcheries and the like in national plans; state plan; use of certain words in advertising or offering of hatching eggs, chicks, poults, or breeding stock.

(a) The Georgia Poultry Improvement Association, Inc., shall be recognized and designated as the official state agency for administration of the National Poultry Improvement Plan sponsored by the secretary of agriculture, United States Department of Agriculture. Participation in the National Poultry Improvement Plan by hatcheries, breeders, dealers, and supply flock owners shall be voluntary and

administrated and governed by the rules and regulations of the official state agency in conjunction with rules and regulations promulgated by the secretary of agriculture, United States Department of Agriculture.

(b) Nothing in this chapter shall be construed to establish a state plan of identification of hatcheries, dealers, or supply flocks, except as specified in this chapter.

(c) The words "state approved," "state tested," or words or phrases of similar implication and meaning shall not be used in advertising or in the sale or offering for sale of hatching eggs, chicks, poults, or breeding stock. (Ga. L. 1946, p. 147, § 1.)

4-7-2. Pullorum disease control.

(a) Regulations for control and eradication of pullorum disease shall be made following a joint hearing between the Commissioner and the Georgia Poultry Improvement Association, Inc. Requirements for pullorum disease testing and other sanitary measures shall be set by the Commissioner. In the event that state regulations do not exist or apply, the minimum pullorum disease control regulations of the Georgia Poultry Improvement Association, Inc., shall be effective.

(b) The Commissioner shall be authorized to quarantine and prohibit the sale or shipment of hatching eggs, chicks, poults, poultry breeding stock, or birds of any species to or from any hatchery, dealer, or flock or in any area within the state. The Commissioner shall be authorized to promulgate special regulations for prevention and spread of pullorum disease or other infectious or contagious diseases of poultry.

(c) Appointment of qualified pullorum disease testing agents and supervision of their field work shall be made by the Commissioner. Only persons who have demonstrated that they are capable of doing satisfactory testing work shall be so authorized. (Ga. L. 1946, p. 147, § 2.)

OPINIONS OF THE ATTORNEY GENERAL

Notice of shipment conditions by Commissioner. — The Commissioner can give notice to any carrier to whom consignments of eggs, chicks, or poultry are made for shipment into this state of the conditions under which Georgia will permit these shipments to be made, and any carrier who accepts for shipment and ships into this state, hatching eggs, chicks, or poultry in violation of these rules or regulations would be guilty of a misdemeanor. 1945-47 Op. Att'y Gen. p. 15.

Mandatory compliance with rules and regulations of commissioner. — A hatchery which does not voluntarily abide by the rules and regulations of the Georgia Poultry Improvement Association must abide by the rules and regulations of the Commissioner of Agriculture. 1957 Op. Att'y Gen. p. 2.

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, § 27 et seq.

C.J.S. — 3B C.J.S., Animals, §§ 128, 134 et seq.

4-7-3. Licenses.

(a) Every person, firm, corporation, or dealer who operates a hatchery shall first register and secure a permanent license from the Commissioner. The fee for such permanent license shall be fixed by the Commissioner in an amount not to exceed $10.00 for each hatchery, dealer, or branch. The license shall be conspicuously displayed in each place of business. The license shall not be transferable. When any condition is revealed to exist which is not in strict accord with this chapter, the license may be revoked or suspended by the Commissioner, in his discretion.

(b) Manufacturers of poultry remedies, before offering for sale each of such remedies in the state for treatment, eradication, or control of poultry diseases, shall first secure a license from and be approved by the Commissioner, at his discretion. The fee for such license shall be $1.00 for each remedy. (Ga. L. 1946, p. 147, § 3; Ga. L. 1969, p. 856, § 1.)

OPINIONS OF THE ATTORNEY GENERAL

All hatcheries are required to register and secure a license from the Commissioner. 1957 Op. Att'y Gen. p. 2.

Mandatory compliance with rules and regulations. — A hatchery which does not voluntarily abide by the rules and regulations of the Georgia Poultry Improvement Association must abide by the rules and regulations of the Commissioner of Agriculture. 1957 Op. Att'y Gen. p. 2.

RESEARCH REFERENCES

ALR. — Right to enjoin business competitor from unlicensed or otherwise illegal acts or practices, 90 ALR2d 7.

4-7-4. Reports of contagious diseases; inspection of premises.

(a) Hatcheries, dealers, and flock owners shall promptly report to the Commissioner the outbreak of any contagious or infectious disease affecting chicks, poults, or breeding stock in their possession or in any flock producing hatching eggs.

(b) The premises and equipment of hatcheries and dealers shall be subject to inspection by the Commissioner; and access to any supply flock shall be granted to the inspectors of the department at any reasonable time during the business day to see that minimum require-

ments of sanitary and disease control regulations are maintained and enforced. (Ga. L. 1946, p. 147, § 4.)

RESEARCH REFERENCES

C.J.S. — 3B C.J.S., Animals, § 128.

4-7-5. Use of sulfaguanidine and sulfathiazole.

(a) It shall be lawful in this state for any recognized poultry flock owners to buy and use sulfaguanidine and sulfathiazole in original packages in powdered form only for their own requirements in the treatment of poultry diseases. Dealers in poultry supplies may buy and sell sulfaguanidine and sulfathiazole.

(b) No person, firm, or corporation in this state shall sell or offer for sale sulfaguanidine or sulfathiazole unless each is plainly labeled with the words "For Poultry Only." (Ga. L. 1946, p. 135, §§ 1, 2.)

Cross references. — Use of drugs of the sulfanilamide or sulfonamide group for use in control of poultry diseases, § 26-4-6.

4-7-6. Shipments of hatching eggs, chicks, poults, poultry breeding stock, or birds of any species into state.

(a) Hatching eggs, chicks, poults, poultry breeding stock, or birds of any species shall not be shipped into the State of Georgia without first obtaining the approval of the Commissioner. Shippers shall be subject to investigation by the Commissioner or other authorized person to determine that hatching eggs, chicks, poults, or poultry breeding stock have been produced and handled under conditions no less adequate for control of pullorum disease and other contagious or infectious diseases of poultry than those required under Georgia regulations.

(b) Hatching eggs, chicks, poults, or poultry breeding stock shipped into the State of Georgia shall be:

(1) Reported by the shipper to the Commissioner on official health certificates signed by the livestock sanitary official in the state of origin, certifying that such shipment has met requirements equivalent to Georgia regulations for control of pullorum disease and other contagious or infectious diseases of poultry; a duplicate copy of the health certificate shall be attached to the waybill on each shipment; or

(2) Reported to the Commissioner on official National Poultry Improvement Plan forms, if produced under a pullorum disease control phase of the National Poultry Improvement Plan. (Ga. L. 1946, p. 147, § 5.)

OPINIONS OF THE ATTORNEY GENERAL

Duplicate copy of health certificate required. — It is the duty of the carrier to whom shipments of poultry are consigned for delivery in Georgia to require a duplicate copy of the health certificate of the state of origin of such poultry and such duplicate certificate must be attached to the waybill on each shipment, and the Department of Agriculture, through its properly delegated agents, has authority to stop at the borders of Georgia any shipment seeking to come into this state without such duplicate certificate. 1945-47 Op. Att'y Gen. p. 15.

Prohibition of shipment for failure to supply compliance certification. — The Commissioner may prohibit the shipment of hatching eggs and poultry into the state unless accompanied by a certificate of the proper official of the state of origin that the shipment has met the requirements of the Georgia statute and regulations for the control of diseases of poultry. 1945-47 Op. Att'y Gen. p. 15.

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, § 27.

C.J.S. — 3B C.J.S., Animals, § 128.

4-7-7. Effect of chapter on Commissioner's authority to control and eradicate livestock and poultry diseases.

Nothing in this chapter shall be construed so as to limit in any manner the authority of the Commissioner to carry out, administer, and enforce all laws, rules, and regulations for the control and eradication of livestock and poultry diseases in this state. (Ga. L. 1946, p. 147, § 6.)

4-7-8. Penalty for violations of chapter; disposal of hatching eggs or birds not in compliance with chapter.

Any person, firm, or corporation found to be in violation of this chapter is guilty of a misdemeanor. The Commissioner may, at his discretion, confiscate, destroy, or otherwise dispose of all hatching eggs, chicks, poults, poultry breeding stock, or birds of any species that are produced in the state or enter the state but are not in compliance with this chapter. (Ga. L. 1946, p. 147, § 7.)

OPINIONS OF THE ATTORNEY GENERAL

Destruction or disposal of hatching eggs or birds. — Commissioner of Agriculture or the Commissioner's duly authorized agent has authority to destroy or otherwise dispose of all hatching eggs, chicks, poultry, poultry breeding stock, or birds of any species that are produced in the state or that enter the state not in compliance with the chapter or the rules and regulations thereunder. 1945-47 Op. Att'y Gen. p. 15.

Instigation of criminal proceedings by Commissioner or agent. — Any person, whether shipper, carrier, or a person within this state who has possession of diseased poultry, who is found guilty of violating any of the provisions of this chapter for the control of diseases of poultry, shall be subject to misdemeanor punishment; the proper authority to instigate such criminal proceedings being the Commissioner of Agriculture of Georgia or one

of the Commissioner's duly authorized agents. 1945-47 Op. Att'y Gen. p. 15.

Notice by Commissioner of shipping conditions. — Commissioner of Agriculture can give notice to any carrier to whom consignments of eggs, chicks, or poultry are made for shipment into this state of the conditions under which Georgia will permit these shipments to be made and any carrier who accepts for shipment and ships into this state, hatching eggs, chicks, or poultry in violation of these rules or regulations would be guilty of a misdemeanor. 1945-47 Op. Att'y Gen. p. 15.

CHAPTER 8

DOGS

Article 1

General Provisions

Sec.
4-8-1. Minimum standards for control of dogs.
4-8-1.1. Abandonment of dead dogs — Upon private property.
4-8-2. Abandonment of dead dogs — Upon public property or public right of way.
4-8-3. Abandonment of dogs.
4-8-4. Liability of owner or custodian for damages done to livestock, poultry, or pet animal by dog.
4-8-5. Cruelty to dogs; authorized killing of dogs.
4-8-6. Permitting dogs in heat to roam or run free.
4-8-6.1. Removal of certain collars from dogs; restitution; exemption.
4-8-7. Penalty for violations of article.

Article 2

Responsible Dog Ownership

4-8-20. Short title.
4-8-21. Definitions.
4-8-22. Jurisdiction; designation of dog control officer; consolidation of services.
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4-8-24. Impoundment.
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4-8-27. Certificates of registration; requirements for issuance of certificate; individuals excluded from receiving registration; limitation of ownership; annual renewal.
4-8-28. Notifications by owner; change in ownership of dog; changes in residence.
4-8-29. Limitations on dog's presence off of owner's premises; penalty for violation; defense.
4-8-30. Confiscation by dog control officer; payment of costs for recovery; euthanasia.
4-8-31. Governmental liability for enforcement.
4-8-32. Penalty for violation.
4-8-33. Application and compliance.

Article 3

Vicious Dogs

4-8-40 through 4-8-45. [Repealed.]

Cross references. — Hunting with dogs, § 27-3-16 et seq. Equality of access to public accommodations and facilities by blind persons accompanied by guide dogs, §§ 30-4-1, 30-4-2. Control of rabies, T. 31, C. 19.

RESEARCH REFERENCES

ALR. — Constitutionality of "dog laws," 49 ALR 847.

Who "harbors" or "keeps" dog under animal liability statute, 64 ALR4th 963.

Landlord's liability to third person for injury resulting from attack off leased premises by dangerous or vicious animal kept by tenant, 89 ALR4th 374.

ARTICLE 1

GENERAL PROVISIONS

4-8-1. Minimum standards for control of dogs.

It is the intention of this chapter to establish as state law minimum standards for the control and regulation of dogs and to establish state crimes for violations of such minimum standards. However, this chapter shall not prohibit local governments from adopting and enforcing ordinances or resolutions which provide for more restrictive control and regulation of dogs than the minimum standards provided for in this chapter. (Code 1981, § 4-8-1, enacted by Ga. L. 2012, p. 1290, § 1/HB 685.)

Effective date. — This Code section became effective July 1, 2012. See the editor's note for applicability.

Editor's notes. — Ga. L. 2012, p. 1290, § 1/HB 685, effective July 1, 2012, redesignated former Code Section 4-8-1 as present Code Section 4-8-1.1.

Ga. L. 2012, p. 1290, § 6/HB 685, not codified by the General Assembly, provides, in part, that this Code section shall apply to proceedings for the classification and registration of dogs which are pending on July 1, 2012, as well as to such proceedings which arise on or after July 1, 2012.

Law reviews. — For article on the 2012 enactment of this Code section, see 29 Ga. St. U.L. Rev. 180 (2012).

4-8-1.1. Abandonment of dead dogs — Upon private property.

No person shall intentionally abandon a dead dog on any private property belonging to another unless the person so doing shall have first obtained permission from the owner of the property on which the dog is being left and the provisions of Code Section 4-5-3 are complied with in full. (Ga. L. 1969, p. 831, § 1; Code 1981, § 4-8-1; Code 1981, § 4-8-1.1, redesignated by Ga. L. 2012, p. 1290, § 1/HB 685.)

The 2012 amendment, effective July 1, 2012, redesignated former Code Section 4-8-1 as present Code Section 4-8-1.1.

Cross references. — Solid waste management, § 12-8-20 et seq.

Editor's notes. — Ga. L. 2012, p. 1290, § 6/HB 685, not codified by the General Assembly, provides, in part, that this Code section shall apply to proceedings for the classification and registration of dogs which are pending on July 1, 2012, as well as to such proceedings which arise on or after July 1, 2012.

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, § 21.

C.J.S. — 3B C.J.S., Animals, § 1. 66 C.J.S., Nuisances, § 56.

ALR. — Validity and construction of statute, ordinance, or regulation applying to specific dog breeds, such as "pit bulls" or "bull terriers", 80 ALR4th 70.

4-8-2. Abandonment of dead dogs — Upon public property or public right of way.

No person shall abandon a dead dog on any public property or public right of way unless the place in which the dog is being left is a public dump or other facility designed for receiving such and has been designated by the local governmental authorities as a public facility for receiving trash or refuse and the provisions of Code Section 4-5-3 are complied with in full. (Ga. L. 1969, p. 831, § 2.)

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, § 21.

C.J.S. — 3B C.J.S., Animals, § 1. 66 C.J.S., Nuisances, § 56.

4-8-3. Abandonment of dogs.

No person shall release a dog on any property, public or private, with the intention of abandoning the dog. (Ga. L. 1969, p. 831, § 3.)

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, § 40.

C.J.S. — 3B C.J.S., Animals, § 441.

4-8-4. Liability of owner or custodian for damages done to livestock, poultry, or pet animal by dog.

(a) The owner or, if no owner can be found, the custodian exercising care and control over any dog which while off the owner's or custodian's property causes injury, death, or damage directly or indirectly to any livestock, poultry, or pet animal shall be civilly liable to the owner of the livestock, poultry, or pet animal for injury, death, or damage caused by the dog. The owner or, if no owner can be found, the custodian exercising care and control over any dog shall be liable for any damage caused by such dog to public or private property. The liability of the owner or custodian of the dog shall include consequential damages.

(b) This Code section is to be considered cumulative of other remedies provided by law. There is no intent to eliminate or limit other causes of action which might inure to the owner of any livestock, poultry, or pet animal. (Ga. L. 1969, p. 831, § 4; Ga. L. 2012, p. 1290, § 2/HB 685.)

The 2012 amendment, effective July 1, 2012, in subsection (a), in the first sentence, substituted "while off the owner's or custodian's property" for "goes upon the land of another and", substituted "livestock, poultry, or pet animal" for "livestock or poultry", and substituted "livestock, poultry, or pet animal for injury, death, or damage" for "livestock or poultry for damages, death, or injury" near the

end, and added the second sentence; and, in the second sentence of subsection (b), substituted "eliminate" for "do away with" and substituted "livestock, poultry, or pet animal" for "livestock or poultry" at the end. See the editor's note for applicability.

Cross references. — Provisions regarding liability of owner of dog which kills or injures livestock, § 51-2-6.

Editor's notes. — Ga. L. 2012, p. 1290, § 6/HB 685, not codified by the General Assembly, provides, in part, that the amendment of this Code section shall apply to proceedings for the classification and registration of dogs which are pending on July 1, 2012, as well as to such proceedings which arise on or after July 1, 2012.

Law reviews. — For survey of developments in Georgia torts law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 247 (1981). For article on the 2012 amendment of this Code section, see 29 Ga. St. U.L. Rev. 180 (2012).

JUDICIAL DECISIONS

Situation where a trespassing dog kills or injures another domestic animal is specifically covered by this section. Kiser v. Morris, 156 Ga. App. 224, 274 S.E.2d 610 (1980).

Knowledge by owner of a vicious or dangerous propensity of the owner's dog. — The rule as to scienter, or knowledge on the part of the owner of a vicious or dangerous propensity of the owner's dog, if one exists, has no application in view of the provisions of this section. Sullivan v. Goss, 133 Ga. App. 217, 210 S.E.2d 366 (1974).

Rule as to scienter, or knowledge on the part of the owner of a vicious or dangerous propensity of the dog, if one exists, has no application where this section does. Kiser v. Morris, 156 Ga. App. 224, 274 S.E.2d 610 (1980).

If a dog is wrongfully in the place where the dog does the mischief, the owner is liable, irrespective of prior knowledge by the owner of the dog's dangerous proclivities. Kiser v. Morris, 156 Ga. App. 224, 274 S.E.2d 610 (1980).

Dog is a domestic animal and the owner of a domestic animal is liable if such animals are wrongfully in the place where the animal does mischief even if the owner does not have notice. Kiser v. Morris, 156 Ga. App. 224, 274 S.E.2d 610 (1980).

Fight in public road. — In an action to recover damages for injuries inflicted upon plaintiff's dog when the dog was attacked by defendant's dog, it was necessary for the plaintiff to prove that the owner of the dog knew of the dog's propensity to do the particular act which caused injury to the complaining party, since the fight was initiated in the public road and upon an easement adjoining defendant's house and culminated in defendant's front yard, which areas were not considered the "land of another." Mintz v. Frazier, 160 Ga. App. 668, 288 S.E.2d 24 (1981).

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, § 65 et seq.

C.J.S. — 3B C.J.S., Animals, § 330 et seq.

ALR. — Liability for killing dog to protect domestic animal or fowl, 10 ALR 689.

Liability for damages due to dog interfering with travel in highway, 11 ALR 270.

Liability of owner or occupant of premises for injury to person thereon by dog not owned or harbored by former, 92 ALR 732.

Validity, construction, and effect of statute eliminating scienter as condition of liability for injury by dog or other animal, 142 ALR 436.

Liability for injury inflicted by horse, dog, or other domestic animal exhibited at show, 80 ALR2d 886.

Dog owner's liability for damages from motor vehicle accident involving attempt to avoid collision with dog on highway, 41 ALR3d 888.

Personal injuries inflicted by animal as within homeowner's or personal liability policy, 96 ALR3d 891.

Liability for injuries inflicted by dog on

public officer or employee, 74 ALR4th 1120.

4-8-5. Cruelty to dogs; authorized killing of dogs.

(a) No person shall perform a cruel act on any dog; nor shall any person harm, maim, or kill any dog, or attempt to do so, except that a person may:

(1) Defend his or her person or property, or the person or property of another, from injury or damage being caused by a dog; or

(2) Kill any dog causing injury or damage to any livestock, poultry, or pet animal.

(b) The method used for killing the dog shall be designed to be as humane as is possible under the circumstances. A person who humanely kills a dog under the circumstances indicated in subsection (a) of this Code section shall incur no liability for such death.

(c) This Code section shall not be construed to limit in any way the authority or duty of any law enforcement officer, dog or rabies control officer, humane society, or veterinarian. (Ga. L. 1969, p. 831, § 5; Ga. L. 2012, p. 1290, § 3/HB 685.)

The 2012 amendment, effective July 1, 2012, inserted "or her" in paragraph (a)(1) and substituted "livestock, poultry, or pet animal" for "livestock or poultry" in paragraph (a)(2). See the editor's note for applicability.

Cross references. — Destroying or injuring police dog, § 16-11-107. Cruelty to animals generally, § 16-12-4. Duty of conservation rangers to kill dogs pursuing or killing deer, § 27-3-49.

Editor's notes. — Ga. L. 2012, p. 1290, § 6/HB 685, not codified by the General Assembly, provides, in part, that the amendment of this Code section shall apply to proceedings for the classification and registration of dogs which are pending on July 1, 2012, as well as to such proceedings which arise on or after July 1, 2012.

Law reviews. — For article on the 2012 amendment of this Code section, see 29 Ga. St. U.L. Rev. 180 (2012).

JUDICIAL DECISIONS

Conditions justifying killing. — To justify extreme penalty of killing a dog in defense of self, family, or property, or person or property of another, such danger must be imminent, and a real or obviously apparent necessity must exist, and the threatened injury could not otherwise have been prevented. Readd v. State, 164 Ga. App. 97, 296 S.E.2d 402 (1982).

Cited in Spivey v. Eavenson, 150 Ga. App. 429, 258 S.E.2d 54 (1979).

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, § 22 et seq.

C.J.S. — 3B C.J.S., Animals, § 194 et seq.

ALR. — Presence of owner as affecting liability for killing trespassing dog, 42 ALR 437.

Dogs as subject of larceny, 92 ALR 212.

Right of action for negligently killing or injuring dog as affected by statutes relating to dogs, 134 ALR 705.

Liability for killing or injuring unlicensed or untagged dog, 145 ALR 993.

Civil liability of landowner for killing or injuring trespassing dog, 15 ALR2d 578.

Privilege to kill or injure nontrespassing licensed dog to defend third person from harm or attack by animal, 74 ALR2d 770.

What constitutes statutory offense of cruelty to animals, 82 ALR2d 794.

What constitutes offense of cruelty to animals—modern cases, 6 ALR5th 733.

Damages for killing or injuring dog, 61 ALR5th 635.

4-8-6. Permitting dogs in heat to roam or run free.

No owner or custodian of any dog in heat shall permit the dog to roam or run free beyond the limits of his property. (Ga. L. 1969, p. 831, § 6.)

RESEARCH REFERENCES

ALR. — Liability of owner of male animal who furnishes its service for breeding purposes, for damage inflicted during such services, 106 ALR 1418.

4-8-6.1. Removal of certain collars from dogs; restitution; exemption.

(a) For the purposes of this Code section, the term "collar" means any electronic or radio transmitting collar that has the purpose of tracking the location of a dog.

(b) No person shall remove a collar from a dog without permission from the dog's owner with the intention of preventing or hindering the owner from locating such dog, and if such dog is lost or killed as a result of the violator's removal of such collar, the violator shall be required to pay the dog's owner restitution in the amount of the actual value of the dog and any associated veterinary expenses.

(c) This Code section shall not apply to an owner or lessee of real property who removes a collar from a dog caught on his or her owned or leased property while such dog remains on such property if such owner or lessee gives notice of such action within 24 hours to the county or municipal law enforcement agency having territorial jurisdiction. (Code 1981, § 4-8-6.1, enacted by Ga. L. 2008, p. 489, § 1/SB 16.)

OPINIONS OF THE ATTORNEY GENERAL

Fingerprinting required for violators. — Offenses arising under O.C.G.A. § 4-8-6.1 are designated as offenses for which those charged are to be fingerprinted. 2009 Op. Att'y Gen. No. 2009-1.

4-8-7. Penalty for violations of article.

Except as provided in Code Sections 16-12-4 and 16-12-37, any person who violates any provision of this article shall be guilty of a misdemeanor. (Ga. L. 1969, p. 831, § 7; Ga. L. 1988, p. 824, § 1; Ga. L. 2000, p. 754, § 3.)

Editor's notes. — Ga. L. 2000, p. 754, § 1, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Animal Protection Act of 2000.'"

Law reviews. — For note on 2000 amendment of this Code section, see 17 Ga. St. U.L. Rev. 12 (2000).

ARTICLE 2

RESPONSIBLE DOG OWNERSHIP

Effective date. — This article became effective July 1, 2012. See the editor's note for applicability.

Cross references. — Liability of owner or keeper of vicious or dangerous animal for injuries caused by animal, § 51-2-7.

Editor's notes. — Ga. L. 2012, p. 1290, § 4/HB 685, effective July 1, 2012, repealed the Code sections formerly codified at this article and enacted the current article. The former article consisted of Code Sections 4-8-20 through 4-8-30, relating to dangerous dog control, and was based on Ga. L. 1988, p. 824, § 2; Ga. L. 1989, p. 159, §§ 1-5; Ga. L. 1989, p. 1552, § 15; Ga. L. 2000, p. 1238, § 1; Ga. L. 2000, p. 1589, § 3.

Ga. L. 2012, p. 1290, § 6/HB 685, not codified by the General Assembly, provides, in part, that the enactment of this article shall apply to proceedings for the classification and registration of dogs which are pending on July 1, 2012, as well as to such proceedings which arise on or after July 1, 2012.

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Proof of Landlord's Liability for Injury Inflicted by Tenant's Dog, 85 POF3d 1.

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, § 75 et seq.

ALR. — 3B C.J.S., Animals, § 330 et seq.

Intentional provocation, contributory or comparative negligence, or assumption of risk as defense to action for injury by dog, 11 ALR5th 127.

Liability for injury inflicted by horse, dog, or other domestic animal exhibited at show, 68 ALR5th 599.

Intentional provocation, contributory or comparative negligence, or assumption of risk as defense to action for injury by dog, 11 ALR5th 127.

4-8-20. Short title.

This article shall be known and may be cited as the "Responsible Dog Ownership Law." (Code 1981, § 4-8-20, enacted by Ga. L. 2012, p. 1290, § 4/HB 685.)

Law reviews. — For article on the 2012 enactment of this Code section, see 29 Ga. St. U.L. Rev. 180 (2012).

4-8-21. Definitions.

(a) As used in this article, the term:

(1) "Classified dog" means any dog that has been classified as either a dangerous dog or vicious dog pursuant to this article.

(2) "Dangerous dog" means any dog that:

(A) Causes a substantial puncture of a person's skin by teeth without causing serious injury; provided, however, that a nip, scratch, or abrasion shall not be sufficient to classify a dog as dangerous under this subparagraph;

(B) Aggressively attacks in a manner that causes a person to reasonably believe that the dog posed an imminent threat of serious injury to such person or another person although no such injury occurs; provided, however, that the acts of barking, growling, or showing of teeth by a dog shall not be sufficient to classify a dog as dangerous under this subparagraph; or

(C) While off the owner's property, kills a pet animal; provided, however, that this subparagraph shall not apply where the death of such pet animal is caused by a dog that is working or training as a hunting dog, herding dog, or predator control dog.

(3) "Local government" means any county or municipality of this state.

(4) "Owner" means any natural person or any legal entity, including, but not limited to, a corporation, partnership, firm, or trust owning, possessing, harboring, keeping, or having custody or control of a dog. In the case of a dog owned by a minor, the term "owner" includes the parents or person in loco parentis with custody of the minor.

(5) "Serious injury" means any physical injury that creates a substantial risk of death; results in death, broken or dislocated bones, lacerations requiring multiple sutures, or disfiguring avulsions; requires plastic surgery or admission to a hospital; or results in protracted impairment of health, including transmission of an infection or contagious disease, or impairment of the function of any bodily organ.

(6) "Vicious dog" means a dog that inflicts serious injury on a person or causes serious injury to a person resulting from reasonable attempts to escape from the dog's attack.

(b) No dog shall be classified as a dangerous dog or vicious dog for actions that occur while the dog is being used by a law enforcement or military officer to carry out the law enforcement or military officer's

official duties. No dog shall be classified as a dangerous dog or a vicious dog if the person injured by such dog was a person who, at the time, was committing a trespass, was abusing the dog, or was committing or attempting to commit an offense under Chapter 5 of Title 16. (Code 1981, § 4-8-21, enacted by Ga. L. 2012, p. 1290, § 4/HB 685.)

Law reviews. — For article on the 2012 enactment of this Code section, see 29 Ga. St. U.L. Rev. 180 (2012).

4-8-22. Jurisdiction; designation of dog control officer; consolidation of services.

(a) A county's jurisdiction for the enforcement of this article shall be the unincorporated area of the county and a municipality's jurisdiction for such enforcement shall be the territory within the corporate limits of the municipality.

(b) The governing authority of each local government shall designate an individual as dog control officer to aid in the administration and enforcement of the provisions of this article. A person carrying out the duties of dog control officer shall not be authorized to make arrests unless the person is a law enforcement officer having the powers of arrest.

(c) Any county or municipality or any combination of such local governments may enter into agreements with each other for the consolidation of dog control services under this Code section. (Code 1981, § 4-8-22, enacted by Ga. L. 2012, p. 1290, § 4/HB 685.)

Law reviews. — For article on the 2012 enactment of this Code section, see 29 Ga. St. U.L. Rev. 180 (2012).

4-8-23. Investigations by dog control officer; notice to owner; hearings; determinations by hearing authority; judicial review.

(a) For purposes of this Code section, the term:

(1) "Authority" means an animal control board or local board of health, as determined by the governing authority of a local government.

(2) "Mail" means to send by certified mail or statutory overnight delivery to the recipient's last known address.

(b) Upon receiving a report of a dog believed to be subject to classification as a dangerous dog or vicious dog within a dog control officer's jurisdiction, the dog control officer shall make such investiga-

tions as necessary to determine whether such dog is subject to classification as a dangerous dog or vicious dog.

(c) When a dog control officer determines that a dog is subject to classification as a dangerous dog or vicious dog, the dog control officer shall mail a dated notice to the dog's owner within 72 hours. Such notice shall include a summary of the dog control officer's determination and shall state that the owner has a right to request a hearing from the authority on the dog control officer's determination within 15 days after the date shown on the notice. The notice shall also provide a form for requesting the hearing and shall state that if a hearing is not requested within the allotted time, the dog control officer's determination shall become effective for all purposes under this article.

(d) When a hearing is requested by a dog owner in accordance with subsection (c) of this Code section, such hearing shall be scheduled within 30 days after the request is received; provided, however, that such hearing may be continued by the authority for good cause shown. At least ten days prior to the hearing, the authority conducting the hearing shall mail to the dog owner written notice of the date, time, and place of the hearing. At the hearing, the dog owner shall be given the opportunity to testify and present evidence and the authority conducting the hearing shall receive other evidence and testimony as may be reasonably necessary to sustain, modify, or overrule the dog control officer's determination.

(e) Within ten days after the hearing, the authority which conducted the hearing shall mail written notice to the dog owner of its determination on the matter. If such determination is that the dog is a dangerous dog or a vicious dog, the notice of classification shall specify the date upon which that determination shall be effective. If the determination is that the dog is to be euthanized pursuant to Code Section 4-8-26, the notice shall specify the date by which the euthanasia shall occur.

(f) Judicial review of the authority's final decision may be had in accordance with Code Section 50-13-19. (Code 1981, § 4-8-23, enacted by Ga. L. 2012, p. 1290, § 4/HB 685.)

Law reviews. — For article on the 2012 enactment of this Code section, see 29 Ga. St. U.L. Rev. 180 (2012).

4-8-24. Impoundment.

A law enforcement officer or dog control officer shall immediately impound a dog if the officer believes the dog poses a threat to the public safety. (Code 1981, § 4-8-24, enacted by Ga. L. 2012, p. 1290, § 4/HB 685.)

Law reviews. — For article on the 2012 enactment of this Code section, see 29 Ga. St. U.L. Rev. 180 (2012).

4-8-25. Court ordered euthanasia.

The judge of any superior court of competent jurisdiction within this state may order the euthanasia of a dog if the court finds, after notice and opportunity for hearing as provided by Code Section 4-8-23, that the dog has seriously injured a human or presents a danger to humans not suitable for control under this article and:

(1) The owner or custodian of the dog has been convicted of a violation of any state criminal law and the crime was related to such dog; or

(2) Any local governmental authority has filed with the court a civil action requesting the euthanasia of the dog. (Code 1981, § 4-8-25, enacted by Ga. L. 2012, p. 1290, § 4/HB 685.)

Law reviews. — For article on the 2012 amendment of this Code section, see 29 Ga. St. U.L. Rev. 180 (2012).

4-8-26. Euthanasia for dogs with repeat offenses.

A dog that is found, after notice and opportunity for hearing as provided by Code Section 4-8-23, to have caused a serious injury to a human on more than one occasion shall be euthanized; provided, however, that no injury occurring before July 1, 2012, shall count for purposes of this Code section. (Code 1981, § 4-8-26, enacted by Ga. L. 2012, p. 1290, § 4/HB 685.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2012, "this Code section" was substituted for "this subsection" at the end of the Code section.

Law reviews. — For article on the 2012 amendment of this Code section, see 29 Ga. St. U.L. Rev. 180 (2012).

4-8-27. Certificates of registration; requirements for issuance of certificate; individuals excluded from receiving registration; limitation of ownership; annual renewal.

(a) It shall be unlawful for an owner to have or possess within this state a classified dog without a certificate of registration issued in accordance with the provisions of this Code section. Certificates of registration shall be nontransferable and shall only be issued to a person 18 years of age or older. No more than one certificate of registration shall be issued per domicile.

(b) Unless otherwise specified by this Code section, a certificate of registration for a dangerous dog shall be issued if the dog control officer determines that the following requirements have been met:

(1) The owner has maintained an enclosure designed to securely confine the dangerous dog on the owner's property, indoors, or in a securely locked and enclosed pen, fence, or structure suitable to prevent the dangerous dog from leaving such property; and

(2) Clearly visible warning signs have been posted at all entrances to the premises where the dog resides.

(c) Except as provided in subsections (e) and (f) of this Code section, a certificate of registration for a vicious dog shall be issued if the dog control officer determines that the following requirements have been met:

(1) The owner has maintained an enclosure designed to securely confine the vicious dog on the owner's property, indoors, or in a securely locked and enclosed pen, fence, or structure suitable to prevent the vicious dog from leaving such property;

(2) Clearly visible warning signs have been posted at all entrances to the premises where the dog resides;

(3) A microchip containing an identification number and capable of being scanned has been injected under the skin between the shoulder blades of the dog; and

(4) The owner maintains and can provide proof of general or specific liability insurance in the amount of at least $50,000.00 issued by an insurer authorized to transact business in this state insuring the owner of the vicious dog against liability for any bodily injury or property damage caused by the dog.

(d) No certificate of registration shall be issued to any person who has been convicted of two or more violations of this article.

(e) No person shall be the owner of more than one vicious dog.

(f) No certificate of registration for a vicious dog shall be issued to any person who has been convicted of:

(1) A serious violent felony as defined in Code Section 17-10-6.1;

(2) The felony of dogfighting as provided for in Code Section 16-12-37 or the felony of aggravated cruelty to animals as provided for in Code Section 16-12-4; or

(3) A felony involving trafficking in cocaine, illegal drugs, marijuana, methamphetamine, or ecstasy as provided for in Code Sections 16-13-31 and 16-13-31.1

from the time of conviction until two years after completion of his or her sentence, nor to any person residing with such person.

(g) Certificates of registration shall be renewed on an annual basis. At the time of renewal of a certificate of registration for a vicious dog, a dog control officer shall verify that the owner is continuing to comply with provisions of this article. Failure to renew a certificate of registration within ten days of the renewal date or initial classification date shall constitute a violation of this article. (Code 1981, § 4-8-27, enacted by Ga. L. 2012, p. 1290, § 4/HB 685.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2012, a period was substituted for a semicolon at the end of paragraph (b)(2), and paragraphs (f)(A) through (f)(C) were redesignated as paragraphs (f)(1) through (f)(3), respectively.

Law reviews. — For article on the 2012 enactment of this Code section, see 29 Ga. St. U.L. Rev. 180 (2012).

4-8-28. Notifications by owner; change in ownership of dog; changes in residence.

(a) The owner of a classified dog shall notify the dog control officer within 24 hours if the dog is on the loose or has attacked a human and shall notify the dog control officer within 24 hours if the dog has died or has been euthanized.

(b) A vicious dog shall not be transferred, sold, or donated to any other person unless it is relinquished to a governmental facility or veterinarian to be euthanized.

(c) The owner of a classified dog who moves from one jurisdiction to another within the State of Georgia shall register the classified dog in the new jurisdiction within ten days of becoming a resident and notify the dog control officer of the jurisdiction from which he or she moved. The owner of a similarly classified dog who moves into this state shall register the dog as required in Code Section 4-8-27 within 30 days of becoming a resident. (Code 1981, § 4-8-28, enacted by Ga. L. 2012, p. 1290, § 4/HB 685.)

Law reviews. — For article on the 2012 enactment of this Code section, see 29 Ga. St. U.L. Rev. 180 (2012).

4-8-29. Limitations on dog's presence off of owner's premises; penalty for violation; defense.

(a) It shall be unlawful for an owner of a dangerous dog to permit the dog to be off the owner's property unless:

(1) The dog is restrained by a leash not to exceed six feet in length and is under the immediate physical control of a person capable of preventing the dog from engaging any other human or animal when necessary;

(2) The dog is contained in a closed and locked cage or crate; or

(3) The dog is working or training as a hunting dog, herding dog, or predator control dog.

(b) It shall be unlawful for an owner of a vicious dog to permit the dog to be:

(1) Outside an enclosure designed to securely confine the vicious dog while on the owner's property or outside a securely locked and enclosed pen, fence, or structure suitable to prevent the vicious dog from leaving such property unless:

(A) The dog is muzzled and restrained by a leash not to exceed six feet in length and is under the immediate physical control of a person capable of preventing the dog from engaging any other human or animal when necessary; or

(B) The dog is contained in a closed and locked cage or crate; or

(2) Unattended with minors.

(c) A person who violates subsection (b) of this Code section shall be guilty of a misdemeanor of high and aggravated nature.

(d) An owner with a previous conviction for a violation of this article whose classified dog causes serious injury to a human being under circumstances constituting another violation of this article shall be guilty of a felony and upon conviction thereof shall be punished by imprisonment for not less than one nor more than ten years, a fine of not less than $5,000.00 nor more than $10,000.00, or both. In addition, the classified dog shall be euthanized at the cost of the owner.

(e) Any irregularity in classification proceedings shall not be a defense to any prosecution under this article so long as the owner of the dog received actual notice of the classification and did not pursue a civil remedy for the correction of the irregularity. (Code 1981, § 4-8-29, enacted by Ga. L. 2012, p. 1290, § 4/HB 685.)

Cross references. — Liability of owner or keeper of vicious or dangerous animal for injuries caused by animal, § 51-2-7.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2012, "or" was deleted at the end of paragraph (a)(1) and "; or" was substituted for a period at the end of paragraph (a)(2).

Law reviews. — For article on the 2012 enactment of this Code section, see 29 Ga. St. U.L. Rev. 180 (2012).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the provisions, decisions under former O.C.G.A. § 4-8-30 are included in the annotations for this Code section.

Absolute liability not imposed. — This Code section does not impose absolute liability on the owner of a dog who has bitten before, but means that if any person is liable for such bite, it is the owner, and not a government official. Griffiths v. Schafer, 223 Ga. App. 560, 478 S.E.2d 625 (1996) (decided under former O.C.G.A. § 4-8-30).

4-8-30. Confiscation by dog control officer; payment of costs for recovery; euthanasia.

(a) A dangerous or vicious dog shall be immediately confiscated by any dog control officer or by a law enforcement officer in the case of any violation of this article. A refusal to surrender a dog subject to confiscation shall be a violation of this article.

(b) The owner of any dog that has been confiscated pursuant to this article may recover such dog upon payment of reasonable confiscation and housing costs and proof of compliance with the provisions of this article. All fines and all charges for services performed by a law enforcement or dog control officer shall be paid prior to owner recovery of the dog. Criminal prosecution shall not be stayed due to owner recovery or euthanasia of the dog.

(c) In the event the owner has not complied with the provisions of this article within 20 days of the date the dog was confiscated, such dog shall be destroyed in an expeditious and humane manner and the owner may be required to pay the costs of housing and euthanasia. (Code 1981, § 4-8-30, enacted by Ga. L. 2012, p. 1290, § 4/HB 685.)

Law reviews. — For article on the 2012 enactment of this Code section, see 29 Ga. St. U.L. Rev. 180 (2012).

RESEARCH REFERENCES

ALR. — Liability for injuries inflicted by dog on public officer or employee, 74 ALR4th 1120.

Landlord's liability to third person for injury resulting from attack on leased premises by dangerous or vicious animal kept by tenant, 87 ALR4th 1004.

4-8-31. Governmental liability for enforcement.

Under no circumstances shall a local government or any employee or official of a local government be held liable for any damages to any person who suffers an injury inflicted by a dog as a result of a failure to enforce the provisions of this article. (Code 1981, § 4-8-31, enacted by Ga. L. 2012, p. 1290, § 4/HB 685.)

Law reviews. — For article on the 2012 enactment of this Code section, see 29 Ga. St. U.L. Rev. 180 (2012).

4-8-32. Penalty for violation.

Except as otherwise specified in this article, any person who violates any provision of this article shall be guilty of a misdemeanor. (Code 1981, § 4-8-32, enacted by Ga. L. 2012, p. 1290, § 4/HB 685.)

Law reviews. — For article on the 2012 enactment of this Code section, see 29 Ga. St. U.L. Rev. 180 (2012).

4-8-33. Application and compliance.

(a)(1) Any dog classified prior to July 1, 2012, as a potentially dangerous dog in this state shall on and after that date be classified as a dangerous dog under this article.

(2) Any dog classified prior to July 1, 2012, as a dangerous dog or vicious dog in this state shall on and after that date be classified as a vicious dog under this article.

(b) The owner of any dog referred to in subsection (a) of this Code section shall come into compliance with all current provisions of this article by January 1, 2013. (Code 1981, § 4-8-33, enacted by Ga. L. 2012, p. 1290, § 4/HB 685.)

Law reviews. — For article on the 2012 enactment of this Code section, see 29 Ga. St. U.L. Rev. 180 (2012).

ARTICLE 3

VICIOUS DOGS

4-8-40 through 4-8-45.

Repealed by Ga. L. 2012, p. 1290, § 5/HB 685, effective July 1, 2012.

Editor's notes. — This article was based on Ga. L. 2006, p. 472, § 1/HB 1497; Ga. L. 2008, p. 114, § 2-1/HB 301.

Ga. L. 2012, p. 1290, § 6/HB 685, not codified by the General Assembly, provides, in part, that the repeal of this article shall apply to proceedings for the classification and registration of dogs which are pending on July 1, 2012, as well as to such proceedings which arise on or after July 1, 2012.

CHAPTER 9

BIOLOGICALS PERMITS

Sec.
4-9-1. Short title.
4-9-2. Definitions.
4-9-3. Permits — Application; issuance; exemptions; posting.
4-9-4. Permits — Transferability; effect of death of permittee.
4-9-5. Promulgation of rules and regulations; revocation or suspension of permits, licenses, and certificates.
4-9-6. Employment of field agents, clerical help, and other personnel.
4-9-7. Prohibited acts.
4-9-8. Seizure, destruction, and withholding from sale of adulterated, misbranded, or contaminated biologicals.
4-9-9. Injunctions.

Cross references. — Regulation of manufacture and sale of drugs generally, T. 26, C. 3.

Administrative rules and regulations. — Use of biologicals on poultry and other animals, Official Compilation of the Rules and Regulations of the State of Georgia, Rules of Georgia Department of Agriculture, Chapter 40-16-1.

4-9-1. Short title.

This chapter may be cited as the "Georgia Biologicals Permit Act of 1966." (Ga. L. 1966, p. 334, § 1.)

4-9-2. Definitions.

As used in this chapter, the term:

(1) "Adulterant" means a substance used as an addition to another substance for falsification or adulteration.

(2) "Adulteration" means an addition of an impure, cheap, or unnecessary ingredient to cheat, cheapen, or falsify a preparation.

(3) "Biologicals" means medicinal preparations made from living organisms and their products, including serums, vaccines, antigens, and antitoxins which are for use on poultry and animals, excluding humans.

(4) "Contaminant" means something that causes contamination, such as a foreign organism developing accidentally in a pure culture.

(5) "Contamination" means the soiling or making inferior by contact or mixing. (Ga. L. 1966, p. 334, § 3.)

4-9-3. Permits — Application; issuance; exemptions; posting.

(a) Every producer, manufacturer, distributor, or sales outlet selling, offering for sale, exposing for sale, distributing, or storing biologicals shall register with and obtain a permit from the department prior to engaging in such activities. No person, firm, or partnership shall engage in any such activities without a permit or while its permit is suspended or revoked. The registration and application for a permit shall be made on a form prescribed by the Commissioner. Upon compliance with this chapter, the applicant shall be issued a permit by the Commissioner for all biological products manufactured, distributed, or sold by the applicant. A previous violation of the law or any regulation of the department by the applicant shall constitute just cause for refusal of a permit.

(b) This chapter shall not apply to any department of the federal or state government, any county board of health, any joint city-county board of health, any licensed graduate veterinarian whose primary use of biologicals is in his practice, or any retail establishment which purchases prepackaged biologicals not under its private label from a producer, manufacturer, distributor, or sales outlet registered under this chapter for sale to the general public only. Retail establishments which sell biologicals received from producers, manufacturers, and distributors, none of which are registered under this chapter, must obtain a separate permit for the biologicals obtained from each nonregistered source.

(c) Permits issued under this Code section shall be posted in a conspicuous place in the business.

(d) Any violation of this Code section shall constitute a misdemeanor. (Ga. L. 1965, p. 177, §§ 2-4; Ga. L. 1966, p. 334, §§ 4-6.)

OPINIONS OF THE ATTORNEY GENERAL

Limitation on authority of Commissioner to issue permits. — Authority of the Commissioner of Agriculture to issue permits for the manufacture and distribution of certain live viruses and disease vectors, and of biologicals does not empower the Commissioner to prohibit distribution of certain vaccines to certain individuals. 1975 Op. Att'y Gen. No. 75-23.

4-9-4. Permits — Transferability; effect of death of permittee.

Permits issued under this chapter shall not be transferable. Upon the death of a person to whom such a permit has been issued, the permit issued to such deceased person shall continue in full force and effect for a period of 90 days from the date of the death of such person, provided the Commissioner is notified of such death within 30 days from the date thereof. During the 90 day period, renewal shall not be required and the

permit shall in all respects be subject to this chapter. The permit shall terminate upon the expiration of the 90 day period. (Ga. L. 1965, p. 177, § 11; Ga. L. 1966, p. 334, § 10.)

4-9-5. Promulgation of rules and regulations; revocation or suspension of permits, licenses, and certificates.

(a) The Commissioner shall promulgate such rules and regulations as he deems necessary to carry out the provisions and intention of this chapter.

(b) The Commissioner is authorized to revoke or suspend any permit issued under this chapter at any time when examination or inspection shall disclose violation of this chapter or any rule or regulation promulgated by the Commissioner, provided that unless revocation or termination is made automatic by this chapter, no license, permit, certificate, or other similar right shall be revoked or suspended without opportunity for hearing in accordance with Chapter 13 of Title 50, the "Georgia Administrative Procedure Act." (Ga. L. 1965, p. 177, § 7; Ga. L. 1966, p. 334, § 7.)

4-9-6. Employment of field agents, clerical help, and other personnel.

The Commissioner shall have the power and authority to employ field agents, clerical help, and other qualified personnel as may be necessary to carry out the purposes of and enforce this chapter. (Ga. L. 1965, p. 177, § 8; Ga. L. 1966, p. 334, § 8.)

4-9-7. Prohibited acts.

The following acts and the procurement, causing, aiding, or abetting of such acts within this state are prohibited:

(1) The manufacture, sale, delivery, holding or offering for sale, or storage of any biologicals that are adulterated, mislabeled, or contaminated;

(2) The receipt in commerce of biologicals known to be adulterated, mislabeled, or contaminated and the delivery or proffered delivery thereof with like knowledge, whether for pay or otherwise;

(3) The willful dissemination of false advertisements concerning any biologicals;

(4) The refusal to permit entry or inspection of any premises wherein biologicals are sold, held for sale, or stored and the refusal to permit the taking of a sample of any such biologicals;

(5) The giving of a guaranty or undertaking which is false except when such guaranty or undertaking is given by a person who relied on a guaranty or undertaking to the same effect signed by and containing the name and address of a manufacturer, producer, distributor, or sales outlet holding a permit from the department and from whom he received the biologicals in good faith;

(6) The removal or disposal of detained or embargoed biologicals, except by the Commissioner or his duly authorized agents;

(7) The adulteration, mutilation, destruction, obliteration, or removal of the whole or any part of the labeling of any biologicals or the doing of any other act with respect to biologicals, if such act is done while such biologicals are held for sale and results in such biologicals being misbranded; and

(8) The use on the labels of any biologicals or in any advertisement of any biologicals of any representation or suggestion that such biologicals have been approved by the department. (Ga. L. 1965, p. 177, § 12; Ga. L. 1966, p. 334, § 11.)

RESEARCH REFERENCES

Am. Jur. 2d. — 25 Am. Jur. 2d, Drugs, Narcotics, and Poisons, §§ 37, 44, 46.

C.J.S. — 3B C.J.S., Animals, § 133. 28A C.J.S., Drugs and Narcotics, § 27 et seq.

ALR. — Validity, construction, and application of statutes or ordinances directed against false or fraudulent statements in advertisements, 89 ALR 1004.

4-9-8. Seizure, destruction, and withholding from sale of adulterated, misbranded, or contaminated biologicals.

The Commissioner shall have the right to seize, destroy, or withhold from sale any adulterated, misbranded, or contaminated biologicals. The Commissioner shall also have the right to withhold from sale any biological which he deems to be hazardous when administered by any persons other than an accredited licensed veterinarian, persons licensed under Chapter 50 of Title 43, or persons approved by him. (Ga. L. 1966, p. 334, § 13; Ga. L. 1976, p. 334, § 1.)

OPINIONS OF THE ATTORNEY GENERAL

Authorization to impound live rabies vaccine. — The Department of Agriculture is not authorized to impound live rabies vaccine in order to preclude the distribution of the vaccine to individuals other than licensed veterinarians. 1975 Op. Att'y Gen. No. 75-23.

RESEARCH REFERENCES

ALR. — Lawfulness of seizure of property used in violation of law as prerequisite to forfeiture action or proceeding, 8 ALR3d 473.

4-9-9. Injunctions.

The Commissioner or any person, corporation, firm, or association, in addition to the remedies set forth in this chapter, may obtain from a court of competent jurisdiction an injunction to restrain continued violations of this chapter. The granting of an injunction is authorized, notwithstanding the fact that such violation also constitutes a misdemeanor and notwithstanding the availability of adequate remedies at law. (Ga. L. 1965, p. 177, § 10; Ga. L. 1966, p. 334, § 9.)

CHAPTER 10

DEALERS IN EXOTIC BIRDS AND PET BIRDS

Sec.
4-10-1. Short title.
4-10-2. Legislative findings.
4-10-3. Definitions.
4-10-4. License — Requirement.
4-10-5. License — Issuance; duration; renewal; fees.
4-10-6. Dealer's duty to maintain records; contents; periodic reports; failure to keep records as grounds for revocation of license; term of preservation.
4-10-7. Seizure, quarantine, and destruction of birds.
4-10-7.1. Importing birds detrimental to agriculture; list of birds; restrictions; permits; quarantine; violations.
4-10-7.2. Importing psittacine or exotic birds deemed potential carriers of disease; list of birds; restrictions; quarantine; violations.
4-10-7.3. Notice and reporting of certain animal diseases.
4-10-8. Rules and regulations.
4-10-9. Enforcement procedure.
4-10-10. Joint regulation by the Department of Agriculture and the Department of Public Health.
4-10-11. Construction of chapter.
4-10-12. Penalty.

4-10-1. Short title.

This chapter may be cited as the "Bird Dealers Licensing Act." (Ga. L. 1981, p. 510, § 1.)

4-10-2. Legislative findings.

The General Assembly finds that the sale of exotic and pet birds presents a serious potential hazard to the health of livestock and humans due to the potential of transmission of disease by birds. The General Assembly further finds that regulation of bird dealers is a necessary means of minimizing this hazard. (Ga. L. 1981, p. 510, § 2.)

4-10-3. Definitions.

As used in this chapter, the term:

(1) "Bird dealer" means any person engaged in the business of dealing in, purchasing, breeding, or offering for sale, whether at wholesale or retail, any exotic birds, pet birds, or birds customarily kept as pets.

(2) "Person" means any individual, firm, partnership, corporation, estate, trust, fiduciary, or other group or combination acting as a unit. (Ga. L. 1981, p. 510, § 3.)

4-10-4. License — Requirement.

It shall be unlawful for any person to act as a bird dealer unless such person has a valid bird dealer's license. (Ga. L. 1981, p. 510, § 4.)

4-10-5. License — Issuance; duration; renewal; fees.

(a) The department shall license bird dealers under the applicable provisions of Chapter 5 of Title 2, the "Department of Agriculture Registration, License, and Permit Act."

(b) Bird dealers' licenses shall be issued for a period of one year and shall be annually renewable. The department may establish separate classes of licenses, including wholesale and retail licenses. The department shall fix fees for licenses so that the revenue derived from licenses shall approximate the total direct and indirect costs of administering this chapter; but the annual fee for any such license shall be at least $50.00 but shall not exceed $400.00. Any fees collected pursuant to this Code section shall be retained pursuant to the provisions of Code Section 45-12-92.1. (Ga. L. 1981, p. 510, § 4; Ga. L. 1992, p. 993, § 1; Ga. L. 2010, p. 9, § 1-16/HB 1055.)

4-10-6. Dealer's duty to maintain records; contents; periodic reports; failure to keep records as grounds for revocation of license; term of preservation.

(a) Every bird dealer shall keep records sufficient to identify:

(1) Each exotic or pet bird in his possession or sold by him, by species and physical description;

(2) The name, address, and telephone number of the person from whom each such bird was acquired and, if that person is a licensed bird dealer, then his license number or, if that person is not a licensed dealer, then his driver's license number, social security number, federal tax identification number, or such other identification as may be available;

(3) The name, address, and telephone number of the person to whom each such bird is transferred and, if that person is a licensed bird dealer, then his license number or, if that person is not a licensed bird dealer, then his driver's license number, social security number, or such other identification as may be available; and

(4) Any such bird which the dealer knows to be or have been sick or diseased or to have died.

(b) The department may require periodic reports of any or all of the records required by subsection (a) of this Code section. The department may require the keeping of additional records; and all required records shall be made available for inspection by the department.

(c) Failure to keep or make available any required records shall be grounds for revocation of a license.

(d) Every bird dealer shall keep all of such records for at least one year. (Ga. L. 1981, p. 510, § 5.)

4-10-7. Seizure, quarantine, and destruction of birds.

The department may quarantine, seize, and destroy any birds which present a hazard of carrying exotic or untreatable disease, as determined by rules and regulations promulgated by the Commissioner. The department shall pay an indemnity to the owner of any seized or destroyed birds from any federal funds made available for that purpose or any state funds appropriated for that purpose. (Ga. L. 1981, p. 510, § 6.)

Cross references. — Authority of Department of Human Resources to regulate importation and sale of animals and birds to be kept as pets, § 31-12-9.

4-10-7.1. Importing birds detrimental to agriculture; list of birds; restrictions; permits; quarantine; violations.

(a) The Commissioner of Agriculture shall by rule determine and establish a listing of all types of birds not native to this state which if introduced into this state would be capable of breeding in the wild and would, if established in the wild, present a threat of being detrimental to the agricultural industry of this state.

(b) Except as provided in subsection (c) of this Code section, it shall be unlawful to bring into this state any bird identified in the listing of birds established pursuant to subsection (a) of this Code section.

(c) The department may issue a permit to bring into this state a bird identified in the listing of birds established pursuant to subsection (a) of this Code section if the person applying for such a permit establishes to the satisfaction of the department that adequate precautions will be taken to ensure that neither the bird for which the permit is issued nor any offspring of such bird will be allowed to escape captivity.

(d) The department may quarantine, seize, and destroy any bird brought into this state in violation of this Code section.

(e) Any person convicted of violating the provisions of subsection (b) of this Code section shall be guilty of a misdemeanor. (Code 1981, § 4-10-7.1, enacted by Ga. L. 1984, p. 1216, § 1.)

4-10-7.2. Importing psittacine or exotic birds deemed potential carriers of disease; list of birds; restrictions; quarantine; violations.

(a) As used in this Code section, the term "psittacine birds" includes birds commonly known as parrots, Amazons, African grays, cockatoos,

macaws, parrotlets, beebees, parakeets, lovebirds, lories, lorikeets, and all other birds of the order Psittaciformes.

(b) It shall be unlawful to bring into this state any psittacine bird or other exotic bird designated by rule by the Commissioner of Agriculture as a potential carrier of disease coming directly or indirectly from outside the United States unless the bird was brought into the United States in conformity with the quarantine regulations of the United States Department of Agriculture.

(c) The department may quarantine, seize, and destroy any bird brought into this state in violation of this Code section and any bird exposed to a bird brought into the state in violation of this Code section.

(d) Any person convicted of violating the provisions of subsection (b) of this Code section shall be guilty of a misdemeanor. (Code 1981, § 4-10-7.2, enacted by Ga. L. 1984, p. 1216, § 1; Ga. L. 1985, p. 149, § 4.)

4-10-7.3. Notice and reporting of certain animal diseases.

(a) The Commissioner is authorized to declare certain animal diseases and syndromes to be diseases requiring notice and to require the reporting thereof to the department in a manner and at such times as may be prescribed by the Commissioner. The department shall require that such data be supplied as is deemed necessary and appropriate for the prevention and control of certain diseases and syndromes as are determined by the Commissioner. All such reports and data shall be deemed confidential and shall not be open to inspection by the public; provided, however, that the Commissioner may release such reports and data in statistical form, for valid research purposes, and for other purposes as deemed appropriate by the Commissioner.

(b) Any person, including, but not limited to, any veterinarian or veterinary diagnostic laboratory and practice personnel and any person associated with any bird dealer regulated by this chapter, submitting reports or data in good faith to the department in compliance with this Code section shall not be liable for any civil damages therefor. (Code 1981, § 4-10-7.3, enacted by Ga. L. 2002, p. 1386, § 2.)

Law reviews. — For note on the 2002 enactment of this Code section, see 19 Ga. St. U.L. Rev. 1 (2002).

4-10-8. Rules and regulations.

The Commissioner may make any rules and regulations, not inconsistent with this chapter, governing dealing in or transportation of exotic or pet birds. (Ga. L. 1981, p. 510, § 8.)

4-10-9. Enforcement procedure.

(a) Notwithstanding any other provision of law, whenever it may appear to the Commissioner or his agent, either upon investigation or otherwise, that any person has engaged in, or is engaging in, or is about to engage in any act, practice, or transaction which is prohibited by any law or regulation governing activities for which a license is required by this chapter, whether or not the person has so registered or obtained such a license or permit, the Commissioner may issue an order, if he deems it to be in the public interest or necessary for the protection of the citizens of this state, prohibiting such person from continuing such act, practice, or transaction or suspending or revoking any such registration, license, or permit held by such person.

(b) In situations where persons would otherwise be entitled to a hearing prior to an order entered pursuant to subsection (a) of this Code section, the Commissioner may issue such an order to be effective upon a later date without a hearing unless a person subject to the order requests a hearing within ten days after receipt of the order. Failure to make the request shall constitute a waiver of any provision of law for a hearing. The order shall contain or shall be accompanied by a notice of opportunity for hearing, stating that a hearing must be requested within ten days of receipt of the notice and order. The order and notice shall be served in person by the Commissioner or his agent or by certified mail or statutory overnight delivery, return receipt requested. In the case of an individual registered with or issued a license or permit by the department, receipt of the order and notice will be conclusively presumed five days after the mailing of the order by certified mail or statutory overnight delivery, return receipt requested, to the address provided by such person in his most recent registration or license or permit application.

(c) In situations where persons would otherwise be entitled to a hearing prior to an order, the Commissioner may issue an order to be effective immediately if the Commissioner or his agent has reasonable cause to believe that an act, practice, or transaction is occurring or is about to occur, that the situation constitutes a situation of imminent peril to the public safety or welfare, and that the situation therefore requires emergency action. The emergency order shall contain findings to this effect and reasons for the determination. The order shall contain or be accompanied by a notice of opportunity for hearing, which notice may provide that a hearing will be held if and only if a person subject to the order requests a hearing within ten days of the receipt of the order and notice. The order and notice shall be served by the Commissioner or his agent or by certified mail or statutory overnight delivery, return receipt requested. In the case of an individual registered with or issued a license or permit by the department, receipt of the order and

notice will be conclusively presumed five days after the mailing of the order by certified mail or statutory overnight delivery, return receipt requested, to the address provided by such person in his most recent registration or license or permit application.

(d) Any request for hearing made pursuant to subsections (b) and (c) of this Code section shall specify (1) in what respects such person is aggrieved, (2) any and all defenses such person intends to assert at the hearing, (3) affirmation or denial of all the facts and findings alleged in the order, and (4) an address to which any further correspondence or notices in the proceeding may be mailed. Upon such a request for hearing, the Commissioner shall schedule and hold the hearing, unless postponed by mutual consent, within 30 days after receipt by the Commissioner of the request therefor. The Commissioner shall give the person requesting the hearing notice of the time and place of the hearing by certified mail or statutory overnight delivery to the address specified in the request for hearing at least 15 days prior to the time of the hearing.

(e) Except where in conflict with the express provisions of this Code section and the reasonable implication of such provisions, the provisions of Chapter 13 of Title 50, the "Georgia Administrative Procedure Act," relating to contested cases shall be applicable to the actions of the Commissioner taken pursuant to this Code section and to the conduct and judicial review of any hearings held as a result thereof.

(f) The Commissioner may institute actions or other legal proceedings in any superior court of proper venue as may be required for the enforcement of any law or regulation governing activities for which registration with or a license or permit from the department is required.

(g) The Commissioner may prosecute an action in any superior court of proper venue to enforce any order made by him pursuant to this Code section.

(h) In cases in which the Commissioner institutes an action or other legal proceeding or prosecutes an action to enforce his order, the superior court may, among other appropriate relief, issue a temporary restraining order or a preliminary, interlocutory, or permanent injunction restraining or enjoining persons from engaging in, or acting in concert with anyone engaging in, any acts, practices, or transactions prohibited by orders of the Commissioner or any law or regulation governing activities for which registration with or a license or permit from the department is required. (Ga. L. 1981, p. 510, § 10; Ga. L. 1984, p. 22, § 4; Ga. L. 2000, p. 1589, § 3.)

Cross references. — Authority of Commissioner to impose penalty in lieu of other action, § 2-2-10.

Editor's notes. — Ga. L. 2000, p. 1589, § 16, not codified by the General Assembly, provides that the amendment to this Code section is applicable with respect to notices delivered on or after July 1, 2000.

4-10-10. Joint regulation by the Department of Agriculture and the Department of Public Health.

If the Department of Public Health elects to regulate the sale or transportation of exotic or pet birds under the authority of Code Section 31-12-9, then the Department of Public Health shall cooperate with the Department of Agriculture in developing and implementing such regulation. (Ga. L. 1981, p. 510, § 7; Ga. L. 2009, p. 453, § 1-4/HB 228; Ga. L. 2011, p. 705, § 6-3/HB 214.)

The 2011 amendment, effective July 1, 2011, substituted "Department of Public Health" for "Department of Community Health" twice in this Code section.

Law reviews. — For article on the 2011 amendment of this Code section, see 28 Ga. St. U.L. Rev. 147 (2011). For article, "Health: Department of Public Health," see 28 Ga. St. U.L. Rev. 147 (2011).

4-10-11. Construction of chapter.

Nothing in this chapter shall be construed to repeal or preempt any laws or parts of laws administered by the Department of Natural Resources. However, insofar as any authority created by this chapter duplicates any other current or future authorities of the Department of Natural Resources with respect to Class Aves, the Department of Agriculture and the Department of Natural Resources shall cooperate in the administration of those duplicated authorities. (Ga. L. 1981, p. 510, § 11; Ga. L. 1986, p. 10, § 4.)

4-10-12. Penalty.

Any person who violates any provision of this chapter shall be guilty of a misdemeanor. (Ga. L. 1981, p. 510, § 4; Ga. L. 2002, p. 1386, § 3.)

Law reviews. — For note on the 2002 amendment of this Code section, see 19 Ga. St. U.L. Rev. 1 (2002).

CHAPTER 11

ANIMAL PROTECTION

Article 1

General Provisions

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4-11-4. Display of licenses.
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Article 2

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4-11-30. Short title.
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4-11-34. Powers and duties of Commissioner.
4-11-35. Attorneys' fees; injunctions; other rights arising out of or relating to violation of article.

OPINIONS OF THE ATTORNEY GENERAL

Fingerprinting offenders. — Violation of any of the provisions of this chapter (now Article 1 of this chapter) are offenses for which those charged with a violation are to be fingerprinted. 1986 Op. Att'y Gen. 86-30.

ARTICLE 1

GENERAL PROVISIONS

Editor's notes. — Ga. L. 1990, p. 328, § 1, effective July 1, 1990, designated the existing provisions of this chapter as Article 1 and enacted Article 2 thereof.

Law reviews. — For note on 2000 amendment of O.C.G.A. §§ 4-11-2, 4-11-10, and 4-11-15 to 4-11-17, see 17 Ga. St. U.L. Rev. 12 (2000).

4-11-1. Short title.

This article shall be known and may be cited as the "Georgia Animal Protection Act." (Code 1981, § 4-11-1, enacted by Ga. L. 1986, p. 628, § 1; Ga. L. 1990, p. 328, § 1; Ga. L. 1993, p. 91, § 4.)

RESEARCH REFERENCES

ALR. — Validity, construction, and application of statutes and ordinances to prosecution for cockfighting, 69 ALR6th 207.

4-11-2. Definitions.

As used in this article, the term:

(1) "Adequate food and water" means food and water which is sufficient in an amount and appropriate for the particular type of animal to prevent starvation, dehydration, or a significant risk to the animal's health from a lack of food or water.

(1.1) "Animal control officer" means an individual authorized by local law or by the governing authority of a county or municipality to carry out the duties imposed by this article or imposed by local ordinance.

(2) "Animal shelter" means any facility operated by or under contract for the state, a county, a municipal corporation, or any other political subdivision of the state for the purpose of impounding or harboring seized, stray, homeless, abandoned, or unwanted dogs, cats, and other animals; any veterinary hospital or clinic operated by a veterinarian or veterinarians which operates for such purpose in addition to its customary purposes; and any facility operated, owned, or maintained by a duly incorporated humane society, animal welfare society, or other nonprofit organization for the purpose of providing for and promoting the welfare, protection, and humane treatment of animals.

(3) "Equine" means any member of the Equidae species, including horses, mules, and asses.

(4) "Humane care" of animals means, but is not limited to, the provision of adequate heat, ventilation, sanitary shelter, and whole-

some and adequate food and water, consistent with the normal requirements and feeding habits of the animal's size, species, and breed.

(5) "Kennel" means any establishment, other than an animal shelter, where dogs or cats are maintained for boarding, holding, training, or similar purposes for a fee or compensation.

(6) "Person" means any person, firm, corporation, partnership, association, or other legal entity, any public or private institution, the State of Georgia, or any county, municipal corporation, or political subdivision of the state.

(7) "Pet dealer" or "pet dealership" means any person who sells, offers to sell, exchanges, or offers for adoption dogs, cats, birds, fish, reptiles, or other animals customarily obtained as pets in this state. However, a person who sells only animals that he or she has produced and raised, not to exceed 30 animals a year, shall not be considered a pet dealer under this article unless such person is licensed for a business by a local government or has a Georgia sales tax number. The Commissioner may with respect to any breed of animals decrease the 30 animal per year exception in the foregoing sentence to a lesser number of any animals for any species that is commonly bred and sold for commercial purposes in lesser quantities. Operation of a veterinary hospital or clinic by a licensed veterinarian shall not constitute the veterinarian as a pet dealer, kennel, or stable under this article.

(8) "Secretary of agriculture" means the secretary of the United States Department of Agriculture.

(9) "Stable" means any building, structure, pasture, or other enclosure where equines are maintained for boarding, holding, training, breeding, riding, pulling vehicles, or other similar purposes and a fee is charged for maintaining such equines or for the use of such equines. (Code 1981, § 4-11-2, enacted by Ga. L. 1986, p. 628, § 1; Ga. L. 1990, p. 328, § 1; Ga. L. 1990, p. 1650, § 1; Ga. L. 2000, p. 754, § 4; Ga. L. 2013, p. 141, § 4/HB 79.)

The 2013 amendment, effective April 24, 2013, part of an Act to revise, modernize, and correct the Code, revised language in paragraph (8).

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1990, "equines" was substituted for "equine" in paragraph (9).

Editor's notes. — Ga. L. 2000, p. 754, § 1, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Animal Protection Act of 2000.'"

4-11-3. Licenses for pet dealers and kennel, stable, or animal shelter operators; requirement; issuance; application.

(a) It shall be unlawful for any person to act as a pet dealer or operate a kennel, stable, or animal shelter unless such person has a valid license issued by the Commissioner of Agriculture. Any person acting without a license in violation of this subsection shall be guilty of a misdemeanor.

(b) The Commissioner shall license pet dealers and kennel, stable, and animal shelter operators under the applicable provisions of Chapter 5 of Title 2, the "Department of Agriculture Registration, License, and Permit Act."

(c) Licenses shall be issued for a period of one year and shall be annually renewable. The Commissioner may establish separate classes of licenses, including wholesale and retail licenses. The Commissioner shall fix fees for licenses so that the revenue derived from licenses shall approximate the total direct cost of administering this article. The Commissioner may establish different fees for the different classes of licenses established, but the annual fee for any such license shall be at least $50.00 but shall not exceed $400.00. Any fees collected pursuant to this Code section shall be retained pursuant to the provisions of Code Section 45-12-92.1.

(d) Applications for licenses shall be on a form furnished by the Commissioner and, together with such other information as the Commissioner shall require, shall state:

(1) The name of the applicant;

(2) The business address of the applicant;

(3) The complete telephone number of the applicant;

(4) The location of the pet dealership, kennel, stable, or animal shelter;

(5) The type of ownership of the pet dealership, kennel, stable, or animal shelter; and

(6) The name of the owner or, if a partnership, firm, corporation, or other entity, the name of the partners or stockholders.

(e) Notwithstanding the provisions of subsection (c) of this Code section, the license fees fixed pursuant to subsection (c) of this Code section shall be increased by 100 percent for the renewal of any license which is not renewed within ten days following the expiration date of the license or for the issuance of a new license to any person who has failed to apply for a license within ten days following the date on which written notice of the need for such license has been given to such person

by the Commissioner or his authorized representative. (Code 1981, § 4-11-3, enacted by Ga. L. 1986, p. 628, § 1; Ga. L. 1990, p. 328, § 1; Ga. L. 1990, p. 1650, § 2; Ga. L. 1992, p. 1122, § 1; Ga. L. 2010, p. 9, § 1-17/HB 1055.)

4-11-4. Display of licenses.

A license must be prominently displayed at each place of business of a pet dealer and at each kennel, stable, and animal shelter in this state. (Code 1981, § 4-11-4, enacted by Ga. L. 1986, p. 628, § 1.)

4-11-5. Licensing of bird dealers.

Any person licensed by the department as a bird dealer shall not be required to obtain a license under this article if such person does not deal in animals other than birds. If, however, a licensed bird dealer sells, offers to sell, exchanges, or offers for adoption dogs, cats, fish, reptiles, or other animals (other than birds) customarily obtained as pets, then such dealer shall be required to obtain a license under this article in addition to his bird dealer's license. (Code 1981, § 4-11-5, enacted by Ga. L. 1986, p. 628, § 1; Ga. L. 1990, p. 328, § 1.)

4-11-5.1. Euthanasia of dogs and cats by animal shelters or facilities operated for collection of stray, neglected, abandoned, or unwanted animals.

(a) Except as provided in subsection (b) of this Code section, the use of sodium pentobarbital or a derivative of it shall be the exclusive method for euthanasia of dogs and cats by animal shelters or other facilities which are operated for the collection and care of stray, neglected, abandoned, or unwanted animals. A lethal solution shall be used in the following order of preference:

(1) Intravenous injection by hypodermic needle;

(2) Intraperitoneal injection by hypodermic needle; or

(3) If the dog or cat is unconscious, intracardial injection by hypodermic needle.

(b) Notwithstanding subsection (a) of this Code section, any substance which is clinically proven to be as humane as sodium pentobarbital and which has been officially recognized as such by the American Veterinary Medical Association may be used in lieu of sodium pentobarbital to perform euthanasia on dogs and cats, but succinylcholine chloride, curare, curariform mixtures, or any substance which acts as a neuromuscular blocking agent may not be used on a dog or cat in lieu of sodium pentobarbital for euthanasia purposes.

(c) In addition to the exception provided for in subsection (b) of this Code section, in cases of extraordinary circumstance where the dog or cat poses an extreme risk or danger to the veterinarian, physician, or lay person performing euthanasia, such person shall be allowed the use of any other substance or procedure that is humane to perform euthanasia on such dangerous dog or cat.

(d) Under no circumstance shall a chamber using commercially bottled carbon monoxide gas or other lethal gas or a chamber which causes a change in body oxygen by means of altering atmospheric pressure or which is connected to an internal combustion engine and uses the engine exhaust for euthanasia purposes be permitted.

(e) A dog or cat may be tranquilized with an approved and humane substance before euthanasia is performed.

(f) Euthanasia shall be performed by a licensed veterinarian or physician or a lay person who is properly trained in the proper and humane use of a method of euthanasia. Such lay person shall perform euthanasia under supervision of a licensed veterinarian or physician. This shall not be construed so as to require that a veterinarian or physician be present at the time euthanasia is performed.

(g) No dog or cat may be left unattended between the time euthanasia procedures are first begun and the time death occurs, nor may its body be disposed of until death is confirmed by a qualified person.

(h) The supervising veterinarian or physician shall be subject to all record-keeping requirements and inspection requirements of the State Board of Pharmacy pertaining to sodium pentobarbital and other drugs authorized under subsection (b) of this Code section and may limit the quantity of possession of sodium pentobarbital and other drugs authorized to ensure compliance with the provisions of this Code section. (Code 1981, § 4-11-5.1, enacted by Ga. L. 1990, p. 1686, § 1; Ga. L. 2010, p. 164, § 1/HB 788.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1990, the spelling of "euthanasia" was corrected the first time it appears in subsection (c).

4-11-5.2. Microchip reader defined; contacting owner of microchipped pet.

(a) As used in this Code section, the term "microchip reader" means a device designed to read microchips at 125 kHz, both encrypted and nonencrypted, 128 kHz, and 134.2 kHz, and which is ISO 11784 and 11785 compliant.

(b) When any dog, cat, or other large animal traditionally kept as a household pet is brought to an animal shelter or other facility operated for the collection and care of stray, neglected, or abandoned animals, the

operator of the facility shall, if the owner of the animal is not known, within 24 hours or as soon as possible scan for the presence of an identifying microchip through the use of a microchip reader. If a microchip is found, the operator shall make a reasonable effort to contact the owner of the animal. Prior to euthanizing a dog, cat, or other large animal traditionally kept as a household pet, any facility referred to in this subsection shall again scan for the presence of an identifying microchip through the use of a microchip reader.

(c) Shelters and facilities and their employees and the Department of Agriculture shall not be liable for failing to detect a microchip or failing to contact the owner of the animal. Shelter personnel shall not be required to scan any animal they deem to be too vicious or dangerous to permit safe handling. (Code 1981, § 4-11-5.2, enacted by Ga. L. 2010, p. 806, § 1/HB 1106.)

4-11-6. Applicability of article to nonresidents; consent to jurisdiction; service.

Any person who is not a resident of this state but who engages in this state in any activities for which a license is required by this article shall be subject to this article as to such activities. Each nonresident applicant for a license required by this article shall be required as a condition of licensure to execute a consent to the jurisdiction of the courts of this state for any action filed under this article; and service of process in any such action shall be by certified mail or statutory overnight delivery by the Commissioner. (Code 1981, § 4-11-6, enacted by Ga. L. 1986, p. 628, § 1; Ga. L. 1990, p. 328, § 1; Ga. L. 2000, p. 1589, § 3.)

Editor's notes. — Ga. L. 2000, p. 1589, § 16, not codified by the General Assembly, provides that the amendment to this Code section is applicable with respect to notices delivered on or after July 1, 2000.

4-11-7. Grounds for refusal to issue or renew or suspension or revocation of licenses.

The Commissioner may refuse to issue or renew or may suspend or revoke a license on any one or more of the following grounds:

(1) Material misstatement in the application for the original license or in the application for any renewal license under this article;

(2) Willful disregard or violation of this article or of any rules or regulations issued pursuant to this article;

(3) Willfully aiding or abetting another in the violation of this article or of any regulation or rule issued pursuant to this article;

(4) Allowing a license issued under this article to be used by an unlicensed person;

(5) A violation of any law of this state or rule of the Commissioner related to the disposition of, dealing in, or handling of dogs, cats, equines, and other animals;

(6) Making substantial misrepresentations or false promises in connection with the business of a licensee under this article;

(7) Pursuing a continued course of making misrepresentations or false promises through advertising, salesmen, agents, or otherwise in connection with the business of a licensee under this article;

(8) Failure to possess the necessary qualifications or meet the requirements of this article for the issuance or holding of a license; or

(9) Failure to provide proper facilities. (Code 1981, § 4-11-7, enacted by Ga. L. 1986, p. 628, § 1; Ga. L. 1990, p. 328, § 1.)

4-11-8. Denial, suspension, or revocation of license for violation of article; applicability of "Georgia Administrative Procedure Act."

The Commissioner is authorized to deny, suspend, or revoke any license required by this article, subject to notice and a hearing, in any case in which he finds that there has been a violation of this article or any rule or regulation adopted pursuant to this article. All proceedings for denial, suspension, or revocation of a license shall be conducted in conformance with Chapter 13 of Title 50, the "Georgia Administrative Procedure Act." (Code 1981, § 4-11-8, enacted by Ga. L. 1986, p. 628, § 1; Ga. L. 1990, p. 328, § 1.)

4-11-9. Inspections.

The Commissioner or his designated agents are authorized to enter upon any public or private property at any time for the purpose of inspecting the business premises of any pet dealer or any animal shelter, kennel, or stable and the dogs, cats, equines, or other animals housed at such facility to determine if such facility is licensed and for the purpose of enforcing this article and the rules and regulations adopted by the Commissioner pursuant to this article. (Code 1981, § 4-11-9, enacted by Ga. L. 1986, p. 628, § 1; Ga. L. 1990, p. 328, § 1.)

4-11-9.1. Quarantine of animal, premises, or any area by Commissioner.

(a) In the control, suppression, prevention, and eradication of animal diseases, the Commissioner or any duly authorized representative

acting under his authority is authorized and required to quarantine an animal, premises, or any area when he shall determine that animals in such place or places are infected with a contagious or infectious disease, that the unsanitary condition of such place or places might cause the spread of such disease, that the animal has or has been exposed to any contagious or infectious disease, or that the owner or occupant of such place or places is not observing sanitary practices prescribed under the authority of this article or any other law of this state.

(b) The Commissioner or his duly authorized representative is authorized to issue and enforce written or printed stop sale, stop use, or stop movement orders to the owners or custodians of any animals, ordering them to hold such animals at a designated place, when the Commissioner or his duly authorized representative finds such animals:

(1) To be infected with or to have been exposed to any contagious or infectious disease;

(2) To be held by a person who is required to be licensed under this article and whose license has expired;

(3) To be held by a person who is required to be licensed under this article and who has failed to obtain a license within ten days of the date on which written notice of need to obtain a license was given to such person by the Commissioner or his authorized representative; or

(4) To have been held in violation of this article,

until the law has been complied with and such animals have been released, in writing, by the Commissioner or the violations have been otherwise legally disposed of by written authority.

(c) It shall be unlawful for any person to sell, use, or move any animal in violation of any quarantine or stop sale, stop use, or stop removal order issued under this Code section. (Code 1981, § 4-11-9.1, enacted by Ga. L. 1990, p. 1650, § 3.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1990, "article" was substituted for "chapter" in subsection (a) and paragraphs (2), (3), and (4) of subsection (b), since Ga. L. 1990, p. 328 so amended other Code sections in this article.

4-11-9.2. Inspections; impoundment of animals; exceptions.

(a) At any time there is probable cause to believe that a violation of this article or any rule or regulation adopted pursuant to this article has occurred, the Commissioner, his or her designated agent, or an animal control officer who is an employee of state or local government may apply to the appropriate court in the county in which the animal is

located for an inspection warrant under the provisions of Code Section 2-2-11.

(b) Any sheriff, deputy sheriff, or other peace officer shall have the authority to enforce the provisions of this article and Code Sections 16-12-4 and 16-12-37.

(c) The Commissioner, his or her designated agent, an animal control officer who is an employee of state or local government, or any sheriff, deputy sheriff, or other peace officer is authorized to impound any animal:

(1) That has not received humane care;

(2) That has been subjected to cruelty in violation of Code Section 16-12-4;

(3) That is used or intended for use in any violation of Code Section 16-12-37; or

(4) If it is determined that a consent order or other order concerning the treatment of animals issued pursuant to this article is being violated.

(d) Prior to an animal being impounded pursuant to paragraph (1), (2), or (3) of subsection (c) of this Code section, a licensed accredited veterinarian approved by the Commissioner or a veterinarian employed by a state or federal government and approved by the Commissioner, shall, at the request of the Commissioner, his or her designee, an animal control officer, a sheriff, a deputy sheriff, or other peace officer, examine and determine the condition or treatment of the animal.

(e) The provisions of this Code section and Code Sections 4-11-9.3 through 4-11-9.6 shall not apply to scientific experiments or investigations conducted by or at an accredited college or university in this state or research facility registered with the Commissioner or the United States Department of Agriculture. (Code 1981, § 4-11-9.2, enacted by Ga. L. 2000, p. 754, § 5.)

Editor's notes. — Ga. L. 2000, p. 754, § 1, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Animal Protection Act of 2000.'"

4-11-9.3. Caring for an impounded animal.

(a) It shall be the duty of any person impounding an animal under Code Section 4-11-9.2 to make reasonable and proper arrangements to provide the impounded animal with humane care and adequate and necessary veterinary services. Such arrangements may include, but shall not be limited to, providing shelter and care for the animal at any state, federal, county, municipal, or governmental facility or shelter;

contracting with a private individual, partnership, corporation, association, or other entity to provide humane care and adequate and necessary veterinary services for a reasonable fee; or allowing a private individual, partnership, corporation, association, or other entity to provide humane care and adequate and necessary veterinary services as a volunteer and at no cost.

(b) Any person impounding an animal under this article or providing care for an impounded animal shall have a lien on such animal for the reasonable costs of caring for such animal. Such lien may be foreclosed in any court that is competent to hear civil cases, including, but not limited to, magistrate courts. Liens shall be foreclosed in magistrate courts only when the amount of the lien does not exceed the jurisdictional limits established by law for such courts.

(c) Any person impounding an animal under this article shall be authorized to return such animal to its owner, upon payment by the owner of all costs of impoundment and care and upon the entry of a consent order, unless such owner, in a prior administrative or legal action in this state or any other state, was found to have failed to provide humane care to an animal, committed cruelty to animals, or committed an act prohibited under Code Section 16-12-37 in violation of the laws of this state or of the United States or any of the several states. Such consent order shall provide conditions relating to the care and treatment of such animal, including, but not limited to, the following, that:

(1) Such animal shall be given humane care and adequate and necessary veterinary services;

(2) Such animal shall not be subjected to cruelty; and

(3) The owner shall comply with this article.

(d) The provisions of subsection (c) of this Code section shall not apply to an animal that was an object or instrumentality of a crime nor shall any such animal be returned to the owner without the approval of the prosecuting attorney. An agency having custody of an animal that was seized as an object or instrumentality of a crime may, with the consent of the prosecuting attorney, apply to the court having jurisdiction over the offense for an order authorizing such agency to dispose of the animal prior to trial of the criminal case as provided by law. (Code 1981, § 4-11-9.3, enacted by Ga. L. 2000, p. 754, § 5; Ga. L. 2008, p. 114, § 2-2/HB 301.)

Editor's notes. — Ga. L. 2000, p. 754, § 1, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Animal Protection Act of 2000.'"

4-11-9.4. Notification of owner; custody of animal.

(a) It shall be the duty of any person impounding an animal under this article to notify the owner of such animal immediately upon impoundment. Such notice shall state the name and business address of the person impounding the animal, the name and address of the state or local government agency having custody of the animal, a description of the animal, the reason why the animal was impounded, and a statement of the time limits for the owner to respond and request a hearing as provided in Code Section 4-11-9.5. The notice shall be provided by personal service or by registered mail, certified mail, or statutory overnight delivery sent to the last known address of the owner. Service of the notice which complies with subsection (b) of Code Section 9-11-5 shall in all cases be sufficient. If the owner of such animal is unknown or cannot be found, service of the notice on the owner shall be made by posting the notice in a conspicuous place at the location where the animal was impounded and by publishing a notice once in a newspaper of general circulation in the county where the animal was impounded.

(b) An animal impounded pursuant to this article is deemed to be in the custody of the state or local government agency responsible for enforcement of this article within said county or municipality. (Code 1981, § 4-11-9.4, enacted by Ga. L. 2000, p. 754, § 5; Ga. L. 2001, p. 1212, § 1.)

Editor's notes. — Ga. L. 2000, p. 754, § 1, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Animal Protection Act of 2000.'"

Ga. L. 2001, p. 1212, § 7, not codified by the General Assembly, provides that this Act is applicable with respect to notices delivered on or after July 1, 2001.

4-11-9.5. Failure to respond; right to hearing; care; crime exception.

(a) If the owner of an animal impounded pursuant to this article fails to respond in writing within five business days of the date the notice of impoundment was served, or, if the owner is unknown or could not be found within 30 days of publication of the notice of impoundment, the impounded animal may be disposed of pursuant to Code Section 4-11-9.6.

(b)(1) If the owner of an animal impounded pursuant to this article refuses to enter into a consent agreement with the government agency having custody of the animal that such animal will be given humane care and adequate and necessary veterinary care, the owner may request, in writing, a hearing within five business days of the date the notice of impoundment was served on such owner, or, if the

owner is unknown or could not be found, within 30 days of the date of publication of the notice of impoundment. Such request for hearing shall be served upon the government agency having custody of the animal. If no hearing is requested within the time limits specified in this paragraph and the failure to request such hearing is due in whole or in part to the reasonably avoidable fault of the owner, the right to a hearing shall have been waived.

(2) Within 30 days after receiving a written request for a hearing, the government agency having custody of the animal shall hold a hearing as is provided in Chapter 13 of Title 50, the "Georgia Administrative Procedure Act." If the animal is in the custody of an agency of local government which has, by local law or ordinance, established a procedure for hearing such matters, the body designated in such local law or ordinance shall conduct the hearing required by this Code section. If the local government does not have a hearing procedure, the government agency having custody of the animal may refer the matter to the Office of State Administrative Hearings. If the animal is in the custody of the Department of Agriculture, the Commissioner or his or her designee shall conduct the hearing. The hearing shall be public and all testimony shall be received under oath. A record of the proceedings at such hearing shall be made and maintained by the hearing officer as provided in Code Section 50-13-13.

(3) The scope of the hearing shall be limited to whether the impounding of the animal was authorized by subsection (c) of Code Section 4-11-9.2.

(4) The hearing officer shall, within five business days after such hearing, forward a decision to the person who impounded the animal and the government agency having custody of the animal.

(5) If the hearing officer finds that the animal was improperly impounded, the animal shall be returned to the owner and the cost incurred in providing reasonable care and treatment for the animal from the date of impoundment to the date of the order shall be paid by the impounding agency.

(6) If the hearing officer finds that the animal was lawfully impounded, the hearing officer may:

(A) Recommend that the government agency having custody of the animal dispose of the animal as provided in Code Section 4-11-9.6; or

(B) Unless, in a prior administrative or legal action in this state or any other state, the owner has been found to have failed to provide humane care to an animal, committed cruelty to animals,

or committed an act prohibited under Code Section 16-12-37 in violation of the laws of this state or of the United States or any of the several states, recommend conditions under which the animal may, upon payment by the owner of all costs of impoundment and care, be returned to the owner. Such conditions shall be reduced to writing and served upon the owner and the government agency having custody of the animal. Such conditions may include, but are not limited to, the following, that:

(i) Such animal shall be given humane care and adequate and necessary veterinary services;

(ii) Such animal shall not be subjected to mistreatment; and

(iii) The owner shall comply with this article.

(c) The provisions of this Code section shall not apply to an animal that was an object or instrumentality of a crime nor shall any such animal be returned to the owner or disposed of without the approval of the prosecuting attorney. (Code 1981, § 4-11-9.5, enacted by Ga. L. 2000, p. 754, § 5; Ga. L. 2008, p. 114, § 2-3/HB 301.)

Editor's notes. — Ga. L. 2000, p. 754, § 1, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Animal Protection Act of 2000.'"

4-11-9.6. Disposal of impounded animal.

(a) The government agency having custody of an animal impounded pursuant to this article which is not returned to the owner as provided in Code Sections 4-11-9.3 and 4-11-9.5 may dispose of the animal through sale by any commercially feasible means, at a public auction or by sealed bids, or, if in the opinion of a licensed accredited veterinarian or a veterinarian employed by a state or federal government and approved by the Commissioner such animal has a temperament or condition such that euthanasia is the only reasonable course of action, by humanely disposing of the animal.

(b) Any proceeds from the sale of such animal shall be used first to pay the costs associated with the impoundment, including, but not limited to, removal of the animal from the premises, shelter and care of the animal, notice, hearing, and disposition of the animal. Any funds remaining shall:

(1) If the owner is unknown or cannot be found, be paid into the state treasury if the animal was impounded by the Commissioner or his or her designated agent or into the treasury of the local government if the animal was impounded by the sheriff, a deputy sheriff, another law enforcement officer, or an animal control officer; or

(2) If the owner is known, be paid to the owner.

(c) The government agency responsible for conducting the sale shall keep a record of all sales, disbursements, and distributions made under this article. (Code 1981, § 4-11-9.6, enacted by Ga. L. 2000, p. 754, § 5.)

Editor's notes. — Ga. L. 2000, p. 754, § 1, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Animal Protection Act of 2000.'"

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Misrepresentation in Sale of Animal, 35 POF2d 607.

4-11-9.7. Notice and reporting required for certain animal diseases.

(a) The Commissioner is authorized to declare certain animal diseases and syndromes to be diseases requiring notice and to require the reporting thereof to the department in a manner and at such times as may be prescribed by the Commissioner. The department shall require that such data be supplied as is deemed necessary and appropriate for the prevention and control of certain diseases and syndromes as are determined by the Commissioner. All such reports and data shall be deemed confidential and shall not be open to inspection by the public; provided, however, that the Commissioner may release such reports and data in statistical form, for valid research purposes, and for other purposes as deemed appropriate by the Commissioner.

(b) Any person, including, but not limited to, any veterinarian or veterinary diagnostic laboratory and practice personnel and any person associated with any pet dealer, kennel, animal shelter, or stable, submitting reports or data in good faith to the department in compliance with this Code section shall not be liable for any civil damages therefor. (Code 1981, § 4-11-9.7, enacted by Ga. L. 2002, p. 1386, § 4.)

Law reviews. — For note on the 2002 enactment of this Code section, see 19 Ga. St. U.L. Rev. 1 (2002).

4-11-10. Unlawful acts by licensed persons.

It shall be unlawful for any person licensed under this article or any person employed by a person licensed under this article or under such person's supervision or control to:

(1) Commit a violation of Code Section 16-12-4, relating to cruelty to animals;

(2) Fail to keep the pet dealership premises, animal shelter, kennel, or stable in a good state of repair, in a clean and sanitary condition, adequately ventilated, or disinfected when needed;

(3) Fail to provide humane care for any animal; or

(4) Fail to take reasonable care to release for sale, trade, or adoption only those animals that appear to be free of disease, injuries, or abnormalities. (Code 1981, § 4-11-10, enacted by Ga. L. 1986, p. 628, § 1; Ga. L. 1990, p. 328, § 1; Ga. L. 2000, p. 754, § 6.)

Editor's notes. — Ga. L. 2000, p. 754, § 1, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Animal Protection Act of 2000.'"

4-11-11. Shipment of animals into state without certificates of health.

It shall be unlawful for any person to ship any animal, other than equines, livestock, birds, cold-blooded animals, and rodents, into this state for the purpose of resale unless such animal is accompanied by a U.S. interstate or international certificate of health. (Code 1981, § 4-11-11, enacted by Ga. L. 1986, p. 628, § 1.)

4-11-12. Cooperation with federal government.

The Commissioner may cooperate with the secretary of agriculture in carrying out Public Law 89-544, commonly known as the Animal Welfare Act, as amended by Public Laws 91-579 and 94-279, and the rules and regulations issued by the secretary of agriculture under that act. The Commissioner may promulgate regulations to facilitate cooperation and avoid any unnecessary duplication or conflict of activities by the department and the secretary of agriculture in regulating the activities or areas covered by this article and Public Law 89-544. The regulations may be in addition to other regulations authorized by this article. (Code 1981, § 4-11-12, enacted by Ga. L. 1986, p. 628, § 1; Ga. L. 1990, p. 328, § 1; Ga. L. 2013, p. 141, § 4/HB 79.)

The 2013 amendment, effective April 24, 2013, part of an Act to revise, modernize, and correct the Code, substituted "secretary of agriculture" for "United States Secretary of Agriculture" at the beginning of the first sentence and revised language in the first and second sentences.

U.S. Code. — The Animal Welfare Act, referred to in this Code section, is codified as 7 U.S.C. §§ 2131-2155.

4-11-13. Animals raised, kept, or maintained for human consumption.

The provisions of this article shall not apply to any person who raises, keeps, or maintains animals solely for the purposes of human consump-

tion. (Code 1981, § 4-11-13, enacted by Ga. L. 1986, p. 628, § 1; Ga. L. 1990, p. 328, § 1.)

4-11-14. Rules and regulations.

The Commissioner is authorized to promulgate and adopt rules and regulations necessary or appropriate to carry out this article. (Code 1981, § 4-11-14, enacted by Ga. L. 1986, p. 628, § 1; Ga. L. 1990, p. 328, § 1.)

4-11-15. Injunctions and restraining orders.

In addition to the remedies provided in this article or elsewhere in the laws of this state and notwithstanding the existence of an adequate remedy at law, the Commissioner or, where authorized by the local governing authority, the city or county attorney is authorized to apply to the superior court for an injunction or restraining order. The court shall for good cause shown grant a temporary or permanent injunction or an ex parte or restraining order, restraining or enjoining any person, partnership, firm, corporation, or other entity from violating and continuing to violate this article, any rules and regulations promulgated under this article, Code Section 16-12-4, or Code Section 16-12-37. Such injunction or restraining order shall be issued without bond and may be granted notwithstanding the fact that the violation constitutes a criminal act and notwithstanding the pendency of any criminal prosecution for the same violation. (Code 1981, § 4-11-15, enacted by Ga. L. 1986, p. 628, § 1; Ga. L. 1990, p. 328, § 1; Ga. L. 2000, p. 754, § 7.)

Editor's notes. — Ga. L. 2000, p. 754, § 1, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Animal Protection Act of 2000.'"

4-11-15.1. Abandonment of domesticated animal.

Notwithstanding the provisions of Code Section 4-11-13, it shall be unlawful for any person knowingly and intentionally to abandon any domesticated animal upon any public or private property or public right of way. This Code section shall not be construed as amending or otherwise affecting the provisions of Chapter 3 of this title, relating to livestock running at large or straying. (Code 1981, § 4-11-15.1, enacted by Ga. L. 2000, p. 754, § 8.)

Editor's notes. — Ga. L. 2000, p. 754, § 1, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Animal Protection Act of 2000.'"

Cross references. — Cruelty to animals, § 16-12-4.

4-11-16. Penalties.

(a) Except as otherwise provided in Code Section 16-12-4 or 16-12-37, any person violating any of the provisions of this article shall be guilty of a misdemeanor and shall be punished as provided in Code Section 17-10-3; provided, however, that if such offense is committed by a corporation, such corporation shall be punished by a fine not to exceed $1,000.00 for each such violation, community service of not less than 200 hours nor more than 500 hours, or both.

(b) Each violation of this article shall constitute a separate offense. (Code 1981, § 4-11-16, enacted by Ga. L. 1986, p. 628, § 1; Ga. L. 1990, p. 328, § 1; Ga. L. 2000, p. 754, § 9.)

Editor's notes. — Ga. L. 2000, p. 754, § 1, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Animal Protection Act of 2000.'"

RESEARCH REFERENCES

ALR. — Challenges to pre- and post-conviction forfeitures and to postconviction restitution under animal cruelty statutes, 70 ALR6th 329.

4-11-17. Filing a report regarding animal cruelty; immunity.

(a) Notwithstanding Code Section 24-12-31 or any other provision of law to the contrary, any licensed veterinarian or veterinary technician having reasonable cause to believe that an animal has been subjected to animal cruelty in violation of Code Section 16-12-4 or an act prohibited under Code Section 16-12-37 may make or cause to be made a report of such violation to the Commissioner, his or her designee, an animal control officer, a law enforcement agency, or a prosecuting attorney and may appear and testify in any judicial or administrative proceeding concerning the care of an animal.

(b) Any person participating in the making of a report pursuant to this Code section or participating in any administrative or judicial proceeding pursuant to this article or Title 16 shall, in so doing, be immune from any civil or criminal liability that might otherwise be incurred or imposed, provided such participation pursuant to this Code section or any other law is made in good faith. (Code 1981, § 4-11-17, enacted by Ga. L. 2000, p. 754, § 10; Ga. L. 2008, p. 114, § 2-4/HB 301; Ga. L. 2011, p. 99, § 3/HB 24.)

The 2011 amendment, effective January 1, 2013, substituted "Code Section 24-12-31" for "Code Section 24-9-29" near the beginning of subsection (a). See editor's note for applicability.

Editor's notes. — Ga. L. 2000, p. 754, § 1, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Animal Protection Act of 2000.'"

Ga. L. 2011, p. 99, § 101/HB 24, not codified by the General Assembly, provides that this Act shall apply to any motion made or hearing or trial commenced on or after January 1, 2013.

Law reviews. — For article, "Evidence," see 27 Ga. St. U.L. Rev. 1 (2011). For article on the 2011 amendment of this Code section, see 28 Ga. St. U.L. Rev. 1 (2011).

4-11-18. Article cumulative; does not prohibit enactment and enforcement of local ordinances by municipal or county governing authority.

This article shall be cumulative and shall not prohibit the enactment and enforcement of local ordinances by a municipal or county governing authority on this subject which are not in conflict with this article; provided, however, that a municipal or county governing authority shall be required to provide timely written notice to the department of any enforcement action taken pursuant to such an ordinance against an operator licensed under this article who is alleged to be in violation of such local ordinance. The department shall be notified of the initiation of any such local enforcement action and of the final conclusions or ultimate outcome of any such action. (Code 1981, § 4-11-18, enacted by Ga. L. 2002, p. 1419, § 1.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2002, Code Section 4-11-17, as enacted by Ga. L. 2002, p. 1419, § 1, was redesignated as Code Section 4-11-18.

ARTICLE 2

GEORGIA FARM ANIMAL, CROP, AND RESEARCH FACILITIES PROTECTION ACT

Law reviews. — For note on 1990 enactment of this article, see 7 Ga. St. U.L. Rev. 197 (1990).

4-11-30. Short title.

This article shall be known and may be cited as the "Georgia Farm Animal, Crop, and Research Facilities Protection Act." (Code 1981, § 4-11-30, enacted by Ga. L. 1990, p. 328, § 1; Ga. L. 2001, p. 888, § 1.)

4-11-31. Definitions.

As used in this article, the term:

(1) "Actor" means a person accused of any of the offenses defined in Code Section 4-11-32.

(2) "Animal" means any warm or cold-blooded animal or insect which is being used in food or fiber production, agriculture, research,

testing, or education, including, but not limited to, hogs, equines, mules, cattle, sheep, ratites, goats, dogs, rabbits, poultry, fish, and bees. The term "animal" shall not include any animal held primarily as a pet.

(3) "Animal facility" includes any vehicle, building, structure, pasture, paddock, pond, impoundment, or premises where an animal is kept, handled, housed, exhibited, bred, or offered for sale and any office, building, or structure where records or documents relating to an animal or to animal research, testing, production, or education are maintained.

(4) "Commissioner" means the Commissioner of Agriculture.

(5) "Consent" means assent in fact, whether express or implied, by the owner or by a person legally authorized to act for the owner which is not:

(A) Induced by force, threat, false pretenses, or fraud;

(B) Given by a person the actor knows, or should have known, is not legally authorized to act for the owner;

(C) Given by a person who by reason of youth, mental disease or defect, or intoxication is known, or should have been known, by the actor to be unable to make reasonable decisions; or

(D) Given solely to detect the commission of an offense.

(5.1) "Crop" shall mean any crops as defined in Code Section 1-3-3.

(5.2) "Crop facility" means any field, building, greenhouse, structure, or premises where crops are grown or offered for sale and any office, building, or structure where records, documents, or electronic data relating to crops or crop research, testing, production, or education are maintained.

(6) "Deprive" means unlawfully to withhold from the owner, interfere with the possession of, free, or dispose of an animal or other property.

(7) "Owner" means a person who has title to the property, lawful possession of the property, or a greater right to possession of the property than the actor.

(8) "Person" means any individual, corporation, association, nonprofit corporation, joint-stock company, firm, trust, partnership, two or more persons having a joint or common interest, or other legal entity.

(9) "Possession" means actual care, custody, control, or management.

(10) "Property" means any real or personal property and shall include any document, record, research data, paper, or computer storage medium.

(11) "State" means the State of Georgia. (Code 1981, § 4-11-31, enacted by Ga. L. 1990, p. 328, § 1; Ga. L. 1995, p. 244, § 9; Ga. L. 2001, p. 888, § 2.)

4-11-32. Prohibited acts; applicability.

(a)(1) A person commits an offense if, without the consent of the owner, the person acquires or otherwise exercises control over an animal facility, an animal from an animal facility, or other property from an animal facility with the intent to deprive the owner of such facility, animal, or property and to disrupt or damage the enterprise conducted at the animal facility.

(2) A person commits an offense if, without the consent of the owner, the person acquires or otherwise exercises control over a crop facility, a crop from a crop facility, or other property from a crop facility with the intent to deprive the owner of such facility, crop, or property and to disrupt or damage the enterprise conducted at the crop facility.

(b)(1) A person commits an offense if, without the consent of the owner, the person damages or destroys an animal facility or damages, frees, or destroys any animal or property in or on an animal facility with the intent to disrupt or damage the enterprise conducted at the animal facility and the damage or loss thereto exceeds $500.00.

(2) A person commits an offense if, without the consent of the owner, the person damages or destroys a crop facility or damages or destroys any crop or property in or on a crop facility with the intent to disrupt or damage the enterprise conducted at the crop facility and the damage or loss thereto exceeds $500.00.

(c)(1) A person commits an offense if, without the consent of the owner, the person damages or destroys an animal facility or damages, frees, or destroys any animal or property in or on an animal facility and the damage or loss thereto is $500.00 or less or enters or remains on an animal facility with the intent to disrupt or damage the enterprise conducted at the animal facility, and the person:

(A) Had notice that the entry was forbidden;

(B) Knew or should have known that the animal facility was or had closed to the public; or

(C) Received notice to depart but failed to do so.

(2) For purposes of this subsection "notice" means:

(A) Oral or written communication by the owner or someone with actual or apparent authority to act for the owner;

(B) The presence of fencing or other type of enclosure or barrier designed to exclude intruders or to contain animals; or

(C) A sign or signs posted on the property or at the entrance to the building, reasonably likely to come to the attention of intruders, indicating that entry is forbidden.

(c.1)(1) A person commits an offense if, without the consent of the owner, the person damages or destroys a crop facility or damages or destroys any crop or property in or on a crop facility and the damage or loss thereto is $500.00 or less or enters or remains on a crop facility with the intent to disrupt or damage the enterprise conducted at the crop facility, and the person:

(A) Had notice that the entry was forbidden;

(B) Knew or should have known that the crop facility was or had closed to the public; or

(C) Received notice to depart but failed to do so.

(2) For purposes of this subsection "notice" means:

(A) Oral or written communication by the owner or someone with actual or apparent authority to act for the owner; or

(B) A sign or signs posted on the property or at the entrance to the building, reasonably likely to come to the attention of intruders, indicating that entry is forbidden.

(d) This Code section shall not apply to, affect, or otherwise prohibit actions taken by the Department of Agriculture, any other federal, state, or local department or agency, or any official, employee, or agent thereof while in the exercise or performance of any power or duty imposed by law or by rule and regulation. (Code 1981, § 4-11-32, enacted by Ga. L. 1990, p. 328, § 1; Ga. L. 2001, p. 888, § 3.)

OPINIONS OF THE ATTORNEY GENERAL

Fingerprinting of violators. — Violation of the provisions of subsection (c) is designated as an offense for which those charged with a violation are to be fingerprinted in order to promote consistency in the treatment of offenders. 1990 Op. Att'y Gen. No. 90-22.

4-11-33. Penalty for violation.

(a) A person convicted of any of the offenses defined in subsections (a) and (b) of Code Section 4-11-32 shall be guilty of a felony and, upon

conviction, shall be punished by a fine not to exceed $10,000.00 or by imprisonment for a term not to exceed three years, or both.

(b) Any person violating subsection (c) or (c.1) of Code Section 4-11-32 shall be guilty of a misdemeanor. (Code 1981, § 4-11-33, enacted by Ga. L. 1990, p. 328, § 1; Ga. L. 2001, p. 888, § 4.)

4-11-34. Powers and duties of Commissioner.

For purposes of enforcing the provisions of this article, the Commissioner:

(1) May investigate any offense under this article;

(2) May seek the assistance of any law enforcement agency of the United States, the state, or any local government in the conduct of such investigations; and

(3) Shall coordinate such investigation, to the maximum extent practicable, with the investigations of any law enforcement agency of the United States, the state, or any local government. (Code 1981, § 4-11-34, enacted by Ga. L. 1990, p. 328, § 1.)

4-11-35. Attorneys' fees; injunctions; other rights arising out of or relating to violation of article.

(a) Any person who has been damaged by reason of a violation of this article may recover all actual and consequential damages, punitive damages, and court costs, including reasonable attorneys' fees, from the person causing such damage.

(b) In addition to the remedies provided in this article or elsewhere in the laws of this state and notwithstanding the existence of an adequate remedy at law, any person who has been damaged by reason of a violation of this article is authorized to apply to the superior courts for an injunction or restraining order. Such courts shall have jurisdiction and for good cause shown shall grant a temporary or permanent injunction or a temporary restraining order restraining or enjoining any person from violating or continuing to violate this article. Such injunction or restraining order shall be issued without bond and may be granted notwithstanding the fact that the violation constitutes a criminal act and notwithstanding the pendency of any criminal prosecution for the same violation.

(c) Nothing in this article shall be construed to limit the exercise of any other rights arising out of or relating to a violation of this article. (Code 1981, § 4-11-35, enacted by Ga. L. 1990, p. 328, § 1.)

CHAPTER 12

INJURIES FROM EQUINE OR LLAMA ACTIVITIES

Sec.
4-12-1. Legislative findings.
4-12-2. Definitions.
4-12-3. Immunity from liability for injury or death; exceptions.
4-12-4. Warning required; effect of failure to comply with notice requirement.
4-12-5. Warning signs or notices posted by llama activity sponsors or llama professionals.

4-12-1. Legislative findings.

The General Assembly recognizes that persons who participate in equine activities or llama activities may incur injuries as a result of the risks involved in such activities. The General Assembly also finds that the state and its citizens derive numerous economic and personal benefits from such activities. The General Assembly finds, determines, and declares that this chapter is necessary for the immediate preservation of the public peace, health, and safety. It is, therefore, the intent of the General Assembly to encourage equine activities and llama activities by limiting the civil liability of those involved in such activities. (Code 1981, § 4-12-1, enacted by Ga. L. 1991, p. 680, § 1; Ga. L. 1995, p. 335, § 1.)

Law reviews. — For annual survey of tort law, see 57 Mercer L. Rev. 363 (2005).

JUDICIAL DECISIONS

Activity within scope of act. — Rider's injuries resulted from the "inherent risks of equine activities," as provided in O.C.G.A. § 4-12-2(7) and, thus, were in the scope of the Injuries from Equine or Llama Activities Act as the evidence showed that the rider was injured when the rider was tacking up and another horse became startled and bucked and thrashed about, causing the rail to which the horses were tied to separate from the posts and fall on the rider's foot. Mays v. Valley View Ranch, Inc., 317 Ga. App. 143, 730 S.E.2d 592 (2012), cert. denied, No. S12C1980, 2012 Ga. LEXIS 980 (Ga. 2012).

Cited in Muller v. English, 221 Ga. App. 672, 472 S.E.2d 448 (1996); Burns v. Leap, 285 Ga. App. 307, 645 S.E.2d 751 (2007).

4-12-2. Definitions.

As used in this chapter, the term:

(1) "Engages in a llama activity" means riding, training, assisting in providing medical treatment of, driving, or being a passenger upon a llama, whether mounted or unmounted, or any person assisting a participant or show management. The term "engages in a llama activity" does not include being a spectator at a llama activity, except

in cases where the spectator places himself or herself in an unauthorized area and in immediate proximity to the llama activity.

(2) "Engages in an equine activity" means riding, training, assisting in providing medical treatment of, driving, or being a passenger upon an equine, whether mounted or unmounted, or any person assisting a participant or show management. The term "engages in an equine activity" does not include being a spectator at an equine activity, except in cases where the spectator places himself or herself in an unauthorized area and in immediate proximity to the equine activity.

(3) "Equine" means a horse, pony, mule, donkey, or hinny.

(4) "Equine activity" means:

(A) Equine shows, fairs, competitions, performances, or parades that involve any or all breeds of equines and any of the equine disciplines, including, but not limited to, dressage, hunter and jumper horse shows, grand prix jumping, three-day events, combined training, rodeos, driving, pulling, cutting, polo, steeplechasing, English and western performance riding, endurance trail riding and western games, and hunting;

(B) Equine training or teaching activities, or both;

(C) Boarding equines;

(D) Riding, inspecting, or evaluating an equine belonging to another, whether or not the owner has received some monetary consideration or other thing of value for the use of the equine or is permitting a prospective purchaser of the equine to ride, inspect, or evaluate the equine;

(E) Rides, trips, hunts, or other equine activities of any type however informal or impromptu that are sponsored by an equine activity sponsor;

(F) Placing or replacing horseshoes on an equine; and

(G) Examining or administering medical treatment to an equine by a veterinarian.

(5) "Equine activity sponsor" means an individual, group, club, partnership, or corporation, whether or not the sponsor is operating for profit or nonprofit, which sponsors, organizes, or provides the facilities for an equine activity, including, but not limited to, pony clubs; 4-H clubs; hunt clubs; riding clubs; school and college sponsored classes, programs, and activities; therapeutic riding programs; and operators, instructors, and promoters of equine facilities, including, but not limited to, stables, clubhouses, ponyride strings, fairs, and arenas at which the activity is held.

(6) "Equine professional" means a person engaged for compensation in:

(A) Instructing a participant or renting to a participant an equine for the purpose of riding, driving, or being a passenger upon the equine;

(B) Renting equipment or tack to a participant; or

(C) Examining or administering medical treatment to an equine as a veterinarian.

(7) "Inherent risks of equine activities" or "inherent risks of llama activities" means those dangers or conditions which are an integral part of equine activities or llama activities, as the case may be, including, but not limited to:

(A) The propensity of the animal to behave in ways that may result in injury, harm, or death to persons on or around them;

(B) The unpredictability of the animal's reaction to such things as sounds, sudden movement, and unfamiliar objects, persons, or other animals;

(C) Certain hazards such as surface and subsurface conditions;

(D) Collisions with other animals or objects; and

(E) The potential of a participant to act in a negligent manner that may contribute to injury to the participant or others, such as failing to maintain control over the animal or not acting within his or her ability.

(8) "Llama" means a South American camelid which is an animal of the genus lama, commonly referred to as a "one llama," including llamas, alpacas, guanacos, and vicunas.

(9) "Llama activity" means:

(A) Llama shows, fairs, competitions, performances, packing events, or parades that involve any or all breeds of llamas;

(B) Using llamas to pull carts or to carry packs or other items;

(C) Using llamas to pull travois-type carriers during rescue or emergency situations;

(D) Llama training or teaching activities or both;

(E) Taking llamas on public relations trips or visits to schools or nursing homes;

(F) Participating in commercial packing trips in which participants pay a llama professional to be a guide on a hike leading llamas;

(G) Boarding llamas;

(H) Riding, inspecting, or evaluating a llama belonging to another, whether or not the owner has received some monetary consideration or other thing of value for the use of the llama or is permitting a prospective purchaser of the llama to ride, inspect, or evaluate the llama;

(I) Using llamas in wool production;

(J) Rides, trips, or other llama activities of any type however informal or impromptu that are sponsored by a llama activity sponsor; and

(K) Trimming the nails of a llama.

(10) "Llama activity sponsor" means an individual, group, club, partnership, or corporation, whether or not the sponsor is operating for profit or nonprofit, which sponsors, organizes, or provides the facilities for a llama activity, including but not limited to llama clubs; 4-H clubs; hunt clubs; riding clubs; school and college-sponsored classes, programs, and activities; therapeutic riding programs; and operators, instructors, and promoters of llama facilities, including but not limited to stables, clubhouses, fairs, and arenas at which the activity is held.

(11) "Llama professional" means a person engaged for compensation:

(A) In instructing a participant or renting to a participant a llama for the purpose of riding, driving, or being a passenger upon the llama; or

(B) In renting equipment or tack to a participant.

(12) "Participant" means any person, whether amateur or professional, who engages in an equine activity or who engages in a llama activity, whether or not a fee is paid to participate in such activity. (Code 1981, § 4-12-2, enacted by Ga. L. 1991, p. 680, § 1; Ga. L. 1995, p. 335, § 2; Ga. L. 2013, p. 141, § 4/HB 79.)

The 2013 amendment, effective April 24, 2013, part of an Act to revise, modernize, and correct the Code, revised punctuation in paragraph (10).

JUDICIAL DECISIONS

No dangerous latent condition. — Rider's injuries, sustained when a portion of a hitching rail to which a horse was tied became detached and fell on the rider after the horse became spooked, resulted from the "inherent risks of equine activities," as provided in O.C.G.A. § 4-12-2(7), and thus were in the scope of the Injuries From Equine or Llama Activities Act. While the rider's mother attempted to show that the hitching rail was defectively constructed and thus amounted to a dan-

gerous latent condition, the mother failed to provide such proof; the ranch's evidence showed that neither the owner or the maintenance worker knew anything about the hitching rail at issue, that the hitching rails were inspected prior to the start of each summer camp, and that the rail had not shown any indication of instability. Mays v. Valley View Ranch, Inc., 317 Ga. App. 143, 730 S.E.2d 592 (2012), cert. denied, No. S12C1980, 2012 Ga. LEXIS 980 (Ga. 2012).

Cited in Muller v. English, 221 Ga. App. 672, 472 S.E.2d 448 (1996); Young v. Brandt, 225 Ga. App. 889, 485 S.E.2d 519 (1997).

4-12-3. Immunity from liability for injury or death; exceptions.

(a) Except as provided in subsection (b) of this Code section, an equine activity sponsor, an equine professional, a llama activity sponsor, a llama professional, or any other person, which shall include a corporation or partnership, shall not be liable for an injury to or the death of a participant resulting from the inherent risks of equine activities or from the inherent risks of llama activities and, except as provided in subsection (b) of this Code section, no participant or participant's representative shall make any claim against, maintain an action against, or recover from an equine activity sponsor, an equine professional, a llama activity sponsor, a llama professional, or any other person for injury, loss, damage, or death of the participant resulting from any of the inherent risks of equine activities or resulting from any of the inherent risks of llama activities.

(b) Nothing in subsection (a) of this Code section shall prevent or limit the liability of an equine activity sponsor, an equine professional, a llama activity sponsor, a llama professional, or any other person if the equine activity sponsor, equine professional, llama activity sponsor, llama professional, or person:

(1)(A) Provided the equipment or tack, and knew or should have known that the equipment or tack was faulty, and such equipment or tack was faulty to the extent that it did cause the injury.

(B) Provided the animal and failed to make reasonable and prudent efforts to determine the ability of the participant to engage safely in the equine activity or llama activity and to safely manage the particular animal based on the participant's representations of his or her ability;

(2) Owns, leases, rents, or otherwise is in lawful possession and control of the land or facilities upon which the participant sustained injuries because of a dangerous latent condition which was known or should have been known to the equine activity sponsor, equine professional, llama activity sponsor, llama professional, or person and for which warning signs have not been conspicuously posted;

(3) Commits an act or omission that constitutes willful or wanton disregard for the safety of the participant, and that act or omission caused the injury; or

(4) Intentionally injures the participant.

(c) Nothing in subsection (a) of this Code section shall prevent or limit the liability of an equine activity sponsor, equine professional, llama activity sponsor, or llama professional under liability provisions as set forth in the products liability laws. (Code 1981, § 4-12-3, enacted by Ga. L. 1991, p. 680, § 1; Ga. L. 1995, p. 335, § 3.)

Law reviews. — For annual survey of tort law, see 57 Mercer L. Rev. 363 (2005).

JUDICIAL DECISIONS

Exception to immunity pertaining to possession and control of the land and facilities applies only to conditions for which warning signs have not been posted. Muller v. English, 221 Ga. App. 672, 472 S.E.2d 448 (1996).

No defective construction. — Rider's injuries, sustained when a portion of a hitching rail to which a horse was tied became detached and fell on the rider after the horse became spooked, resulted from the "inherent risks of equine activities," as provided in O.C.G.A. § 4-12-2(7) and, thus, were in the scope of the Injuries from Equine or Llama Activities Act. While the rider's mother attempted to show that the hitching rail was defectively constructed, there was insufficient evidence to show that the hitching rail was defectively constructed based on industry practices. Mays v. Valley View Ranch, Inc., 317 Ga. App. 143, 730 S.E.2d 592 (2012), cert. denied, No. S12C1980, 2012 Ga. LEXIS 980 (Ga. 2012).

Exception to immunity pertaining to willful or wanton disregard for safety did not apply when plaintiff was kicked by the sponsor's horse during a fox hunt since it was shown that the horse was not so unusually prone to kick that continuing to ride the horse was evidence of willful or wanton disregard for the safety of others. Muller v. English, 221 Ga. App. 672, 472 S.E.2d 448 (1996).

Failure to adhere to a traditional fox hunting custom such as tying a red ribbon in the tail of an inexperienced or irritable horse did not rise to the level of willful or wanton disregard. Muller v. English, 221 Ga. App. 672, 472 S.E.2d 448 (1996).

Exception to immunity for cases in which the sponsor provided the animal did not apply when the plaintiff was riding the plaintiff's own mount. Muller v. English, 221 Ga. App. 672, 472 S.E.2d 448 (1996).

Waiver of review of immunity claim. — In a rider's personal injury action against the owners of a horse, the owners waived review of the owner's claim that O.C.G.A. C. 12, T. 4 provided the owners' immunity from suit as a matter of law, when, in the owners' motion for judgment notwithstanding the verdict, the owners' acquiesced in a trial court ruling that the question of whether warning signs were posted, an element of a claim of immunity, was for the jury. Young v. Brandt, 225 Ga. App. 889, 485 S.E.2d 519 (1997).

Immunity as "any other person." — In an action arising from an incident in which a horse reared and fell back on the plaintiff after plaintiff mounted the horse, the defendants were entitled to immunity as "any other person" where the plaintiff neither alleged nor tendered evidence showing the defendants, as equine activity sponsors or as equine professionals, had to have warning signs to trigger immunity. Wiederkehr v. Brent, 248 Ga. App. 645, 548 S.E.2d 402 (2001).

4-12-4. Warning required; effect of failure to comply with notice requirement.

(a) Every equine professional and every equine activity sponsor shall post and maintain signs which contain the warning notice specified in subsection (b) of this Code section. Such signs shall be placed in a clearly visible location on or near stables, corrals, or arenas where the equine professional or the equine activity sponsor conducts equine activities. The warning notice specified in subsection (b) of this Code section shall appear on the sign in black letters, with each letter to be a minimum of one inch in height. Every written contract entered into by an equine professional or by an equine activity sponsor for the providing of professional services, instruction, or the rental of equipment or tack or an equine to a participant, whether or not the contract involves equine activities on or off the location or site of the equine professional's or the equine activity sponsor's business, shall contain in clearly readable print the warning notice specified in subsection (b) of this Code section.

(b) The signs and contracts described in subsection (a) of this Code section shall contain the following warning notice:

WARNING

Under Georgia law, an equine activity sponsor or equine professional is not liable for an injury to or the death of a participant in equine activities resulting from the inherent risks of equine activities, pursuant to Chapter 12 of Title 4 of the Official Code of Georgia Annotated.

(c) Failure to comply with the requirements concerning warning signs and notices provided in this Code section shall prevent an equine activity sponsor or equine professional from invoking the privileges of immunity provided by this chapter. (Code 1981, § 4-12-4, enacted by Ga. L. 1991, p. 680, § 1.)

JUDICIAL DECISIONS

Finding of substantial compliance. — Because the unique circumstances of fox hunting were not expressly contemplated by the Injuries From Equine Activities Act, substantial compliance with the requirements of O.C.G.A. § 4-12-4 was found when the sponsor of a hunt posted signs at the clubhouse and at various locations at which the hunt frequently met, and on a vehicle windshield at the place where the hunt met on the day in question, and when the text of the warning sign was contained in a release signed by the plaintiff. Muller v. English, 221 Ga. App. 672, 472 S.E.2d 448 (1996).

Warning in compliance. — Rider's injuries, sustained when a portion of a hitching rail to which a horse was tied became detached and fell on the rider after the horse became spooked, resulted from the "inherent risks of equine activities," as provided in O.C.G.A. § 4-12-2(7) and, thus, were in the scope of the Injuries from Equine or Llama Activities Act. The

release signed by the mother contained the warning required by O.C.G.A. § 4-12-4. Mays v. Valley View Ranch, Inc., 317 Ga. App. 143, 730 S.E.2d 592 (2012), cert. denied, No. S12C1980, 2012 Ga. LEXIS 980 (Ga. 2012).

4-12-5. Warning signs or notices posted by llama activity sponsors or llama professionals.

(a) Every llama professional and every llama activity sponsor shall post and maintain signs which contain the warning notice specified in subsection (b) of this Code section. Such signs shall be placed in a clearly visible location on or near stables, corrals, pens, or arenas where the llama professional or the llama activity sponsor conducts llama activities. The warning notice specified in subsection (b) of this Code section shall appear on the sign in black letters, with each letter to be a minimum of one inch in height. Every written contract entered into by a llama professional or by a llama activity sponsor for the providing of professional services, instruction, or the rental of equipment or tack or a llama to a participant, whether or not the contract involves llama activities on or off the location or site of the llama professional's or the llama activity sponsor's business, shall contain in clearly readable print the warning notice specified in subsection (b) of this Code section.

(b) The signs and contracts described in subsection (a) of this Code section shall contain the following warning notice:

WARNING

> Under Georgia law, a llama activity sponsor or llama professional is not liable for an injury to or the death of a participant in llama activities resulting from the inherent risks of llama activities, pursuant to Chapter 12 of Title 4 of the Official Code of Georgia Annotated.

(c) Failure to comply with the requirements concerning warning signs and notices provided in this Code section shall prevent a llama activity sponsor or llama professional from invoking the privileges of immunity provided by this chapter. (Code 1981, § 4-12-5, enacted by Ga. L. 1995, p. 335, § 4.)

CHAPTER 13

HUMANE CARE FOR EQUINES

Sec.
4-13-1. Short title.
4-13-2. Definitions.
4-13-3. Prohibited acts.
4-13-4. Inspection warrants; impoundment authorized; examination.
4-13-5. Duty to care for impounded equines; lien; return to owner.
4-13-6. Notice of impoundment.
4-13-7. Disposal of equine by sale or euthanasia.
4-13-8. Injunctive relief.
4-13-9. Rules and regulations.
4-13-10. Penalty for violation of chapter.

4-13-1. Short title.

This chapter shall be known and may be cited as the "Humane Care for Equines Act." (Code 1981, § 4-13-1, enacted by Ga. L. 1992, p. 2398, § 2.)

4-13-2. Definitions.

As used in this chapter, the term:

(1) "Adequate food and water" means food and water which is sufficient in amount and appropriate for the particular type of equine to prevent starvation, dehydration, or a significant risk to the equine's health from a lack of food or water.

(2) "Equine" means any member of the Equidae species, including horses, mules, and asses.

(3) "Humane care" means, but is not limited to, the provision of adequate food and water consistent with the normal requirements and feeding habits of the equine's size, species, and breed.

(4) "Owner" means any person owning, having possession or custody of, or in charge of an equine.

(5) "Person" means any person, firm, corporation, partnership, association, or other legal entity; any public or private institution; the State of Georgia; or any county, municipal corporation, or political subdivision of the state. (Code 1981, § 4-13-2, enacted by Ga. L. 1992, p. 2398, § 2.)

4-13-3. Prohibited acts.

It shall be unlawful for the owner of any equine:

(1) To commit a violation of Code Section 16-12-4, relating to cruelty to animals, which involves an equine owned by, possessed by, or in the custody or control of such person;

(2) To fail to provide adequate food and water to such equine;

(3) To fail to provide humane care for such equine;

(4) To unnecessarily overload, overdrive, torment, or beat any equine or to cause the death of any equine in a cruel or inhumane manner; or

(5) To interfere with or hinder the Commissioner or his designated agent or any sheriff, deputy sheriff, or other law enforcement officer in carrying out his duties under this chapter. (Code 1981, § 4-13-3, enacted by Ga. L. 1992, p. 2398, § 2.)

JUDICIAL DECISIONS

Due process issues. — Requiring hearings before impounding horses under the Georgia Humane Care for Equines Act, O.C.G.A. § 4-13-1 et seq., could cause further harm to animals being deprived of adequate food and water, thus, there was no due process violation and defendant agency officials had qualified immunity on plaintiff animal owner's claim; the safeguards of O.C.G.A. §§ 4-13-3 and 4-13-4(a) and (b), in connection with any seizure, and the procedure for requesting a hearing under O.C.G.A. § 2-2-9.1(d) after any seizure were adequate. Reams v. Irvin, 561 F.3d 1258 (11th Cir. 2009).

4-13-4. Inspection warrants; impoundment authorized; examination.

(a) At any time there is cause to believe that a violation of Code Section 4-13-3 has occurred, the Commissioner of Agriculture or his designated agent may apply to the appropriate court in the county in which the equine is located for an inspection warrant under the provisions of Code Section 2-2-11 or any sheriff, deputy sheriff, or other law enforcement officer may apply for a search warrant for the purpose of inspecting any equine found on such property to determine if a violation of Code Section 4-13-3 has occurred.

(b) The Commissioner or his designated agent or any sheriff, deputy sheriff, or other law enforcement officer is authorized to impound any equine which has not been furnished with adequate food and water, which has not received humane care, or which has been subjected to cruelty in violation of Code Section 4-13-3. Such determination as to the condition or treatment of the equine shall be made by a licensed veterinarian employed by the state or federal government following an examination conducted at the request of the Commissioner or his designated agent or any sheriff, deputy sheriff, or other law enforcement officer. (Code 1981, § 4-13-4, enacted by Ga. L. 1992, p. 2398, § 2.)

JUDICIAL DECISIONS

Due process issues. — Requiring hearings before impounding horses under the Georgia Humane Care for Equines Act, O.C.G.A. § 4-13-1 et seq., could cause further harm to animals being deprived of adequate food and water, thus, there was no due process violation and defendant agency officials had qualified immunity on plaintiff animal owner's claim; the safeguards of O.C.G.A. §§ 4-13-3 and 4-13-4(a) and (b), in connection with any seizure, and the procedure for requesting a hearing under O.C.G.A. § 2-2-9.1(d) after any seizure were adequate. Reams v. Irvin, 561 F.3d 1258 (11th Cir. 2009).

4-13-5. Duty to care for impounded equines; lien; return to owner.

(a) It shall be the duty of any person designated for impounding an equine under Code Section 4-13-4 to make reasonable and proper arrangements to provide the impounded equine with adequate and necessary shelter, food, water, veterinary services, and humane care and to take such actions as to ensure the survival of the equine or the humane euthanasia of the equine and disposal thereof if such actions are necessary. Such arrangements may include, but shall not be limited to, providing shelter and care for the equine at any state, federal, county, municipal, or governmental facility or shelter, contracting with a private individual, partnership, corporation, association, or other entity to provide shelter, food, water, veterinary services, and humane care for a reasonable fee, or allowing a private individual, partnership, corporation, association, or other entity to provide shelter, food, water, veterinary services, and humane care as a volunteer and at no cost. Any person impounding an equine under this chapter or providing care for an impounded equine shall have a lien on such equine for the reasonable costs of caring for such equine.

(b) The lien acquired under subsection (a) of this Code section may be foreclosed in any court which is competent to hear civil cases, including, but not limited to, magistrate courts. Liens shall be foreclosed in magistrate courts only when the amount of the lien does not exceed the jurisdictional limits established by law for such courts.

(c) Any person impounding an equine under this chapter is authorized to return the equine to its owner upon payment by the owner of all costs of impoundment and care and upon the entry of a consent order or receiving written assurances:

(1) That such equine will be given humane care, adequate food and water, adequate shelter, and veterinary services;

(2) That such equine will not be subjected to cruelty; and

(3) That the owner will comply with this chapter. (Code 1981, § 4-13-5, enacted by Ga. L. 1992, p. 2398, § 2.)

RESEARCH REFERENCES

ALR. — Propriety, measure, and elements of restitution to which victim is entitled under state criminal statute — cruelty to, killing, or abandonment of, animals, 45 ALR6th 435.

4-13-6. Notice of impoundment.

It shall be the duty of any person impounding an equine under this chapter to notify the owner of such equine immediately upon impoundment. Such notice shall state the name and address of the person impounding the equine, the location where the equine is being held, and a description of the equine. If the owner of such equine is unknown or cannot be found, service of the notice on the owner shall be obtained by publishing a notice once in a newspaper of general circulation where the equine is impounded. (Code 1981, § 4-13-6, enacted by Ga. L. 1992, p. 2398, § 2.)

4-13-7. Disposal of equine by sale or euthanasia.

If the owner of the equine cannot be found, if the owner refuses to enter into a consent order or to provide a written assurance that such equine will be given humane care and adequate food, water, shelter, and veterinary care, or if the owner fails to comply with this chapter after having entered into a consent order or having given a written assurance on a previous occasion, the Commissioner or his designated agent, the sheriff, any deputy sheriff, or any other law enforcement officer may dispose of the equine through sale at a public auction or by sealed bids or, if such equine is in a physical condition such that euthanasia is the only reasonable course of action, by humanely disposing of the equine. Prior to disposing of an equine through sale or euthanasia, the Commissioner or his designated agent, the sheriff, any deputy sheriff, or any other law enforcement officer shall make a reasonable effort to locate the owner and, if the owner cannot be located after reasonable effort, the sale or euthanasia may proceed. Any proceeds from the sale of such equine shall be used first to pay the costs of care given the equine and any funds remaining shall be paid into the state treasury if the equine was impounded by the Commissioner or his designated agent or into the county treasury if the equine was impounded by the sheriff, a deputy sheriff, or other law enforcement officer. (Code 1981, § 4-13-7, enacted by Ga. L. 1992, p. 2398, § 2.)

4-13-8. Injunctive relief.

In addition to the remedies provided in this chapter or elsewhere in the laws of this state and notwithstanding the existence of an adequate remedy at law, the Commissioner is authorized to apply to the superior

courts for an injunction or restraining order. Such courts shall have jurisdiction and for good cause shown shall grant a temporary or permanent injunction or an ex parte or restraining order restraining or enjoining any person, partnership, firm, corporation, or other entity from violating and continuing to violate this chapter or any rules and regulations promulgated under this chapter. Such injunction or restraining order shall be issued without bond and may be granted notwithstanding the fact that the violation constitutes a criminal act and notwithstanding the pendency of any criminal prosecution for the same violation. (Code 1981, § 4-13-8, enacted by Ga. L. 1992, p. 2398, § 2.)

4-13-9. Rules and regulations.

The Commissioner is authorized to promulgate and adopt rules and regulations necessary or appropriate to carry out this chapter. (Code 1981, § 4-13-9, enacted by Ga. L. 1992, p. 2398, § 2.)

4-13-10. Penalty for violation of chapter.

Except as otherwise provided in Code Section 16-12-4 or 16-12-37, any person, partnership, firm, corporation, or other entity violating any of the provisions of this chapter shall be guilty of a misdemeanor. (Code 1981, § 4-13-10, enacted by Ga. L. 1992, p. 2398, § 2; Ga. L. 2000, p. 754, § 11.)

Editor's notes. — Ga. L. 2000, p. 754, § 1, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Animal Protection Act of 2000.'"

CHAPTER 14

STERILIZATION OF DOGS AND CATS IN SHELTERS

Sec.
4-14-1. Legislative findings and policy.
4-14-2. Definitions.
4-14-3. Sterilization of dogs and cats required; exceptions; costs.
4-14-4. Penalty for noncompliance.
4-14-5. Adoption of stricter shelter policies.

4-14-1. Legislative findings and policy.

The General Assembly finds that the breeding of dogs and cats acquired from public or private animal shelters, animal control agencies operated by political subdivisions of this state, humane societies, or public or private animal refuges in the State of Georgia results in the birth of thousands of animals who become strays, suffer privation and death, constitute a public nuisance and health hazard, and, ultimately, are impounded and destroyed at great public expense. It is therefore declared to be the public policy of this state that preventing the breeding of dogs and cats acquired from such shelters, animal control agencies, humane societies, or public or private animal refuges be encouraged. (Code 1981, § 4-14-1, enacted by Ga. L. 1994, p. 999, § 1.)

RESEARCH REFERENCES

C.J.S. — 3B C.J.S., Animals, § 222 et seq.

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, §§ 8, 43.

4-14-2. Definitions.

As used in this chapter, the term:

(1) "Animal shelter" means any facility operated by or under contract for the state or any county, municipal corporation, or other political subdivision of the state for the purpose of impounding or harboring seized, stray, homeless, abandoned, or unwanted dogs, cats, and other animals; any veterinary hospital or clinic operated by a veterinarian or veterinarians which operates for such purpose in addition to its customary purposes; and any facility operated, owned, or maintained by a duly incorporated humane society, animal welfare society, or other nonprofit organization for the purpose of providing for and promoting the welfare, protection, and humane treatment of animals.

(2) "Humane society" means any unincorporated nonprofit organization existing for the purpose of prevention of cruelty to animals.

(3) "Public or private animal refuge" means harborers of unwanted animals of any breed, including crossbreeds, who provide food,

shelter, and confinement for a group of dogs, a group of cats, or a combination of dogs and cats.

(4) "Sexually mature animal" means any dog or cat that has reached the age of 180 days or six months or more.

(5) "Sterilization" means the surgical removal of the reproductive organs of a dog or cat in order to render the animal unable to reproduce. (Code 1981, § 4-14-2, enacted by Ga. L. 1994, p. 999, § 1.)

4-14-3. Sterilization of dogs and cats required; exceptions; costs.

(a) Any public or private animal shelter, animal control agency operated by a political subdivision of this state, humane society, or public or private animal refuge shall make provisions for the sterilization of all dogs or cats acquired from such shelter, agency, society, or refuge by:

(1) Providing sterilization by a licensed veterinarian before relinquishing custody of the animal; or

(2) Entering into a written agreement with the person acquiring such animal guaranteeing that sterilization will be performed by a licensed veterinarian within 30 days after acquisition of such animal in the case of an adult animal or within 30 days of the sexual maturity of the animal in the case of an immature animal;

provided, however, that the requirements of this Code section shall not apply to any privately owned animal which any such shelter, agency, society, or refuge may have in its possession for any reason if the owner of such animal claims or presents evidence that such animal is the property of such person.

(b) All costs of sterilization pursuant to this Code section shall be the responsibility of the person acquiring such animal and, if performed prior to acquisition, may be included in any fees charged by the shelter, agency, society, or refuge for such animal.

(c) Any person acquiring an animal from a public or private animal shelter, animal control agency operated by a political subdivision of this state, humane society, or public or private animal refuge, which animal is not sterile at the time of acquisition, shall submit to the animal shelter, animal control agency, humane society, or public or private animal refuge a signed statement from the licensed veterinarian performing the sterilization required by paragraph (2) of subsection (a) of this Code section within seven days after such sterilization attesting that such sterilization has been performed.

(d) Every public or private animal shelter, animal control agency operated by a political subdivision of this state, humane society, or

public or private animal refuge selling or offering for sale or exchange any dog or cat shall maintain and furnish to any person acquiring an animal from such shelter, agency, society, or refuge a current list of veterinarians licensed in this state who have notified the shelter, agency, society, or refuge that they are willing to perform sterilizations and the cost for such procedures. (Code 1981, § 4-14-3, enacted by Ga. L. 1994, p. 999, § 1.)

4-14-4. Penalty for noncompliance.

It shall be a misdemeanor to fail or refuse to comply with the requirements of Code Section 4-14-3 and any person convicted of said misdemeanor shall be subject to a fine not to exceed $200.00. (Code 1981, § 4-14-4, enacted by Ga. L. 1994, p. 999, § 1.)

4-14-5. Adoption of stricter shelter policies.

This chapter shall not prohibit the adoption by any political subdivision of this state of shelter policies which are more stringent than the requirements of this chapter. (Code 1981, § 4-14-5, enacted by Ga. L. 1994, p. 999, § 1.)

CHAPTER 15

DOG AND CAT REPRODUCTIVE STERILIZATION SUPPORT

Sec.
4-15-1. Support program established; annual report; contributions on tax returns.

Editor's notes. — Ga. L. 2002, p. 1215, § 4(b), not codified by the General Assembly, provided: "If an amendment to the Constitution of the State of Georgia authorizing the creation of a special fund for support of the dog and cat reproductive sterilization support program is not ratified at the general election in 2002, Sections 1 and 2 of this Act shall be repealed in their entirety on January 1, 2003, and no such motor vehicle license plates as contemplated in Sections 1 and 2 of this Act shall be issued pursuant to this Act." That amendment was ratified by the voters at the November 2002 general election so that this chapter became effective January 1, 2003.

4-15-1. Support program established; annual report; contributions on tax returns.

(a) The Commissioner shall establish a dog and cat reproductive sterilization support program and educational activities in support thereof. The department shall utilize moneys placed in a special fund for such program as derived from special license plate sales, any funds appropriated to the department for such purposes, and any voluntary contributions or other funds made available to the department for such purposes for the implementation, operation, and support of such reproductive sterilization program. The Commissioner is authorized to promulgate rules to direct and administer the dog and cat reproductive sterilization support program and to carry out this Code section.

(b) The Commissioner shall submit a report to the Senate Agriculture and Consumer Affairs Committee and the House Committee on Agriculture and Consumer Affairs detailing the receipts of and expenditures from the dog and cat reproductive sterilization support program fund. Such report shall be made not later than the last day of August each year.

(c)(1) Unless an earlier date is deemed feasible and established by the Governor, each Georgia income tax return form for taxable years beginning on or after January 1, 2006, shall contain appropriate language, to be determined by the state revenue commissioner, offering the taxpayer the opportunity to contribute to the Dog and Cat Sterilization Fund established in subsection (a) of this Code

section by either donating all or any part of any tax refund due, by authorizing a reduction in the refund check otherwise payable, or by contributing any amount over and above any amount of tax owed by adding that amount to the taxpayer's payment. The instructions accompanying the income tax return form shall contain a description of the purposes for which this fund was established and the intended use of moneys received from the contributions. Each taxpayer required to file a state income tax return who desires to contribute to the Dog and Cat Sterilization Fund may designate such contribution as provided in this Code section on the appropriate income tax return form.

(2) The Department of Revenue shall determine annually the total amount so contributed, shall withhold therefrom a reasonable amount for administering this voluntary contribution program, and shall transmit the balance to the Department of Agriculture for deposit in the Dog and Cat Sterilization Fund established in subsection (a) of this Code section; provided, however, the amount retained for administrative costs shall not exceed $50,000.00 per year. If, in any tax year, the administrative costs of the Department of Revenue for collecting contributions pursuant to this subsection exceed the sum of such contributions, the administrative costs which the Department of Revenue is authorized to withhold from such contributions shall not exceed the sum of such contributions. (Code 1981, § 4-15-1, enacted by Ga. L. 2002, p. 1215, § 1; Ga. L. 2005, p. 1131, § 1/HB 452; Ga. L. 2009, p. 303, § 1/HB 117.)

Editor's notes. — Ga. L. 2009, p. 303, § 20/HB 117, not codified by the General Assembly, provides that: "This Act is intended to reflect the current internal organization of the Georgia Senate and House of Representatives and is not otherwise intended to change substantive law. In the event of a conflict with any other Act of the 2009 General Assembly, such other Act shall control over this Act."

RESEARCH REFERENCES

C.J.S. — 3B C.J.S., Animals, § 222 et seq.

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, §§ 8, 43.

TITLE 5

APPEAL AND ERROR

Chap.

1. General Provisions, Reserved.
2. Appeals to Jury in Justice of the Peace Court, 5-2-1 through 5-2-6. [Repealed]
3. Appeals to Superior or State Court, 5-3-1 through 5-3-31.
4. Certiorari to Superior Court, 5-4-1 through 5-4-20.
5. New Trial, 5-5-1 through 5-5-51.
6. Certiorari and Appeals to Appellate Courts Generally, 5-6-1 through 5-6-51.
7. Appeal or Certiorari by State in Criminal Cases, 5-7-1 through 5-7-6.

Cross references. — Right of appeal from confession of judgment, § 9-12-18. Appeals from decisions of judge of superior court in cases involving acquisition of property by state, counties, and municipalities for public road construction and other transportation purposes, § 32-3-14 et seq. Judicial review and subsequent appeal of decisions of administrative bodies, §§ 50-13-19, 50-13-20. Requirement of expeditious determination of actions and appeals involving challenges to public improvements, projects, or facilities, § 50-15-3.

Law reviews. — For article discussing developments in Georgia criminal law in 1976 to 1977, see 29 Mercer L. Rev. 55 (1977).

JUDICIAL DECISIONS

Statute providing for appeal but prescribing no procedure for doing so. — Where statute provides for appeal in certain cases and entirely fails to prescribe manner in which appeals are to be entered in class of cases it deals with, appellant is relegated to processes provided under general law. Rogers v. Anderson, 95 Ga. App. 637, 98 S.E.2d 388 (1957).

CHAPTER 1

GENERAL PROVISIONS

Reserved

CHAPTER 2

APPEALS TO JURY IN JUSTICE OF THE PEACE COURT

Sec.
5-2-1 through 5-2-6 [Repealed].

5-2-1 through 5-2-6.

Reserved. Repealed by Ga. L. 1983, p. 884, § 4-2, effective July 1, 1983.

Editor's notes. — These Code sections were based on Orig. Code 1863, §§ 4069, 4070, 4082; Code 1868, §§ 4098, 4099, 4111; Ga. L. 1878-79, p. 153, §§ 1 — 6; Ga. L. 1878-79, p. 190, § 1; Code 1882, §§ 4157a — 4157f, 4157i; Ga. L. 1882-83, p. 64, § 1; Ga. L. 1882-83, p. 95, § 1; Civil Code 1895, §§ 4140 — 4147; Civil Code 1910, §§ 4740 — 4747; Ga. L. 1921, p. 116, § 1; Code 1933, §§ 6-304, 6-401 — 6-407; Ga. L. 1953, Nov.-Dec. Sess., p. 312, § 1.

CHAPTER 3

APPEALS TO SUPERIOR OR STATE COURT

Article 1

General Provisions

Sec.
5-3-1. Right of appeal from county courts and justice of the peace courts [Repealed].
5-3-2. Right to appeal from probate courts; exception.
5-3-3. Persons by whom appeal may be entered generally; attorney's authority to appeal to be in writing; dismissal for failure to file; ratification of unauthorized appeal.
5-3-4. Appeal by one of several plaintiffs or defendants — Authorization and procedure generally.
5-3-5. Appeal by one of several plaintiffs or defendants — Effect of judgment on appeal generally; recovery of damages awarded upon appeal.
5-3-6. Appeal by one of several plaintiffs or defendants — Liability and recourse of surety on judgment on appeal.
5-3-7. Appeal suspends judgment; effect of dismissal or withdrawal of appeal.
5-3-8. Requirement of consent to withdrawal of appeal.

Article 2

Procedure

Sec.
5-3-20. Time for filing appeals.
5-3-21. Notice of appeal; form; service.
5-3-22. Payment of costs prerequisite to appeal; affidavit of indigence; dismissal for nonpayment following court order; supersedeas bond.
5-3-23. Signature on bond of attorney at law or in fact.
5-3-24. Exemption of executors, administrators, and trustees from paying costs and giving bond.
5-3-25. Appeal by partners or joint contractors; signature on bond; appeal by corporation.
5-3-26. Requirement of written defenses in appeal from justice of the peace court; right to amend pleadings [Repealed].
5-3-27. Amendments to cure defects.
5-3-28. Transmittal of record and transcripts to superior court; issuance of orders and writs.
5-3-29. De novo investigation.
5-3-30. Calendaring appeal; waiver of trial by jury; monetary limitations inapplicable.
5-3-31. Damages assessed for frivolous appeals.

Cross references. — Exercise of judicial power, Ga. Const. 1983, Art. VI, Sec. IV, Para. I. Procedure for appeals from decisions of superior court reviewing decisions of lower courts on appeal, § 5-6-35. Appeals to superior court from final action of Department of Banking and Finance, § 7-1-90. Description of extent of authority of superior court to exercise appellate jurisdiction and to exercise general supervision over all inferior tribunals, § 15-6-8. Appeal to superior court from decision of tribunal established to hear matters relating to construction or administration of school law, § 20-2-1160. Appeals to superior court from decisions of registration officers denying right of voter registration, § 21-2-224. Appeal to jury in superior court from decision of assessors in condemnation proceedings, § 22-2-80 et seq. Appeal to superior court from award of special master in condemnation proceeding, § 22-2-112. Right of appeal to superior court from convictions for traffic offenses, § 40-13-28. Appeal to superior court from decision of State Board of Equalization, § 48-2-18. Appeal to superior court from orders, rulings, or findings

of state revenue commissioner, § 48-2-59. Appeal to superior court from final decision by administrative agency in contested case, § 50-13-19.

JUDICIAL DECISIONS

Chapter 11 of Title 9 does not deal with appellate court powers. — Scope of Ga. L. 1966, p. 609, § 1 (see O.C.G.A. C. 11, T. 9) is procedure in trial courts of record, and its rules do not deal with powers of appellate courts. Buckhead Doctors' Bldg., Inc. v. Oxford Fin. Cos., 116 Ga. App. 503, 157 S.E.2d 767 (1967).

Applicability. — Appeals which may be taken to superior courts are limited by O.C.G.A. C. 3, T. 5. Walton County v. Scenic Hills Estates, Inc., 261 Ga. 94, 401 S.E.2d 513 (1991).

RESEARCH REFERENCES

ALR. — Power of legislature to require appellate court to review evidence, 19 ALR 744; 24 ALR 1267; 33 ALR 10.

Amendment in appellate court increasing amount claimed beyond, or reducing amount claimed to, jurisdiction of court below, 168 ALR 641.

Defeated party's payment or satisfaction of, or other compliance with, civil judgment as barring his right to appeal, 39 ALR2d 153.

Appealability of state court's order granting or denying motion to disqualify attorney, 5 ALR4th 1251.

ARTICLE 1

GENERAL PROVISIONS

Cross references. — Right of appeal from cases in the justice of peace courts, Ga. Const. 1983, Art. VI, Sec. I, Para. V.

JUDICIAL DECISIONS

Analysis

General Consideration
Applicability
1. In General
2. Distinction Between Appeal and Certiorari
Amount Claimed
Jurisdiction
Procedural Issues

General Consideration

Editor's note. — In light of the similarity of the statutory provisions, decisions under former Code Section 5-3-1, which was subsequently repealed but was succeeded by provisions in this article, are included in the annotations for this article.

Right to appeal to superior court is fixed by statute, and lies only from bodies or tribunals when appeal therefrom is provided by statute. Georgia Power Co. v. Friar, 47 Ga. App. 675, 171 S.E. 210 (1933), aff'd, 179 Ga. 470, 175 S.E. 807 (1934).

When amount claimed is over $50.00, the law confers right to appeal to superior court. Humphrey v. Johnson, 13 Ga. App. 557, 79 S.E. 530 (1913).

When amount in controversy is $50.00 or less, appeal will not lie as matter of right. Gay v. Brown, 45 Ga. App.

General Consideration (Cont'd)

862, 166 S.E. 374 (1932).

Party may appeal to jury in superior court. Hendrix & McBurney v. Mason, 70 Ga. 523 (1883); Southern Express Co. v. Hilton, 94 Ga. 450, 20 S.E. 126 (1894); Wood v. McCrary, 107 Ga. 345, 33 S.E. 395 (1899).

Parties may appeal by consent from justice court to superior court when amount involved is sufficient to authorize appeal. Smith v. Rawson, 61 Ga. 208 (1878).

General statutory meaning of appeal from inferior court to superior court is that, after having been tried in inferior court, jurisdiction of entire case is transferred to superior court for another complete trial. Hartley v. Holwell, 202 Ga. 724, 44 S.E.2d 896 (1947).

Sections dealing with appeals to superior court from inferior courts are in pari materia. — In case of appeal from ordinary's court (now probate court) to superior court, the various sections relating to appeals to superior court from justice's courts, county courts, and courts of ordinary are in pari materia, and should be construed as providing for a single system of appellate procedure. Wofford v. Vandiver, 72 Ga. App. 623, 34 S.E.2d 579 (1945).

Assumption of failure in whole or part to obtain relief sought. — Right given to party to appeal from judgment in justice's court is predicated on assumption that by judgment complained of appellant has failed entirely in suit or has failed to recover full amount sued for, as to hold otherwise would be to run counter to the well-settled principle that no one will be heard to complain of a judgment unless one has been injured or is aggrieved thereby. Walker v. Hartford Accident & Indem. Co., 196 Ga. 361, 26 S.E.2d 695 (1943).

Party not aggrieved by judgment of trial court is without legal right to except thereto, since the party has of it no just cause of complaint. Walker v. Hartford Accident & Indem. Co., 196 Ga. 361, 26 S.E.2d 695 (1943).

When party is aggrieved by judgment or decree. — Substance of judgment, and not opinion of party, determines whether or not one is aggrieved. Walker v. Hartford Accident & Indem. Co., 196 Ga. 361, 26 S.E.2d 695 (1943).

Party is aggrieved by a judgment or decree when it operates on one's rights of property, or bears directly upon one's interest. Walker v. Hartford Accident & Indem. Co., 196 Ga. 361, 26 S.E.2d 695 (1943).

Appeal from confession of judgment. — Appeal can be made from confession of judgment without formal entering of judgment by justice. Huff v. Whitner, Manry & Co., 8 Ga. App. 25, 68 S.E. 463 (1910).

Parallel between appeal granted by section and other sections. — By comparing sections, which are in pari materia, substantially the same procedure is provided in cases of appeal from award of assessors in condemnation proceeding to superior court as is provided in cases of appeal from justice's court to superior court. State Hwy. Bd. v. Long, 61 Ga. App. 173, 6 S.E.2d 130 (1939).

Cited in Armstrong v. Hand, 36 Ga. 267 (1867); Little v. Thompson, 39 Ga. 658 (1869); Brown v. Robinson, 91 Ga. 275, 18 S.E. 156 (1893); Central of Ga. Ry. v. Howard, 112 Ga. 917, 38 S.E. 338 (1901); Robinson v. McAlpin, 130 Ga. 489, 61 S.E. 115 (1908); Crawford County Bank v. Critt-Hightower Co., 17 Ga. App. 804, 88 S.E. 691 (1916); Slocumb v. Ross, 119 Ga. App. 567, 168 S.E.2d 208 (1969); City of Savannah Beach v. Thompson, 135 Ga. App. 63, 217 S.E.2d 304 (1975).

Applicability

1. In General

Defendant may appeal though defenses stricken in county court. — When suit is brought in county court for sum exceeding $50.00 in amount, which results, upon trial, in judgment for plaintiff, the defendant may enter appeal to superior court even though the defenses interposed by him in county court were stricken. Helmly v. Davis, 100 Ga. 493, 28 S.E. 231 (1897).

Appeal of wrongfully dismissed case. — If case is dismissed when judgment for the defendant should have been

entered, the plaintiff may appeal. Hollis v. Doster, 113 Ga. 115, 38 S.E. 308 (1901).

Section inapplicable to proceeding in county court to evict intruder; certiorari is proper remedy. Rigell v. Sirmans, 123 Ga. 455, 51 S.E. 381 (1905).

2. Distinction Between Appeal and Certiorari

General rules. — Certiorari will not lie when there are issues of fact involved. McDonald v. Dickens, 58 Ga. 77 (1877).

In cases of law, certiorari is proper remedy, in cases of fact, appeal is proper. Rogers v. Bennett, 78 Ga. 707, 3 S.E. 660 (1887).

If in case in county court, amount in controversy is more than $50.00 and case involves question of fact, appeal is proper remedy; if no question of fact is involved, but case rests solely on questions of law, certiorari is proper remedy. Small v. Sparks & Son, 69 Ga. 745 (1882).

Right of appeal presupposes issue to be tried by jury. Small v. Sparks & Son, 69 Ga. 745 (1882).

Distinction between statutory appeal and appeal by writ of error. — Statutory appeal providing for another trial in appellate court on merits of case is altogether different from writ of error on appeal for correction of errors in trial eventuating in judgment from which appeal is taken. In latter proceeding inquiry is into correctness of judgment upon pleading and evidence before trial court. The appellate court affirms or reverses in whole or in part the judgment on review and certifies result to trial court, when the final judgment is entered. That procedure has nothing in common with that of a statutory appeal. The statutory appeal allows litigants in certain cases the right to another trial in superior court upon compliance with certain requisites. The trial in superior court is had without reference to evidence introduced in former trial, and is a de novo investigation. City of Macon v. Ries, 179 Ga. 320, 176 S.E. 21 (1934).

Garnishment proceedings. — Certiorari is proper remedy for error in judgment in proceeding seeking strengthening of attachment or garnishment bond. Gregory v. Clark, 73 Ga. 542 (1884).

Amount Claimed

Amount claimed determines right of appeal. Gay v. Brown, 45 Ga. App. 862, 166 S.E. 374 (1932).

Where no amount claimed, appeal to superior court will not lie. Humphrey v. Johnson, 13 Ga. App. 557, 79 S.E. 530 (1913).

It is amount claimed, and not amount recovered, which determines right of party to appeal. Taylor v. Blasingame, 73 Ga. 111 (1884); Helmly v. Davis, 100 Ga. 493, 28 S.E. 231 (1897).

Pleadings control in determining amount claimed. Singer Mfg. Co. v. Martin, 75 Ga. 570 (1885); Simmons v. Allen, 26 Ga. App. 725, 106 S.E. 811 (1921).

Method of determining amount claimed. — Amount claimed is determined by adding principal and interest together. Bell v. Morton, 68 Ga. 831 (1882); Magarahan v. Wright & Lamkin, 83 Ga. 773, 10 S.E. 584 (1889).

Interest. — In determining amount claimed, interest cannot be waived. McDonald v. Dickens, 58 Ga. 77 (1877); Howard v. Chamberlin, Boynton & Co., 64 Ga. 686 (1880).

Reductions at trial cannot be considered in determining amount claimed. Bell v. Davis, 93 Ga. 233, 18 S.E. 647 (1893).

Amount of execution or value of property. — In claim cases, amount of execution or value of property determines right of appeal. Turman v. Cargill & Daniel, 54 Ga. 663 (1875); Napier Bros. v. Woodall, 118 Ga. 830, 45 S.E. 684 (1903); Adkins v. Bennett, 138 Ga. 118, 74 S.E. 838 (1912).

Reasonable attorney's fees, recoverable by statute, are considered. — In suit in justice's court, where plaintiff, as beneficiary in life insurance policy, brought suit against insurer to recover in sum of $30.00, representing amount due plaintiff under terms of policy, $7.50 representing 25 percent of amount sued for as damages, and $50.00 representing reasonable attorney's fees as provided in by statute which authorizes recovery for damages and attorney's fees when an insurer has acted in bad faith in failing to pay amount due under policy within required time, amount sued for and claimed in suit was in excess of $50.00. Tate v. Industrial

Amount Claimed (Cont'd)

Life & Health Ins. Co., 58 Ga. App. 305, 198 S.E. 303 (1938).

Costs of suit may be added to amount claimed. — When amount claimed by the plaintiff in garnishment proceedings was $49.60 and $2.75 costs in suit in justice court and judgment was obtained against the defendant, amount in controversy between garnishees, appellants, plaintiff, and appellee, was $52.35, and the superior court judge erred in dismissing the appeal as being one in controversy involving $50.00 or less. Gay v. Brown, 45 Ga. App. 862, 166 S.E. 374 (1932).

Attachment proceedings. — Appeal lies when attachment for more than $50.00 is levied on property worth less than $50.00, followed by a verdict for less than that amount. Padgett v. Ford, 117 Ga. 508, 43 S.E. 1002 (1903).

Jurisdiction

Appeal imparts same jurisdiction as was possessed by county court. — In trying appeal from county court, superior court can reach no result which could not have been reached in county court had case been finally disposed of there; hence on trial of such appeal the superior court cannot entertain an equitable petition offered by the defendant as an amendment to a plea of general issue, which petition contemplates and prays for relief which only a court of equity, or a court of law exercising full equity powers, could administer, such as rescission of contracts, cancellation of promissory notes or injunction. Goodman v. Little, 213 Ga. 178, 97 S.E.2d 567 (1957).

In trying appeal from county court, superior court can deal with no question of merits except as could have been raised in county court, and can render no final judgment except such as county court had jurisdiction to render. Greer v. Burnam, 69 Ga. 734 (1882); Hufbauer v. Jackson, 91 Ga. 298, 18 S.E. 159 (1893).

Amendability of summons on appeal. — When case is on appeal in superior court from justice's court, any amendment of summons whether in matter of form or of substance, may be made, which could have been made while case was pending in primary court; the only restriction on either court is that there must be enough to amend by. Wofford v. Vandiver, 72 Ga. App. 623, 34 S.E.2d 579 (1945).

Procedural Issues

Appellant recognizes validity of summons and judgment by entering appeal to superior court. Twitty v. Bower, 84 Ga. 751, 11 S.E. 354 (1890).

Judgment appealed from need not be set forth in appeal. Georgia, F. & A. Ry. v. Penn Tobacco Co., 9 Ga. App. 840, 72 S.E. 443 (1911).

Defenses allowed by oral plea must be reduced to writing on appeal. — In justice's court, which is not a court of record, many defenses are allowed to be made by oral plea, and on appeal to superior court these defenses are required to be reduced to writing before case proceeds to trial. Wofford v. Vandiver, 72 Ga. App. 623, 34 S.E.2d 579 (1945).

New trial is upon prior pleadings and defenses subject to amendment. — In appeal from county court to superior court, trial of the case is a de novo proceeding, but it by no means follows that pleadings and defenses in the case are to begin over again in the new trial; on the contrary, the new trial is had on papers connected with the case when judgment was rendered, subject to proper amendment. Wofford v. Vandiver, 72 Ga. App. 623, 34 S.E.2d 579 (1945).

Motion to dismiss summons may be made in superior court after appeal for de novo trial following trial in justice court. Furman v. Smith, 106 Ga. App. 742, 128 S.E.2d 641 (1962).

RESEARCH REFERENCES

ALR. — Who entitled to appeal from decree admitting will to probate or denying probate, 88 ALR 1158.

Change of law after decision of lower court as affecting decision on appeal or error, 111 ALR 1317; 151 ALR 987.

Fault or omission of justice of peace regarding bond, undertaking, or recognizance, as affecting party seeking appeal, 117 ALR 1386.

Amendment in appellate court increasing amount claimed beyond, or reducing amount claimed to, jurisdiction of court below, 168 ALR 641.

Appealability of ruling on demurrer to plea, answer, or reply, 171 ALR 1433.

Inadequacy of verdict as ground of complaint by party against whom it is rendered, 174 ALR 765.

Questions or legal theories affecting trust estates as subject to consideration on appeal though not raised below, 11 ALR2d 317.

Right of mother of illegitimate child to appeal from order or judgment entered in bastardy proceedings, 18 ALR2d 948.

Appealability of order overruling or sustaining motion to quash or set aside service of process, 30 ALR2d 287.

Appealability of order pertaining to pretrial examination, discovery, interrogatories, production of books and papers, or the like, 37 ALR2d 586.

Plea of guilty in justice of the peace or similar inferior court as precluding appeal, 42 ALR2d 995.

Counterclaim or the like as affecting appellate jurisdictional amount, 58 ALR2d 84.

Jurisdictional amount for appellate review as affected by payment or tender, or by settlement, 58 ALR2d 166.

Jurisdictional amount for appellate review as affected by plaintiff's abandonment of claim, wholly or in part, 58 ALR2d 177.

Ruling on motion to quash execution as ground of appeal or writ of error, 59 ALR2d 692.

Contact or communication between juror and outsider during trial of civil case as ground for mistrial, new trial, or reversal, 64 ALR2d 158.

Appealability of order relating to forfeiture of bail, 78 ALR2d 1180.

Appealability of order relating to transfer, on jurisdictional grounds, of cause from one state court to another, 78 ALR2d 1204.

Inattention of juror from sleepiness or other cause as ground for reversal or new trial, 88 ALR2d 1275; 59 ALR5th 1.

Appealability of order entered in connection with pretrial conference, 95 ALR2d 1361.

Judgment subject to appeal as entitled to full faith and credit, 2 ALR3d 1384.

Extraterritorial effect of valid award of custody of child of divorced parents, in absence of substantial change in circumstances, 35 ALR3d 520.

Right of municipal corporation to review of unfavorable decision in action or prosecution for violation of ordinance — modern status, 11 ALR4th 399.

5-3-1. Right of appeal from county courts and justice of the peace courts.

Reserved. Repealed by Ga. L. 1983, p. 884, § 4-2, effective July 1, 1983.

Editor's notes. — This Code section was based on Orig. Code 1863, § 3529; Code 1868, § 3552; Ga. L. 1868, p. 131, § 2; Ga. L. 1871-72, p. 288, § 5; Ga. L. 1872, p. 40, § 1; Code 1873, § 3610a; Ga. L. 1874, p. 85, § 1; Code 1882, § 3610a; Civil Code 1895, § 4453; Civil Code 1910, § 4998; Code 1933, § 6-101.

5-3-2. Right to appeal from probate courts; exception.

(a) An appeal shall lie to the superior court from any decision made by the probate court, except an order appointing a temporary administrator.

(b) Notwithstanding subsection (a) of this Code section, no appeal from the probate court to the superior court shall lie from any civil case

in a probate court which is provided for by Article 6 of Chapter 9 of Title 15. (Laws 1805, Cobb's 1851 Digest, p. 283; Laws 1823, Cobb's 1851 Digest, p. 497; Ga. L. 1851-52, p. 49, § 1; Ga. L. 1851-52, p. 91, § 19; Ga. L. 1859, p. 33, § 5; Code 1863, § 3530; Ga. L. 1866, p. 24, § 1; Code 1868, § 3553; Code 1873, § 3611; Code 1882, § 3611; Civil Code 1895, § 4454; Civil Code 1910, § 4999; Code 1933, § 6-201; Ga. L. 1972, p. 738, § 6; Ga. L. 1986, p. 982, § 1.)

Cross references. — Exercise of judicial power, Ga. Const. 1983, Art. VI, Sec. I, Para. VI.

Editor's notes. — Ga. L. 1986, p. 982, § 25, not codified by the General Assembly, provided that that Act would apply to all cases filed on or after July 1, 1986.

Law reviews. — For annual survey on trial practice and procedure, see 38 Mercer L. Rev. 383 (1986).

JUDICIAL DECISIONS

Analysis

General Consideration
Applicability
1. In General
2. Distinction Between Appeal and Certiorari
Jurisdiction
Effect of Appeal

General Consideration

Applicability. — This section is general, and applies to all cases. Goodwyn v. Veal, 50 Ga. App. 657, 179 S.E. 126 (1935).

O.C.G.A. § 5-3-2 applies only to final judgments rendered by the probate court. Sears v. State, 196 Ga. App. 207, 396 S.E.2d 1 (1990).

Appeal granted under statute extends to any interested party. — Any interested party, dissatisfied with judgment of court of ordinary (now probate court) may appeal, except in cases involving removal of a guardian. Hobbs v. Cody, 45 Ga. 478 (1872).

Creditor served by citation becomes party to proceeding, and may appeal under section if the creditor is dissatisfied with appointment of the administrator by ordinary (now judge of probate court), whether the creditor objects in court or not. Mitchell v. Pyron, 17 Ga. 416 (1855).

General statutory meaning of appeal from inferior court to superior court is that, after having been tried in inferior court, jurisdiction of entire case is transferred to superior court for another complete trial. Hartley v. Holwell, 202 Ga. 724, 44 S.E.2d 896 (1947).

Sections dealing with appeals to superior court from inferior courts are in pari materia. — In case of appeal from ordinary's court (now probate court) to superior court, the various Code sections relating to appeals to superior court from justice's courts, county courts, and courts of ordinary are in pari materia, and should be construed as providing for a single system of appellate procedure. Wofford v. Vandiver, 72 Ga. App. 623, 34 S.E.2d 579 (1945).

Effect on probate court's original jurisdiction over probate of wills. — Former Code 1933, § 6-201 (see O.C.G.A. § 5-3-2) was not intended to invade original jurisdiction of courts of ordinary (now probate courts) granted by Ga. Const. 1976, Art. VI, Sec. VI, Para. I (see Ga. Const. 1983, Art. VI, Sec. I, Para. I) and former Code 1933, § 113-603 over probate of wills. Hartley v. Holwell, 202 Ga. 724, 44 S.E.2d 896 (1947).

Appeal to superior court with waiver of judgment of probate court. — When appraisers filed their return for year's support, objections thereto were filed and matter was appealed by consent

to superior court, and judgment of court of ordinary (now judge of probate court) was thereby expressly waived; such express waiver had same legal effect as formal decision or judgment of court of ordinary (now probate court) as to matter at issue, and status of widow as to vesting of her title was same as if decision or judgment had been formally rendered. Tilley v. King, 193 Ga. 602, 19 S.E.2d 281 (1942), later appeal, 69 Ga. App. 561, 26 S.E.2d 293 (1943).

In no case, except by consent of parties, can an appeal be entered from court of ordinary (now judge of probate court) to superior court until after judgment has been rendered in case by court of ordinary. Bates v. Weaver, 145 Ga. 241, 88 S.E. 986 (1916) (decided under former Code 1910, § 5011).

Forwarding of lower court original pleadings. — It is duty of ordinary (now judge of probate court) to send to clerk of superior court the original pleadings. Robinson v. McAlpin, 130 Ga. 489, 61 S.E. 115 (1908) (decided under former Code 1895, § 4467).

Failure to send up certificate that appellant has paid costs not ground for dismissal of appeal. Morgan v. Campbell, 133 Ga. 549, 66 S.E. 369 (1909) (decided under former Code 1895, § 4467).

This section does not require that ordinary (now judge of probate court) send up with appeal papers a certificate or other evidence showing that appellant has paid costs which accrued in trial of case. Morgan v. Campbell, 133 Ga. 549, 66 S.E. 369 (1909) (decided under former Code 1895, § 4466).

Cited in Baber v. Woods, 39 Ga. 643 (1869); Redd v. Dure, 40 Ga. 389 (1869); Fite v. Black, 85 Ga. 413, 11 S.E. 782 (1890); Brodhead v. Shoemaker, 44 Ga. 518, 11 L.R.A. 567 (N.D. Ga. 1890); Ford v. Redfearn, 145 Ga. 498, 89 S.E. 611 (1916); Head v. Waldrup, 193 Ga. 165, 17 S.E.2d 585 (1941); Forrester v. Pullman Co., 66 Ga. App. 745, 19 S.E.2d 330 (1942); Bethea County v. Dixon, 72 Ga. App. 384, 33 S.E.2d 723 (1945); Whitehurst v. Singletary, 77 Ga. App. 811, 50 S.E.2d 80 (1948); Jones v. Cannady, 78 Ga. App. 453, 51 S.E.2d 551 (1949); Gray v. Gunby, 206 Ga. 63, 55 S.E.2d 588 (1949); Harnesberger v. Davis, 86 Ga. App. 41, 70 S.E.2d 615 (1952); May v. Hadden, 211 Ga. 84, 84 S.E.2d 65 (1954); Goodman v. Little, 213 Ga. 178, 97 S.E.2d 567 (1957); Brumbelow v. Brumbelow, 111 Ga. App. 665, 142 S.E.2d 855 (1965); Burson v. Bishop, 117 Ga. App. 602, 161 S.E.2d 518 (1968); State Bd. of Equalization v. Pineland Tel. Coop., 135 Ga. App. 796, 219 S.E.2d 1 (1975); Mathews v. Mathews, 136 Ga. App. 833, 222 S.E.2d 609 (1975); Montgomery v. DeKalb Steel, Inc., 144 Ga. App. 191, 240 S.E.2d 741 (1977); Hunter v. Hunter, 149 Ga. App. 324, 254 S.E.2d 477 (1979); Brown v. Frachiseur, 247 Ga. 463, 277 S.E.2d 16 (1981); Kariuki v. DeKalb County, 253 Ga. 713, 324 S.E.2d 450 (1985); Copeland v. White, 178 Ga. App. 644, 344 S.E.2d 436 (1986); Hunt v. Henderson, 178 Ga. App. 688, 344 S.E.2d 470 (1986); Smith v. Watts, 181 Ga. App. 524, 352 S.E.2d 840 (1987); Hamrick v. Bonner, 182 Ga. App. 76, 354 S.E.2d 687 (1987); Hart v. Fortson, 263 Ga. 389, 435 S.E.2d 45 (1993); Clark v. Davis, 242 Ga. App. 425, 530 S.E.2d 49 (2000); Candies v. Hulsey, 277 Ga. 630, 593 S.E.2d 353 (2004); In the Interest of J.R.R., 281 Ga. 662, 641 S.E.2d 526 (2007); Montgomery v. Montgomery, 287 Ga. App. 77, 650 S.E.2d 754 (2007); Mays v. Rancine-Kinchen, 291 Ga. 283, 729 S.E.2d 321 (2012).

Applicability

1. In General

Appeal only where probate court's exclusive jurisdiction in whole case involved. — Appeal must be from decision of court of ordinary (now probate court) in exercise of exclusive jurisdiction in whole case made by application to probate. A ruling striking some but not all grounds of caveat to application to probate a will is not such a decision. Hartley v. Holwell, 202 Ga. 724, 44 S.E.2d 896 (1947).

Motion to amend judgment does not extend time to file. — An appeal from a motion to amend judgment of a probate court is not a final judgment and thus, is not an appealable decision within the meaning of subsection (a) of this section. Nor will such a motion extend the

Applicability (Cont'd)
1. In General (Cont'd)

date for filing a notice of appeal under the plain and literal language of § 5-3-20(a). Jabaley v. Jabaley, 208 Ga. App. 179, 430 S.E.2d 119 (1993).

An executrix's appeal from a probate court's decision was untimely and a motion to reconsider, which actually was a motion to amend, did not extend the time for appeal, and, under O.C.G.A. §§ 5-3-2 and 5-3-20, the executrix should have appealed within 30 days of a final order discharging her and ordering that she return a certain amount to the estate. In re Estate of Thomas, 285 Ga. App. 615, 647 S.E.2d 326 (2007).

Appeal allowed from appointment of permanent administrator. Deckle v. McLeod, 144 Ga. 289, 86 S.E. 1082 (1915).

Decision regarding compensation and discharge of temporary administrator is appealable. Comer v. Ross, 100 Ga. 652, 28 S.E. 387 (1897).

Decision concerning application of administrator or guardian for discharge is appealable. Maloy v. Maloy, 131 Ga. 579, 62 S.E. 991 (1908).

Dismissal of petition to remove administrator is appealable. Wells v. Chambers, 28 Ga. App. 429, 111 S.E. 677 (1922).

Order denying petition by incompetent World War I veteran for removal of guardian. — Appeal lies from order denying petition by incompetent World War I veteran for removal of guardian and appointment of new guardian, for accounting and recovery of moneys due, and for other relief, on account of alleged returns by guardian without proper vouchers and a devastavit as to certain amounts. Dillon v. Sills, 54 Ga. App. 299, 187 S.E. 725 (1936).

Appeal allowed from revocation of letters of guardianship, though no issue of fact is involved. Teasley v. Campbell, 133 Ga. 545, 66 S.E. 273 (1909); Teasley v. Vickery, 133 Ga. 721, 66 S.E. 918 (1910); Wash v. Wash, 145 Ga. 405, 89 S.E. 364 (1916).

When guardian is removed and the guardian's letters revoked, upon rule issued by ordinary (now judge of probate court), after hearing on the answer to such rule filed by guardian, the person may appeal to superior court. Bruce v. Dunn, 52 Ga. App. 758, 184 S.E. 361 (1936).

Decision refusing ex parte application made by executor or administrator is appealable. Findlay v. Whitmire, 15 Ga. 334 (1854).

Judgment for money against administrator or guardian under citation for settlement is appealable. Hobbs v. Cody, 45 Ga. 478 (1872).

Probate court's refusal to grant letters pendente lite is appealable. Barksdale v. Cobb, 16 Ga. 13 (1854); Gresham v. Pyron, 17 Ga. 263 (1855).

Judgment, final insofar as it adjudges that certain disbursements made by administrator were unauthorized, is appealable even though it reserves to ordinary (now judge of probate court) the right at a later date to order distribution of estate according to terms of will. Cubine v. Cubine, 69 Ga. App. 656, 26 S.E.2d 462 (1943).

Prerequisite to appeal from judgment setting apart homestead. — Judgment of ordinary (now judge of probate court) setting apart a homestead can only be reviewed by certiorari unless objected to as provided for under former Civil Code 1895, § 2838 (see O.C.G.A. § 44-13-13). Fontano v. Mozley & Co., 121 Ga. 46, 48 S.E. 707 (1904).

Appeal from dismissal of application for homestead. — No appeal lies from decision of ordinary (now judge of probate court) sustaining demurrer (now motion to dismiss) to application for homestead. In such case, certiorari is exclusive remedy for reviewing judgment. Cunningham v. United States Sav. & Loan Co., 109 Ga. 616, 34 S.E. 1024 (1900).

Habeas corpus proceedings. — Section does not confer right of appeal from decision of ordinary (now judge of probate court) in habeas corpus proceeding. Burden v. Barron, 154 Ga. 630, 115 S.E. 1 (1922) (decided under former Code 1910, § 5011).

No direct appeal from interlocutory order. — Appeal from probate court to superior court is for the purpose of conducting a de novo investigation in the superior court, and not for the purpose of

correcting errors of law committed in the probate court. Thus, there can be no direct appeal to the superior court from an interlocutory ruling in the probate court. Driver v. State, 198 Ga. App. 643, 402 S.E.2d 524, cert. denied, 198 Ga. App. 897, 402 S.E.2d 524 (1991).

Decisions regarding annual returns of administrators are not covered by this section. Adams v. Beall, 60 Ga. 325 (1878) (decided under former Code 1873, § 3624).

Appeal by mental health facility from adverse commitment decision. — Mental health facility did not have the right to appeal from an adverse involuntary commitment decision and the facility did not have statutory authority, nor would it have been constitutional to detain the patient pending appeal of a probate court order of discharge. Georgia Mental Health Inst. v. Brady, 263 Ga. 591, 436 S.E.2d 219 (1993).

Appeal from decisions of commissioners appointed by ordinary (now judge of probate court) not authorized. Pope v. Hays, 30 Ga. 539 (1860).

Decedent's non-party mother lacked standing to appeal. — Notwithstanding a settlement agreement in which the decedent's wife released any interest in the decedent's estate, given that the decedent's mother was not a party in the probate court, despite publication of notice and service by the wife, the mother lacked standing to appeal the probate court's decision to award the wife a year's support. Booker v. Booker, 286 Ga. App. 6, 648 S.E.2d 445 (2007).

No appeal lies from preliminary ruling in main case. — Appeal to superior court from preliminary ruling and before court of ordinary (now probate court) rendered judgment in the main case, would improperly usurp jurisdiction of court of ordinary, in violation of Ga. Const. 1976, Art. VI, Sec. VI, Para. I (see Ga. Const. 1983, Art. VI. Sec. I, Para. I) and former Code 1933, § 113-613 (see O.C.G.A. § 53-5-1) depriving that court of jurisdiction to decide main question. Hartley v. Holwell, 202 Ga. 724, 44 S.E.2d 896 (1947).

2. Distinction Between Appeal and Certiorari

Certiorari is proper but not exclusive remedy to correct certain errors in decisions of courts of ordinary (now probate courts). Stephens v. Bell, 41 Ga. App. 353, 153 S.E. 99 (1930).

Election of remedy. — When either appeal under former Civil Code 1910, § 4999 (see O.C.G.A. § 5-3-2), or certiorari under former Civil Code 1910, § 5181 (see O.C.G.A. § 5-4-2) was appropriate, movant may elect which one the movant will pursue. Pierce v. Felts, 146 Ga. 809, 92 S.E. 541 (1917).

Distinction between statutory appeal on merits and appeal by writ of error. — Statutory appeal providing for another trial in appellate court on merits of the case is altogether different from writ of error on appeal for correction of errors in trial eventuating in judgment from which appeal is taken. In latter proceeding the inquiry is into correctness of judgment upon pleading and evidence before the trial court. Appellate court affirms or reverses in whole or in part the judgment on review and certifies result to trial court, where final judgment is entered. That procedure has nothing in common with that of a statutory appeal. The statutory appeal allows litigants in certain cases the right to another trial in superior court upon compliance with certain requisites. Trial in superior court is had without reference to evidence introduced in former trial, and is a de novo investigation. City of Macon v. Ries, 179 Ga. 320, 176 S.E. 21 (1934).

Jurisdiction

Appeal imparts same jurisdiction as was possessed by probate court. — Appeal brings whole case up for new hearing but with same jurisdiction as was possessed by court of ordinary (now probate court). Knowles v. Knowles, 125 Ga. App. 642, 188 S.E.2d 800 (1972).

Superior court on trial of appeal from court of ordinary (now probate court) has no broader powers than court of ordinary itself had. Goodman v. Little, 213 Ga. 178,

Jurisdiction (Cont'd)

97 S.E.2d 567 (1957).

Province of probate court versus proper trial court. — In a child's appeal of a trial court's declaratory judgment that the will of a parent was republished by a codicil and that a portion of a prior order of a probate court that the ex-spouse of the testator was to be treated as if having predeceased the testator was null and void was upheld on appeal as the issue regarding the construction of the will regarding the ex-spouse was a question of law for the trial court and was not within the jurisdiction of the probate court. Honeycutt v. Honeycutt, 284 Ga. 42, 663 S.E.2d 232 (2008).

Effect of Appeal

Whole case brought up. — By § 5-3-29, appeal under this section brings up whole case for new hearing. Moody v. Moody, 29 Ga. 519 (1859).

Case on appeal from the court of ordinary (now probate court) brings the whole case up for a new hearing. Goodman v. Little, 213 Ga. 178, 97 S.E.2d 567 (1957).

De novo investigation. — Appeal under section places matter in superior court for de novo investigation under § 5-3-29. Knowles v. Knowles, 125 Ga. App. 642, 188 S.E.2d 800 (1972).

When such appeal is made, it is a de novo investigation for subject matter appealed. Anderson v. Smith, 76 Ga. App. 171, 45 S.E.2d 282 (1947), overruled on other grounds, Sorrells v. Sorrells, 247 Ga. 9, 274 S.E.2d 314 (1981).

Trial in superior court of statutory appeals is had without reference to evidence introduced in former trial, and is a de novo investigation; when a case is on appeal, any amendment, whether in matter of form or substance, may be made which could have been made while case was in primary court. Wofford v. Vandiver, 72 Ga. App. 623, 34 S.E.2d 579 (1945).

Appeal of an application for a year's support award by a probate court is a de novo proceeding in the superior court, and as such, the appeal is subject to the established procedures for civil actions, thus entitling a party to invoke summary judgment. Bright v. Knecht, 182 Ga. App. 820, 357 S.E.2d 159 (1987).

Case appealed must be tried anew. — It is not the province of superior court on such appeal to review and affirm or reverse rulings of ordinary (now judge of probate court), but to try issue anew and pass original judgments on questions involved as if there had been no previous trial. Knowles v. Knowles, 125 Ga. App. 642, 188 S.E.2d 800 (1972).

RESEARCH REFERENCES

Am. Jur. 2d. — 5 Am. Jur. 2d, Appellate Review, § 183 et seq.

ALR. — Questions or legal theories affecting trust estates as subject to consideration on appeal though not raised below, 11 ALR2d 317.

Change of law after decision of lower court as affecting decision on appeal or error, 111 ALR 1317; 151 ALR 987.

Appealability of order pertaining to pretrial examination, discovery, interrogatories, production of books and papers, or the like, 37 ALR2d 586.

Appealability of order, of court possessing probate jurisdiction, allowing or denying tardy presentation of claim to personal representative, 66 ALR2d 659.

Appealability of order entered in connection with pretrial conference, 95 ALR2d 1361.

Judgment subject to appeal as entitled to full faith and credit, 2 ALR3d 1384.

5-3-3. Persons by whom appeal may be entered generally; attorney's authority to appeal to be in writing; dismissal for failure to file; ratification of unauthorized appeal.

An appeal may be entered by the plaintiff or defendant in person, or by his attorney at law or in fact and, if by the latter, he must be

authorized in writing, which authority shall be filed in the court in which the case is pending at the time the appeal is entered; but if it is shown to the court that the authority exists, the court may allow a reasonable time to file the same. Upon failure to so file, the appeal shall be dismissed and execution shall issue without further order. If the authority is not filed within the time allowed, a ratification of an unauthorized appeal, if made in writing and filed in the clerk's office before the next term of the court, shall render the appeal valid. (Orig. Code 1863, § 3535; Code 1868, § 3558; Code 1873, § 3615; Code 1882, § 3615; Civil Code 1895, § 4457; Civil Code 1910, § 5002; Code 1933, § 6-104.)

JUDICIAL DECISIONS

Appeals without written authority. — Former Civil Code 1895, § 4237 and 4457 (see O.C.G.A. § 15-19-5 and 5-3-3, respectively) permitted attorneys at law to enter appeals without written authority. Friar v. Curry, Arrington & Co., 119 Ga. 908, 47 S.E. 206 (1904); Nathan v. Lamb, 18 Ga. App. 39, 88 S.E. 794 (1916).

Assessor's award in condemnation proceedings. — Attorney at law for municipality may file appeal to assessor's award in condemnation proceedings. Potts v. City of Atlanta, 140 Ga. 431, 79 S.E. 110 (1913).

Attorneys in fact cannot enter appeals absent writing sufficiently establishing authority to do so. Lovelady v. Franklin Davis Nursery Co., 113 Ga. 324, 38 S.E. 748 (1901); Lovejoy v. Franklin Davis Nursery Co., 115 Ga. 714, 42 S.E. 151 (1902).

Agent created by parol cannot enter appeal. Cook v. Buchanan, 86 Ga. 760, 13 S.E. 83 (1891).

When written authority has been lost, appeal may be ratified. Booten v. Bank of Empire State, 67 Ga. 358 (1881).

Agent cannot show authority by ex parte affidavit. Bank of Empire State v. Booten, 52 Ga. 653 (1874).

Receiver cannot enter appeal unless receiver is party to proceedings. Dupree v. Drake, 94 Ga. 456, 19 S.E. 242 (1894).

Cited in McCoy v. Sasnett, 77 Ga. App. 819, 49 S.E.2d 913 (1948); State Hwy. Dep't v. Sumner, 102 Ga. App. 1, 115 S.E.2d 787 (1960); State Hwy. Dep't v. Hester, 112 Ga. App. 51, 143 S.E.2d 658 (1965); Schwindler v. State, 261 Ga. App. 30, 581 S.E.2d 619 (2003).

RESEARCH REFERENCES

Am. Jur. 2d. — 5 Am. Jur. 2d, Appellate Review, § 231 et seq.

C.J.S. — 4 C.J.S., Appeal and Error, § 325 et seq.

ALR. — Right of trustee of express trust to appeal from order or decree not affecting his own personal interest, 6 ALR2d 147.

Attorney's right to institute or maintain appeal where client refuses to do so, 91 ALR2d 618.

5-3-4. Appeal by one of several plaintiffs or defendants — Authorization and procedure generally.

When there is more than one party plaintiff or defendant, and one or more of the parties plaintiff or defendant desire to appeal, and the others refuse or fail to appeal, the party plaintiff or defendant desiring to appeal may enter an appeal in the manner provided by law. (Laws

1839, Cobb's 1851 Digest, p. 500; Code 1863, § 3539; Code 1868, § 3562; Code 1873, § 3619; Code 1882, § 3619; Civil Code 1895, § 4461; Civil Code 1910, § 5006; Code 1933, § 6-110; Ga. L. 1995, p. 10, § 5.)

JUDICIAL DECISIONS

Parties to appeal. — Although only one of the coparties appeals, all of the coparties who have the same interests and rights are also a party to the appeal. Hunt v. Henderson, 178 Ga. App. 688, 344 S.E.2d 470 (1986).

Right of all parties to prosecute or defend. — All parties who are brought up on appeal, whether they have filed an appeal or not have the right to appear and prosecute or defend, whichever the case may be. Hunt v. Henderson, 178 Ga. App. 688, 344 S.E.2d 470 (1986).

Section inapplicable to certiorari cases, but applies to appeals only. Winn v. Ingram, 3 Ga. App. 628, 60 S.E. 328 (1908).

Suits against several defendants jointly. — Section inapplicable where several defendants jointly sued are discharged and remaining defendant held liable. It is otherwise if judgment below was rendered against all defendants. Patterson v. Barrow, 99 Ga. 166, 25 S.E. 398 (1896).

Defendant cannot enter appeal from only part of judgment. Bryson v. Scott, 111 Ga. 196, 36 S.E. 619 (1900).

Where nonappealing defendant dies between first and second trial. — Where one of three defendants enters appeal under section, and one of other two dies, between first and second trial, he was a party to appeal, so far as to require his legal representative to be made a party to cause before it can proceed. Stell v. Glass, 1 Ga. 475 (1846).

Cited in Powell v. Perry, 63 Ga. 417 (1879); Metzer v. Steed, 132 Ga. 822, 65 S.E. 117 (1909); Marks v. Steinberg, 55 Ga. App. 561, 190 S.E. 808 (1937); Colley v. Dillon, 158 Ga. App. 416, 280 S.E.2d 425 (1981).

RESEARCH REFERENCES

Am. Jur. 2d. — 5 Am. Jur. 2d, Appellate Review, § 231 et seq.

C.J.S. — 4 C.J.S., Appeal and Error, §§ 237 et seq., 325 et seq.

ALR. — May new trial or reversal for error as to measure of damages against one or more of the parties be restricted to those parties, 32 ALR 255.

Right to perfect appeal, against party who has not appealed, by cross appeal filed after time for direct appeal has passed, 32 ALR3d 1290.

5-3-5. Appeal by one of several plaintiffs or defendants — Effect of judgment on appeal generally; recovery of damages awarded upon appeal.

Upon the appeal of either party plaintiff or defendant, as provided in Code Section 5-3-4, the whole record shall be taken up and all shall be bound by the final judgment; but, in case damages are awarded upon such appeal, the damages shall only be recovered against the party appealing and his security, if any, and not against the party failing or refusing to appeal. (Laws 1839, Cobb's 1851 Digest, p. 500; Code 1863, § 3540; Code 1868, § 3563; Code 1873, § 3620; Code 1882, § 3620; Civil Code 1895, § 4462; Civil Code 1910, § 5007; Code 1933, § 6-111.)

JUDICIAL DECISIONS

Whole record brought up. — By former Civil Code 1895, §§ 4462 and 4469 (see O.C.G.A. §§ 5-3-5 and 5-3-29), appeal brings up whole record, and a party not appealing can make amendments to a plea or answer already entered. Murray v. Marshall, 106 Ga. 522, 32 S.E. 634 (1899).

Appeal carries up whole record and judgment binds both appealing and nonappealing parties. Murray v. Marshall, 106 Ga. 522, 32 S.E. 634 (1899); Bryson v. Scott, 111 Ga. 196, 36 S.E. 619 (1900).

Two parties may file appeal jointly. — When either party, without other joining, can appeal, and all be bound by final judgment, appeal will not be null and void simply because two of the parties filed appeal jointly. Marks v. Steinberg, 55 Ga. App. 561, 190 S.E. 808 (1937).

Section applies to appeals from decrees. Smith v. Cooper, 21 Ga. 359 (1857) (see now O.C.G.A. § 5-3-5).

Entry of appeal prevents issuance of execution against other party. Lewis v. Armstrong, 69 Ga. 752 (1882).

Appeal by maker of note from joint judgment of county against the maker and indorsers prevents execution against indorsers. Turnell v. Carter, 5 Ga. App. 847, 64 S.E. 114 (1909).

Right of all parties to prosecute or defend. — All parties who are brought up on appeal, whether the parties have filed an appeal or not have the right to appear and prosecute or defend, whichever the case may be. Hunt v. Henderson, 178 Ga. App. 688, 344 S.E.2d 470 (1986).

Decedent's non-party mother lacked standing to appeal. — Notwithstanding a settlement agreement in which the decedent's wife released any interest in the decedent's estate, given that the decedent's mother was not a party in the probate court, despite publication of notice and service by the wife, the mother lacked standing to appeal the probate court's decision to award the wife a year's support. Booker v. Booker, 286 Ga. App. 6, 648 S.E.2d 445 (2007).

Cited in Powell v. Perry, 63 Ga. 447 (1879); Lewis & Co. v. Chisolm, 68 Ga. 40 (1881); Wheeler v. Layman Foundation, 188 Ga. 267, 3 S.E.2d 645 (1939); Hardwick v. Georgia Power Co., 100 Ga. App. 38, 110 S.E.2d 24 (1959); Colley v. Dillon, 158 Ga. App. 416, 280 S.E.2d 425 (1981).

RESEARCH REFERENCES

Am. Jur. 2d. — 5 Am. Jur. 2d, Appellate Review, § 231 et seq.

C.J.S. — 4 C.J.S., Appeal and Error, § 325 et seq.

ALR. — May new trial or reversal for error as to measure of damages against one or more of the parties be restricted to those parties, 32 ALR 255.

Power of legislature to require appellate court to review evidence, 33 ALR 10.

Judgment or order dismissing action as against one defendant as subject of appeal or error before disposition of case as against codefendant, 114 ALR 759.

Grant of new trial, or reversal of judgment on appeal as to one joint tortfeasor, as requiring new trial or reversal as to other tortfeasor, 143 ALR 7.

5-3-6. Appeal by one of several plaintiffs or defendants — Liability and recourse of surety on judgment on appeal.

The security, if any, of the party appealing shall be bound for the judgment on the appeal; and, in case the security is compelled to pay off the debt or damages for which judgment is entered in the case, he shall have recourse only against the party for whom he became security. (Laws 1823, Cobb's 1851 Digest, p. 498; Laws 1839, Cobb's 1851 Digest,

p. 500; Code 1863, § 3541; Code 1868, § 3564; Code 1873, § 3621; Code 1882, § 3621; Civil Code 1895, § 4463; Civil Code 1910, § 5008; Code 1933, § 6-112.)

Law reviews. — For survey article on constitutional law, see 34 Mercer L. Rev. 53 (1982).

JUDICIAL DECISIONS

First part of section provides for liability when principal appeals, whether or not surety appeals. Beall v. Cochran, 18 Ga. 38 (1855); Barnett v. Travis, 96 Ga. 760, 22 S.E. 314 (1895); National Sur. Co. v. White, 21 Ga. App. 471, 94 S.E. 589 (1917).

Second clause of section grants right of subrogation against principal. National Surety Co. v. White, 21 Ga. App. 471, 94 S.E. 589 (1917).

Charging estate of security. — Plaintiff, by scire facias, may charge estate of security on appeal with amount of final judgment rendered against original party. Bank of Charleston v. Moore, 6 Ga. 416 (1849).

Plaintiff may charge estate of security with amount of judgment by entry of judgment nunc pro tunc. Mayo v. Kersey, 24 Ga. 167 (1858).

Surety not subject for breach of bond when trial cannot be had as to appellant. — Condemnation money for which surety on appeal is liable is that which is recovered in case on appeal trial. If, by reason of injunction, death, or other cause, no trial of case is or can be had as to appellant, the surety is not subject for a breach of bond. Planters' & Miners' Bank v. Hudgins, 84 Ga. 108, 10 S.E. 501 (1889).

Cited in Satzky v. King, 115 Ga. 948, 42 S.E. 233 (1902); Bennett v. Farkas, 126 Ga. 228, 54 S.E. 942 (1906); Touchton v. Stewart, 222 Ga. 455, 150 S.E.2d 643 (1966).

RESEARCH REFERENCES

Am. Jur. 2d. — 5 Am. Jur. 2d, Appellate Review, § 231 et seq.

ALR. — Failure of sureties on appeal bond to justify after exception to their sufficiency and consequent dismissal of appeal, as releasing them from liability, 96 ALR 1371.

Liability on supersedeas bond which was legally insufficient to effect stay, where enforcement of judgment was in fact suspended, 120 ALR 1062.

Condition of bond on appeal not in terms covering payment of money judgment, as having that effect by implication or construction, 124 ALR 501.

Attorneys' fees paid by appellee in resisting unsuccessful appellate review as damages recoverable on appeal bond, 37 ALR2d 525.

5-3-7. Appeal suspends judgment; effect of dismissal or withdrawal of appeal.

An appeal shall suspend but not vacate a judgment and, if dismissed or withdrawn, the rights of all the parties shall be the same as if no appeal had been entered. (Orig. Code 1863, § 3549; Code 1868, § 3572; Code 1873, § 3628; Code 1882, § 3628; Civil Code 1895, § 4470; Civil Code 1910, § 5015; Code 1933, § 6-502.)

Cross references. — Similar provisions regarding suspension of judgment by appeal, § 9-12-19.

JUDICIAL DECISIONS

Justice's court judgment remains operative, but incapable of enforcement pending appeal. Haygood v. King, 161 Ga. 732, 132 S.E. 62 (1926); Tilley v. King, 193 Ga. 602, 19 S.E.2d 281 (1942), later appeal, 69 Ga. App. 561, 26 S.E.2d 293 (1943).

Effect of statute is to preserve all incidents of judgment except right to enforce the judgment by sale of defendant's property pending appeal. Watkins v. Angier, 99 Ga. 519, 27 S.E. 718 (1896).

Dismissal of appeal by superior court for want of jurisdiction renders county court's judgment final. Johnson v. Ford, 92 Ga. 751, 19 S.E. 712 (1894).

Effect of dismissal of appeal to superior court from judgment of court of ordinary (now probate court) admitting will to probate was to make effective judgment of court of ordinary. Hooks v. Hooks, 197 Ga. 482, 29 S.E.2d 599 (1944).

Appellant cannot, without adverse party's consent, certify case back to inferior court. — In appeal from inferior court, or assessors in condemnation proceeding, to superior court, the law contemplates that if judgment is obtained in superior court the prevailing party is entitled to superior court execution and aid of all processes of superior court to enforce the court's judgment. A dismissal of the entire case or proceedings with consent of court might be permissible under some circumstances, for this would be a final termination of the entire case or proceedings, but appellant cannot, at will and without consent of the adverse party, certify the case back to the inferior court, or to assessors, and relegate adverse party to processes of inferior court. Such would be the effect of allowing appellant to withdraw the appeal without consent of the adverse party contrary to provisions of former Code 1933, § 6-503 (see O.C.G.A. § 5-3-8). State Hwy. Bd. v. Long, 61 Ga. App. 173, 6 S.E.2d 130 (1939).

Dismissal by appealing party. — The appealing party cannot dismiss the appeal to the prejudice of his coparties, as their rights on appeal are equal to those of the party making the appeal. Hunt v. Henderson, 178 Ga. App. 688, 344 S.E.2d 470 (1986).

Distinction between dismissing case on appeal and dismissing appeal. — Difference must be noted between dismissing case on appeal and dismissing an appeal. The first dismissal lets out whole case while second is an affirmance of judgment below and rights of all parties are same as if no appeal had been entered. Fagan v. McTier, 81 Ga. 73, 6 S.E. 177 (1888); State Hwy. Bd. v. Long, 61 Ga. App. 173, 6 S.E.2d 130 (1939).

While appeal only suspends and does not vacate judgment allowing probate in solemn form, so that judgment may again become effective in event of dismissal of appeal, a dismissal of the case vitiates entire proceeding, leaving parties in same status as if no action was ever commenced to probate in solemn form. Hodges v. Libbey, 120 Ga. App. 246, 170 S.E.2d 37 (1969).

Time period that lien of judgment is binding. — Where on appeal from judgment in justice's court appellee is successful, lien of judgment will be taken as binding from date of its original rendition, and entitled to superiority over subsequently rendered judgment, notwithstanding provisions of § 9-12-88. Tilley v. King, 193 Ga. 602, 19 S.E.2d 281 (1942), later appeal, 69 Ga. App. 561, 26 S.E.2d 293 (1943).

Where plaintiff, appellee, obtains judgment on appeal, such judgment, as to priority, is to be treated as being of date when judgment appealed from was entered, and accordingly it takes precedence over another judgment rendered by superior court, older than judgment on appeal, but younger than original judgment entered in justice's court. Watkins v. Angier, 99 Ga. 519, 27 S.E. 718 (1896).

Property bought by defendant before entry of judgment on justice's

docket is bound by subsequent judgment in superior court. Dodd & Co. v. Glover, 102 Ga. 82, 29 S.E. 158 (1897).

Statute of limitations does not run while appeal is pending. — Statute of limitations does not run in favor of plaintiff in error as to judgment in justice's court, and execution cannot be issued upon such judgment pending appeal in superior court. Twitty v. Bower, 84 Ga. 751, 11 S.E. 354 (1890).

Cited in Robinson v. Medlock, 59 Ga. 598 (1877); East Tenn., V. & Ga. R.R. v. Miles, 72 Ga. 252 (1884); Rasberry v. Harville, 90 Ga. 530, 16 S.E. 299 (1892); Reagan v. Powell, 125 Ga. 89, 53 S.E. 580 (1906); Jones v. Cannady, 78 Ga. App. 453, 51 S.E.2d 551 (1949); Garrison v. McGuire, 114 Ga. App. 665, 152 S.E.2d 624 (1966); Anderson v. Burnham, 12 Bankr. 286 (Bankr. N.D. Ga. 1981); Nelson v. Smothers, 168 Ga. App. 120, 308 S.E.2d 239 (1983); Williamson v. Lucas, 78 Bankr. 372 (Bankr. M.D. Ga. 1987); Georgia Mental Health Inst. v. Brady, 263 Ga. 591, 436 S.E.2d 219 (1993).

RESEARCH REFERENCES

Am. Jur. 2d. — 5 Am. Jur. 2d, Appellate Review, §§ 387 et seq., 543, 814.

C.J.S. — 5 C.J.S., Appeal and Error, § 748 et seq.

ALR. — First decision of intermediate court as law of the case on appeal to court of last resort from subsequent decision, 41 ALR 1078; 118 ALR 1286.

Judgment in tort action as subject of assignment, attachment, or garnishment pending appeal, 121 ALR 420.

Running of limitations against proceeding to renew or revive judgment as affected by appeal or right of appeal from judgment, or by motion or right to move for new trial, 123 ALR 565.

Liability of insurer under policy indemnifying against liability or loss as affected by pendency of appeal or motion for new trial from judgment against insured or by the fact that time for appeal or motion for new trial has not expired, 125 ALR 755.

Decree on bill of review reversing prior decree as affecting purchaser or mortgagee of real property in the interval between the original decree and the filing of the bill of review, 150 ALR 676.

Defeated party's payment or satisfaction of, or other compliance with, civil judgment as barring his right to appeal, 39 ALR2d 153.

Conviction from which appeal is pending as bar to another prosecution for same offense, 61 ALR2d 1224.

Judgment subject to appeal as entitled to full faith and credit, 2 ALR3d 1384.

5-3-8. Requirement of consent to withdrawal of appeal.

After an appeal has been entered, no person shall be allowed to withdraw the appeal without the consent of the adverse party. (Laws 1799, Cobb's 1851 Digest, p. 495; Code 1863, § 3550; Code 1868, § 3573; Code 1873, § 3629; Code 1882, § 3629; Civil Code 1895, § 4471; Civil Code 1910, § 5016; Code 1933, § 6-503.)

JUDICIAL DECISIONS

Sole provision for dismissing appeal. — This section, except for defects in proceedings, is only provision for dismissing appeal. Rousch v. Green, 2 Ga. App. 112, 58 S.E. 313 (1907).

Only provision for dismissal of appeal to superior court, except for defects in appeal proceedings, is found in this section, which provides that no person shall be allowed to withdraw an appeal after it shall be entered but by consent of adverse party. Rabun v. Planters Cotton Oil Co., 68 Ga. App. 37, 21 S.E.2d 922 (1942).

Dismissal of appeal without adverse party's consent. — Under general law, an appeal is a de novo investigation,

and it is error for the court to dismiss the appeal when there is no defect in appeal proceedings, and when the adverse party does not consent for appeal to be withdrawn or dismissed. Rose City Foods, Inc. v. Usry, 86 Ga. App. 307, 71 S.E.2d 649 (1952).

Certification of case back to inferior court. — In appeal from inferior court, or assessors in condemnation proceeding, to superior court, the law contemplates that if judgment is obtained in superior court the prevailing party is entitled to a superior court execution and aid of all processes of superior court to enforce the court's judgment. A dismissal of the entire case or proceedings with consent of court might be permissible under some circumstances, for this would be a final termination of the entire case or proceedings, but appellant cannot, at will and without consent of adverse party, certify case back to inferior court, or to assessors, and relegate adverse party to processes of inferior court. Such would be the effect of allowing appellant to withdraw the appellant's appeal without consent of adverse party contrary to statutory provisions. State Hwy. Bd. v. Long, 61 Ga. App. 173, 6 S.E.2d 130 (1939).

Attempted withdrawal of appeal by appellant, in vacation. — Attempt by appellant to withdraw, in vacation, appeal from judgment of court of ordinary (now probate court) establishing a will, by entry on docket by clerk of court, is a nullity. Rasberry v. Harville, 90 Ga. 530, 16 S.E. 299 (1892).

Applicability to other provisions. — Provisions of former Code 1933, § 6-503 (see O.C.G.A. § 5-3-8) were applicable to appeals in condemnation proceedings instituted under statute governing condemnation by state and national government and all others exercising right of eminent domain. State Hwy. Dep't v. Blalock, 98 Ga. App. 630, 106 S.E.2d 552 (1958).

Cited in Tommey & Stewart v. Finney, 45 Ga. 155 (1872); Robison v. Medlock, 59 Ga. 598 (1877); Ellis v. O'Neal, 175 Ga. 652, 165 S.E. 751 (1932); Bethea County v. Dixon, 72 Ga. App. 384, 33 S.E.2d 723 (1945); State Hwy. Dep't v. Thomas, 122 Ga. App. 252, 176 S.E.2d 635 (1970); Pilgrim v. Brookfield West, Inc., 136 Ga. App. 619, 222 S.E.2d 137 (1975).

RESEARCH REFERENCES

ALR. — First decision of intermediate court as law of the case on appeal to court of last resort from subsequent decision, 41 ALR 1078; 118 ALR 1286.

Public interest as ground for refusal to dismiss an appeal, where question has become moot, or dismissal is sought by one or both parties, 132 ALR 1185.

ARTICLE 2
PROCEDURE

5-3-20. Time for filing appeals.

(a) Appeals to the superior court shall be filed within 30 days of the date the judgment, order, or decision complained of was entered.

(b) The date of entry of an order, judgment, or other decision shall be the date upon which it was filed in the court, agency, or other tribunal rendering same, duly signed by the judge or other official thereof.

(c) This Code section shall apply to all appeals to the superior court, any other law to the contrary notwithstanding. (Orig. Code 1863, § 3533; Code 1868, § 3556; Code 1873, § 3613; Code 1882, § 3613; Civil Code 1895, § 4455; Civil Code 1910, § 5000; Code 1933, § 6-102; Ga. L. 1972, p. 738, § 1.)

History of Code section. — This Code section is derived from the decision in State v. Dean, 9 Ga. 405 (1851).

JUDICIAL DECISIONS

Section is not a statute of limitation but is jurisdictional. — Requirement of O.C.G.A. § 5-3-20 that appeals to superior court must be filed "within 30 days of the date the judgment, order, or decision complained of was entered" is not a statute of limitation but is jurisdictional in nature. Rowell v. Parker, 192 Ga. App. 215, 384 S.E.2d 396 (1989).

Section applied liberally in sustaining appeals. — Very liberal rule has uniformly been recognized in sustaining appeals when party appealing has shown bona fide intention to do so within the four days (now 30 days) allowed by statute. Bank of Empire State v. Booton, 52 Ga. 653 (1874).

Appeal cannot, except by consent or parties, be entered until after judgment in court of ordinary (now probate court). Wright v. Clark, 139 Ga. 34, 76 S.E. 565 (1912); Bates v. Weaver, 145 Ga. 241, 88 S.E. 986 (1916).

Motion to amend judgment does not extend time to file. — Appeal from a motion to amend judgment of a probate court is not a final judgment and, thus, is not an appealable decision within the meaning of O.C.G.A. § 5-3-2(a). Nor will such a motion extend the date for filing a notice of appeal under the plain and literal language of subsection (a) of O.C.G.A. § 5-3-20. Jabaley v. Jabaley, 208 Ga. App. 179, 430 S.E.2d 119 (1993).

Executrix's appeal from a probate court's decision was untimely and a motion to reconsider, which actually was a motion to amend, did not extend the time for appeal, and, under O.C.G.A. §§ 5-3-2 and 5-3-20, the executrix should have appealed within 30 days of a final order discharging the executrix and ordering that the executrix return a certain amount to the estate. In re Estate of Thomas, 285 Ga. App. 615, 647 S.E.2d 326 (2007).

Claim was time-barred. — Owner's failure to appeal the rezoning of a neighbor's property precluded the owner from attacking the rezoning decision under Spaulding County, Ga., Unified Development Ordinance § 418 and O.C.G.A. § 5-3-20; a claim that Spaulding County, Ga., Unified Development Ordinance § 414 did not comply with the Georgia Zoning Procedures Law, O.C.G.A. § 36-66-1 et seq., was also time-barred, as any challenge to the rezoning had to be raised within 30 days. Hollberg v. Spalding County, 281 Ga. App. 768, 637 S.E.2d 163 (2006).

Property owners' claims against a county, the county's board of commissioners, and the county's officials were time-barred because, although the owners appeared and objected throughout a zoning process, the owners failed to file an appeal within 30 days of the zoning resolution that formed the basis of the owners' complaint as required by O.C.G.A. § 5-3-20(a). Instead, the owners waited nearly three years to file a new action, asserting that the owners were entitled to do so because the actions of the zoning board were void. The owners could not be permitted to do indirectly that which the law did not allow to be done directly. Fortson v. Tucker, 307 Ga. App. 694, 705 S.E.2d 895 (2011).

Summary judgment in favor of the county was affirmed because the action was filed more than 30 days after the letter was signed; thus, the trial court correctly determined that the action was untimely under O.C.G.A. § 5-3-20. The letter constituted a zoning decision by the county. Mortgage Alliance Corp. v. Pickens County, 316 Ga. App. 755, 730 S.E.2d 471 (2012).

Jurisdiction of court in county without more than 100,000 persons. — Probate court of county that did not have a population of more than 100,000 persons according to either the 1980 or 1990 decennial census lacked authority to entertain a motion for new trial, and any such motion therefore being without legal force and effect before the county probate court,

would not serve to extend the time for filing a notice of appeal under either O.C.G.A. § 5-3-20 or O.C.G.A. § 5-6-38(a). Jabaley v. Jabaley, 208 Ga. App. 179, 430 S.E.2d 119 (1993).

Appeal from magistrate court. — Magistrate courts are not courts of record with the power to grant new trials; thus, a motion for a new trial in the magistrate court did not toll the time for filing an appeal to state or superior court. Bowen v. Ball, 215 Ga. App. 640, 451 S.E.2d 502 (1994).

Newly discovered evidence when party negligently failed to enter timely appeal. — When party did not enter appeal within time prescribed and has otherwise been guilty of negligence, a new trial will not be granted on account of newly discovered evidence. Miller v. Mitchell, Reid & Co., 38 Ga. 312 (1868).

Former Code 1933, § 6-102 (see O.C.G.A. § 5-3-20) did not extend time for filing notice of appeal specified in Ga. L. 1957, p. 387, § 14 (see O.C.G.A. § 22-2-112). City of Savannah Beach v. Thompson, 135 Ga. App. 63, 217 S.E.2d 304 (1975).

Denial of request for rezoning. — The signing of the initial document reducing to writing county commission's decision denying a request to rezone a piece of property commenced the running of the clock under this section. Where the chairman of the board of commissioners executed the written minutes of the meeting in which the request was denied on March 25, 1986, the 30-day period for the filing of an appeal began to run on that day, although official notice of the denial was not received in the mail until May 22, 1986. Chadwick v. Gwinnett County, 257 Ga. 59, 354 S.E.2d 420 (1987).

Effect of filing in wrong court. — Where a notice of appeal from a probate court decision is filed in a timely fashion, the superior court is vested with discretion in determining whether to dismiss the appeal. If the superior court finds that the filing of the notice of appeal in superior court has caused an unreasonable as well as inexcusable delay in the transmission of the record from the probate court, the appeal should be dismissed. Otherwise, the superior court is authorized to retain the appeal. In that event, the superior court has ample authority under § 5-3-27 to enter an order directing that the probate court transmit the record to the superior court so that the appeal can be decided. Mack v. Demming, 248 Ga. 117, 281 S.E.2d 591 (1981).

Municipal court judgment. — When the defendant was convicted in a municipal court that was not a city court or court of record and, thus, did not have authority to grant new trials, the defendant's motion for a new trial did not toll the 30-day time limit for filing appeals. City of Lawrenceville v. Davis, 233 Ga. App. 1, 502 S.E.2d 794 (1998).

Appeal from action of county commissioners. — Action for a declaratory judgment that a vote of a board of county commissioners resulted in the denial of a rezoning application was improperly dismissed as untimely because the trial court erroneously treated the judgment as an appeal of a zoning decision. Head v. DeKalb County, 246 Ga. App. 756, 542 S.E.2d 176 (2000).

Cited in Ansley v. Barlow, 103 Ga. 107, 29 S.E. 596 (1897); Wood v. McCrary, 107 Ga. 345, 33 S.E. 395 (1899); Knox v. Crump, 15 Ga. App. 697, 84 S.E. 169 (1915); Holston Box & Lumber Co. v. Holcomb, 30 Ga. App. 651, 118 S.E. 577 (1923); Hughes v. State Bd. of Medical Exmrs., 162 Ga. 246, 134 S.E. 42 (1926); Gray v. Gunby, 206 Ga. 63, 55 S.E.2d 588 (1949); Weatherford v. Weatherford, 114 Ga. App. 223, 150 S.E.2d 713 (1966); Burson v. Foster, 123 Ga. App. 168, 179 S.E.2d 678 (1971); Pope v. Wolfe, 128 Ga. App. 226, 196 S.E.2d 412 (1973); Irby v. Christian, 130 Ga. App. 375, 203 S.E.2d 284 (1973); State Bd. of Equalization v. Pineland Tel. Coop., 135 Ga. App. 796, 219 S.E.2d 1 (1975); King v. King, 137 Ga. App. 251, 223 S.E.2d 752 (1976); City of Atlanta v. International Soc'y for Krishna Consciousness of Atlanta, Inc., 240 Ga. 96, 239 S.E.2d 515 (1977); Hawn v. Chastain, 246 Ga. 723, 273 S.E.2d 135 (1980); Village Ctrs., Inc. v. DeKalb County, 248 Ga. 177, 281 S.E.2d 522 (1981); Chambers v. City of Atlanta Bd. of Zoning Adjustment, 255 Ga. 538, 340 S.E.2d 922 (1986); Copeland v. White, 178 Ga. App. 644, 344 S.E.2d 436 (1986); Hunt v. Henderson, 178 Ga. App. 688, 344 S.E.2d 470 (1986).

RESEARCH REFERENCES

Am. Jur. 2d. — 5 Am. Jur. 2d, Appellate Review, § 252 et seq.

ALR. — Motion or petition for rehearing in court below as affecting time within which appellate proceedings must be taken or instituted, 10 ALR2d 1075.

Lower court's consideration, on the merits, of unseasonable application for new trial, rehearing, or other re-examination, as affecting time in which to apply for appellate review, 148 ALR 795.

Exclusion or inclusion of terminal Sunday or holiday in computing time for taking or perfecting appellate review, 61 ALR2d 482.

Retroactive effect on appeal from judgment previously entered of statute shortening time allowed for appellate review, 81 ALR2d 417.

Right to perfect appeal, against party who has not appealed, by cross appeal filed after time for direct appeal has passed, 32 ALR3d 1290.

Defendant's appeal from plea conviction as affected by prosecutor's failure or refusal to dismiss other pending charges, pursuant to plea agreement, until expiration of time for appeal, 86 ALR3d 1262.

5-3-21. Notice of appeal; form; service.

(a) An appeal to the superior court may be taken by filing a notice of appeal with the court, agency, or other tribunal appealed from. No particular form shall be necessary for the notice of appeal, but the following is suggested:

(NAME OF INFERIOR JUDICATORY)

STATE OF GEORGIA

_____	)	
	)	
v.	)	(Case number
	)	designation)
	)	
_____	)	

APPEAL TO SUPERIOR COURT

Notice is hereby given that _____, appellant herein, and

_____, above-named, hereby appeals to the Superior

(plaintiff, defendant, etc.)

Court of _____ County from the judgment (or order, decision, etc.) entered herein on _____(date)_____, _____.

Dated: _____.

_____

Attorney For
Appellant

_____

Address

(b) A copy of the notice of appeal shall be served on all parties in the same manner prescribed by Code Section 5-6-32. Failure to perfect service on any party shall not work dismissal, but the superior court shall grant continuances and enter such other orders as may be necessary to permit a just and expeditious determination of the appeal. (Orig. Code 1863, § 3534; Code 1868, § 3557; Ga. L. 1868, p. 131, § 2; Code 1873, § 3614; Code 1882, § 3614; Civil Code 1895, § 4456; Civil Code 1910, § 5001; Code 1933, § 6-103; Ga. L. 1972, p. 738, § 3; Ga. L. 1999, p. 81, § 5.)

JUDICIAL DECISIONS

Authority for appeals. — O.C.G.A. § 5-3-21 does not constitute an enabling act that authorizes appeals from any court, agency, or tribunal, and any authority for appeals to superior court must be found in other Code sections. Southern States Landfill, Inc. v. City of Atlanta Bd. of Zoning Adjustments, 261 Ga. 759, 410 S.E.2d 721 (1991).

Notice is absolute jurisdictional requirement. — Proper and timely filing of a notice of appeal is an absolute requirement to confer jurisdiction upon the appellate court. Cooper v. Gwinnett County Bd. of Educ., 157 Ga. App. 289, 277 S.E.2d 285 (1981); Elbert County Bd. of Educ. v. Gurley, 215 Ga. App. 205, 450 S.E.2d 258 (1994).

Supersedeas bond not notice of appeal. — While a notice of appeal serves as supersedeas unless a bond is ordered by the court, a supersedeas bond is not, of itself, a notice of appeal. A bond may be required for security as a prerequisite to bringing an appeal but the bond does not, itself, commence the appeal. Sharpe v. State, 198 Ga. App. 381, 401 S.E.2d 586 (1991).

Effect of filing in wrong court. — When a notice of appeal from a probate court decision is filed in a timely fashion, the superior court is vested with discretion in determining whether to dismiss the appeal. If the superior court finds that the filing of the notice of appeal in superior court has caused an unreasonable as well as inexcusable delay in the transmission of the record from the probate court, the appeal should be dismissed. Otherwise, the superior court is authorized to retain the appeal. In that event, the superior court has ample authority under O.C.G.A. § 5-3-27 to enter an order directing that the probate court transmit the record to the superior court so that the appeal can be decided. Mack v. Demming, 248 Ga. 117, 281 S.E.2d 591 (1981).

Appeal from decision rendered by local school board. — When no notice of appeal from a decision rendered by a local school board was filed with the State Board of Education but, instead, appellant filed an appeal directly in the superior court, proper appellate procedure was not followed. Therefore, the superior court did not have jurisdiction to review the decision sought to be appealed. Cooper v. Gwinnett County Bd. of Educ., 157 Ga. App. 289, 277 S.E.2d 285 (1981); Elbert County Bd. of Educ. v. Gurley, 215 Ga. App. 205, 450 S.E.2d 258 (1994).

Cited in Lane v. Douglas, 128 Ga. App. 231, 196 S.E.2d 368 (1973); City of Savannah Beach v. Thompson, 135 Ga. App. 63, 217 S.E.2d 304 (1975); Judd v. Valdosta/Lowndes County Zoning Bd. of Appeals, 147 Ga. App. 128, 248 S.E.2d 196 (1978).

RESEARCH REFERENCES

Am. Jur. 2d. — 5 Am. Jur. 2d, Appellate Review§ 292 et seq. 14 Am. Jur. 2d, Certiorari, § 49 et seq.

Am. Jur. Pleading and Practice Forms. — 2 Am. Jur. Pleading and Practice Forms, Appeal and Error, § 68.

ALR. — Sufficiency of "designation" under Federal Appellate Procedure Rule 3(c) of judgment or order appealed from in civil cases by notice of appeal not specifically designating such judgment or order, 141 ALR Fed 445.

5-3-22. Payment of costs prerequisite to appeal; affidavit of indigence; dismissal for nonpayment following court order; supersedeas bond.

(a) No appeal shall be heard in the superior or state court until any costs which have accrued in the court, agency, or tribunal below have been paid unless the appellant files with the superior or state court or with the court, agency, or tribunal appealed from an affidavit stating that because of indigence he or she is unable to pay the costs on appeal. In all cases, no appeal shall be dismissed in the superior or state court because of nonpayment of the costs below until the appellant has been directed by the court to do so and has failed to comply with the court's direction.

(b) Filing of the notice of appeal and payment of costs or filing of an affidavit as provided in subsection (a) of this Code section shall act as supersedeas, and it shall not be necessary that a supersedeas bond be filed; provided, however, that the superior or state court upon motion may at any time require that supersedeas bond with good security be given in such amount as the court may deem necessary unless the appellant files with the court an affidavit stating that because of indigence he or she is unable to give bond. (Laws 1799, Cobb's 1851 Digest, p. 494; Code 1863, § 3536; Code 1868, § 3559; Code 1873, § 3616; Code 1882, § 3616; Civil Code 1895, § 4458; Civil Code 1910, § 5003; Code 1933, § 6-105; Ga. L. 1972, p. 738, § 4; Ga. L. 1995, p. 10, § 5; Ga. L. 2009, p. 647, § 1/HB 324.)

JUDICIAL DECISIONS

Analysis

General Consideration
Costs
Supersedeas Bond

General Consideration

Purpose of payment. — Payments of costs in order to carry appeal is primarily intended to protect court officers. Hilderbrand v. Housing Auth., 109 Ga. App. 297, 136 S.E.2d 24 (1964).

Former Civil Code 1895, § 4464 (see O.C.G.A. § 5-3-24) formed an exception to former Civil Code 1895, § 4458 (see O.C.G.A. § 5-3-22). Bryson v. Scott, 111 Ga. 196, 36 S.E. 619 (1900).

Cited in Planters' & Miners' Bank v. Hudgins, 84 Ga. 108, 10 S.E. 501 (1889); Lewis, Leonard & Co. v. Maulden, 93 Ga. 758, 21 S.E. 147 (1894); Chapple v. Tucker, 110 Ga. 467, 35 S.E. 643 (1900); Deiter v. Ragsdale, 120 Ga. 417, 47 S.E. 942 (1904); Hays v. Eubanks, 125 Ga. 349, 54 S.E. 174 (1906); Roberts v. Napier Bros., 126 Ga. 693, 55 S.E. 914 (1906); Potts v. City of Atlanta, 140 Ga. 431, 79 S.E. 110 (1913); Whitson v. McNutt & Co., 26 Ga. App. 281, 105 S.E. 861 (1921); Alvaton Mercantile Co. v. Caldwell, 156 Ga. 317, 119 S.E. 25 (1923); Goodwyn v. Veal, 50 Ga. App. 657, 179 S.E. 126 (1935); Trowbridge v. Dominy, 92 Ga. App. 177, 88 S.E.2d 161 (1955); Kendrix v. Superior Egg Co., 99 Ga. App. 575, 109 S.E.2d 59 (1959); Smith v. Huckabee Properties, Inc., 111 Ga. App. 451, 142 S.E.2d 320 (1965); Taylor v. Public Convalescent Serv., 245 Ga. 805, 267 S.E.2d 242 (1980); Hawn v. Chastain, 154 Ga. App. 609, 269 S.E.2d 50 (1980).

Costs

Costs within meaning of former Code 1933, § 6-105 (see O.C.G.A. § 5-3-22) include all costs accruing in case up to entry of appeal. Shingler v. Furst, 52 Ga. App. 39, 182 S.E. 72 (1935).

Failure of clerk to exact costs when the clerk had recorded appeal will not operate as dismissal. Crawford v. Cate, 20 Ga. 69 (1856); Lyner v. Jackson, 20 Ga. 773 (1856); Fain v. Fain, 179 Ga. App. 285, 346 S.E.2d 96 (1986).

"Direct" means to give an order or command, not merely to advise or notify. Therefore, when the appellant was notified by the probate court of the obligation to pay court costs, but was not directed to pay costs by the court, the appellant's appeal should not have been dismissed for nonpayment of costs. Fain v. Fain, 179 Ga. App. 285, 346 S.E.2d 96 (1986).

Successful appellant cannot secure a refund of costs. Abrams v. Lang, Sons, 60 Ga. 218 (1878).

When an appeal is withdrawn, judgment may be entered for costs but not amount due on execution. Bryan v. Simpson, 92 Ga. 307, 18 S.E. 547 (1893).

Supersedeas Bond

Supersedeas bond not notice of appeal. — While a notice of appeal serves as supersedeas unless a bond is ordered by the court, a supersedeas bond is not, of itself, a notice of appeal. A bond may be required for security as a prerequisite to bringing an appeal but the bond does not, itself, commence the appeal. Sharpe v. State, 198 Ga. App. 381, 401 S.E.2d 586 (1991).

Failure to file supersedeas bond is no ground for dismissing appeal. Thornton v. Burson, 151 Ga. App. 456, 260 S.E.2d 388 (1979).

Failure to file supersedeas bond is no ground for dismissing appeal, even when the superior court finds such failure is willful. Hawn v. Chastain, 246 Ga. 723, 273 S.E.2d 135 (1980).

Effect of failure to file supersedeas bond. — Failure to file supersedeas bond simply means that judgment of trial court may be enforced. Thornton v. Burson, 151 Ga. App. 456, 260 S.E.2d 388 (1979).

Intent of General Assembly that appeals not be dismissed for failure to post supersedeas bonds is clearly shown by subsection (a), which expressly authorizes dismissal of an appeal for nonpayment of costs accrued in a lower tribunal after the appellant has been directed by superior court to pay such costs. Hawn v. Chastain, 246 Ga. 723, 273 S.E.2d 135 (1980).

No authorization for dismissal for failure to file supersedeas bond. — Ga. L. 1966, p. 609, § 41 (see O.C.G.A. § 9-11-41(b) not authorize dismissal of an appeal to superior court for failure to comply with order requiring supersedeas bond pursuant to subsection (b) of former Code 1933, § 6-105 (see O.C.G.A. § 5-3-22). Hawn v. Chastain, 246 Ga. 723, 273 S.E.2d 135 (1980).

Supersedeas Bond (Cont'd)

Dispossessory actions. — Subsection (b) of O.C.G.A. § 5-3-22 is applicable to appeals relating to dispossessory actions. Walker v. Crane, 216 Ga. App. 765, 455 S.E.2d 855 (1995).

RESEARCH REFERENCES

Am. Jur. 2d. — 5 Am. Jur. 2d, Appellate Review, §§ 421, 583, 851. 14 Am. Jur. 2d, Certiorari, § 53 et seq.

C.J.S. — 4 C.J.S., Appeal and Error, §§ 427 et seq., 535.

ALR. — Liability of surety in appeal bond where there was no supersedeas for costs in court below, 12 ALR 721.

Validity of judgment entered on appeal or supersedeas bond without previous notice and opportunity to be heard, 86 ALR 308.

Amount named in appeal or supersedeas bond as the maximum limit of sureties' liability or as a limitation of the amount which they undertake shall be paid on the judgment appealed from, 87 ALR 257.

Liability on supersedeas bond which was legally insufficient to effect stay, where enforcement of judgment was in fact suspended, 120 ALR 1062.

Condition of bond on appeal not in terms covering payment of money judgment, as having that effect by implication or construction, 124 ALR 501.

Supersedeas stay, or bail upon appeal in habeas corpus, 143 ALR 1354.

When appeal is or is not deemed to have been prosecuted "with effect" or "to effect" within condition of supersedeas bond, 163 ALR 410.

Attorneys' fees paid by appellee in resisting unsuccessful appellate review as damages recoverable on appeal bond, 37 ALR2d 525.

Necessity that person acting in fiduciary or representative capacity give bond to maintain appellate review proceedings, 41 ALR2d 1324.

Check or money as meeting requirement of appeal bond, 65 ALR2d 1134.

Taxable costs and disbursements as including expenses for bonds incident to steps taken in action, 90 ALR2d 448.

5-3-23. Signature on bond of attorney at law or in fact.

If an appeal is entered by the attorney at law or in fact, he may sign the name of the principal to the appeal bond, if required, and the principal shall be bound thereby as though he had signed it himself. (Orig. Code 1863, § 3537; Code 1868, § 3560; Code 1873, § 3617; Code 1882, § 3617; Civil Code 1895, § 4459; Civil Code 1910, § 5004; Code 1933, § 6-107.)

JUDICIAL DECISIONS

Cited in McCoy v. Sasnett, 77 Ga. App. 819, 49 S.E.2d 913 (1948); Ganns v. Worrell, 216 Ga. 512, 117 S.E.2d 533 (1960); National Bank v. Little, 115 Ga. App. 327, 154 S.E.2d 624 (1967).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 2 Am. Jur. Pleading and Practice Forms, Appeal and Error, § 261.

5-3-24. Exemption of executors, administrators, and trustees from paying costs and giving bond.

Executors, administrators, and other trustees, when defending an action as such or defending solely the title of the estate, may enter an appeal without paying costs and giving bond and security as required by Code Section 5-3-22; but, if a judgment should be obtained against such executor, administrator, or other trustee and not the assets of the estate, he must pay costs and give security as in other cases. (Laws 1799, Cobb's 1851 Digest, p. 495; Code 1863, § 3542; Code 1868, § 3565; Code 1873, § 3622; Code 1882, § 3622; Civil Code 1895, § 4464; Civil Code 1910, § 5009; Code 1933, § 6-113.)

Editor's notes. — The operation of this Code section is confined to appeals from courts other than the probate courts. See Hobbs v. Cody, 45 Ga. 478 (1872); Goodwyn v. Veal, 50 Ga. App. 657, 179 S.E. 126 (1935), and Wever v. Wever, 183 Ga. 453, 188 S.E. 706 (1936).

JUDICIAL DECISIONS

Suit against person as administrator gives the administrator the right to appeal without giving security. Irving v. Melton, 27 Ga. 330 (1859).

One sued in capacity of administrator need not give security as a prerequisite to appeal provided judgment is to affect only assets of decedent. McCay v. Devers, 9 Ga. 184 (1850).

When judgment rendered binds administrator personally, an appeal cannot be entered under provisions of this section. Bryson v. Scott, 111 Ga. 196, 36 S.E. 619 (1900); Webb v. Webb, 24 Ga. App. 464, 101 S.E. 200 (1919).

Administrator appealing from citation for settlement must pay costs. — In citation of administrator or other trustee for settlement in court of ordinary (now probate court), a personal judgment is intended, and when such judgment is rendered, against administrator or other trustee, in order to appeal the administrator must either pay costs or make a pauper affidavit required by law; the administrator cannot appeal as administrator or other trustee without paying costs under this section. Bruce v. Dunn, 52 Ga. App. 758, 184 S.E. 361 (1936).

Section inapplicable to citation proceedings by distributee against administrator. Hickman v. Hickman, 74 Ga. 401 (1884); Webb v. Webb, 24 Ga. App. 464, 101 S.E. 200 (1919).

Section inapplicable to annual ex parte return of administrator. Adams v. Beall, 60 Ga. 325 (1878).

Administrator, whose surety has become insolvent pending appeal, need not furnish additional security. Latimer Whiting & Co. v. Administrators of Ware, 2 Ga. 272 (1847).

When judgment amended to charge defendant individually. — When judgment de bonis testatoris was rendered by justice, and defendant, on same day, entered appeal without giving security, and subsequently judgment was amended by justice, so as to charge the defendant individually, appeal should not be dismissed because entered without appellant's giving bond and security. Cannon v. Sheffield, 59 Ga. 103 (1877).

Defective pauper affidavit filed in appeal by trustee. — Appeal by trustee from judgment against estate shall not be dismissed because the defective pauper affidavit was filed. Sawyer v. Cheney, 59 Ga. 368 (1877).

Clerk's failure to exact costs does not affect appeal. — If clerk receives appeal from administrator without exacting costs, appeal is good; for clerk, as to all concerned, except appellant, is estopped from saying that the appellant has not

received costs. Crawford v. Cate, 20 Ga. 69 (1856).

Cited in Ford v. Redfearn, 145 Ga. 498, 89 S.E. 611 (1916); Goodwyn v. Veal, 50 Ga. App. 657, 179 S.E. 126 (1935); Wever v. Wever, 183 Ga. 453, 188 S.E. 706 (1936).

RESEARCH REFERENCES

Am. Jur. 2d. — 5 Am. Jur. 2d, Appellate Review, § 849 et seq.

C.J.S. — 4 C.J.S., Appeal and Error, § 531 et seq.

ALR. — Right of executor or administrator to contest, or appeal from, court's rejection of claim against decedent's estate, 129 ALR 922.

5-3-25. Appeal by partners or joint contractors; signature on bond; appeal by corporation.

When several partners or joint contractors bring or defend an action as such, any one of the partners or joint contractors may enter an appeal in the name of the firm or joint contractors and sign the name of the firm or joint contractors to a bond if required by the superior court, which shall be binding on the firm and the joint contractors as though they had signed it themselves. In the case of corporations, the appeal may be entered by the president or any agent thereof managing the case or by the attorney of record. (Laws 1838, Cobb's 1851 Digest, p. 589; Code 1863, § 3538; Code 1868, § 3561; Code 1873, § 3618; Code 1882, § 3618; Civil Code 1895, § 4460; Civil Code 1910, § 5005; Code 1933, § 6-108.)

JUDICIAL DECISIONS

Last sentence of section provides for appeals by corporations. Crumm v. Allen & Co., 11 Ga. App. 203, 75 S.E. 108 (1912).

Description term not attached to name. — Dismissal is proper when appeal entered by one without descriptive term attached to one's name. Holston Box & Lumber Co. v. Holcomb, 30 Ga. App. 651, 118 S.E. 577 (1923).

Requirements of other statute are not as strict. — Requirements of former Civil Code 1895, §§ 4639, 4640, and 4641 (see O.C.G.A. § 5-4-5), as to those who may sign a certiorari bond on behalf of a corporation are not as strict as provisions of former Civil Code 1985, § 4460 (see O.C.G.A. § 5-3-25). New York Life Ins. Co. v. Rhodes, 4 Ga. App. 25, 60 S.E. 828 (1908).

Cited in King Hdwe. Co. v. Bowden, 113 Ga. 924, 39 S.E. 404 (1901).

RESEARCH REFERENCES

C.J.S. — 4 C.J.S., Appeal and Error, § 325 et seq.

ALR. — Survival of liability on joint obligation, 67 ALR 608.

5-3-26. Requirement of written defenses in appeal from justice of the peace court; right to amend pleadings.

Reserved. Repealed by Ga. L. 1983, p. 884, § 4-2, effective July 1, 1983.

Editor's notes. — This Code section was based on Ga. L. 1884-85, p. 97, § 1; Civil Code 1895, § 4139; Civil Code 1910, § 4739; Code 1933, § 6-303.

5-3-27. Amendments to cure defects.

No appeal shall be dismissed because of any defect in the notice of appeal, bond, or affidavit of indigence or because of the failure of the lower court, agency, or other tribunal to transmit the pleadings or other record; but the superior court shall at any time permit such amendments and enter such orders as may be necessary to cure the defect. (Code 1933, § 6-115, enacted by Ga. L. 1972, p. 738, § 5.)

JUDICIAL DECISIONS

Technicalities should not be determinative. — People's right to litigate with governmental bodies should not be decided on technicalities any more than one citizen's right to litigate with another citizen. City of Atlanta v. International Soc'y for Krishna Consciousness of Atlanta, Inc., 240 Ga. 96, 239 S.E.2d 515 (1977).

Effect of filing in wrong court. — When a notice of appeal from a probate court decision is filed in a timely fashion, the superior court is vested with discretion in determining whether to dismiss the appeal. If the superior court finds that the filing of the notice of appeal in superior court has caused an unreasonable as well as inexcusable delay in the transmission of the record from the probate court, the appeal should be dismissed. Otherwise, the superior court is authorized to retain the appeal. In that event, the superior court has ample authority to enter an order directing that the probate court transmit the record to the superior court so that the appeal can be decided. Mack v. Demming, 248 Ga. 117, 281 S.E.2d 591 (1981).

Filing an independent suit, rather than a notice of appeal in the lower tribunal, was sufficient to vest the superior court with jurisdiction to decide an appeal from an adverse decision of the mayor and city council, and the superior court was bound to make the determination whether the procedural irregularity caused unreasonable or inexcusable delay. Hanson v. Wilson, 257 Ga. 5, 354 S.E.2d 126 (1987).

Appeal from city court to superior court correctly dismissed. — Superior court correctly dismissed defendant's appeal from the city court to the superior court, because such appeal from the city court erroneously taken to the superior court to be transferred to the appellate court was not authorized by O.C.G.A. § 5-3-27. Sawyer v. City of Atlanta, 257 Ga. App. 324, 571 S.E.2d 146 (2002).

Cited in Sims v. American Cas. Co., 131 Ga. App. 461, 206 S.E.2d 121 (1974); Judd v. Valdosta/Lowndes County Zoning Bd. of Appeals, 147 Ga. App. 128, 248 S.E.2d 196 (1978); Zornes v. State, 262 Ga. 757, 426 S.E.2d 355 (1993); Adams v. State, 234 Ga. App. 696, 507 S.E.2d 538 (1998); Register v. Elliott, 285 Ga. App. 741, 647 S.E.2d 406 (2007).

RESEARCH REFERENCES

Am. Jur. 2d. — 5 Am. Jur. 2d, Appellate Review, §§ 264, 307, 341, 915.

C.J.S. — 4 C.J.S., Appeal and Error, §§ 415, 470, 600, 737.

5-3-28. Transmittal of record and transcripts to superior court; issuance of orders and writs.

(a) Within ten days of the filing of the notice of appeal, it shall be the duty of the judge or other official of the court, agency, or tribunal appealed from to cause a true copy of the pleadings, if any, and all other parts of the record (and transcript of evidence and proceedings, where the appeal is not de novo) to be transmitted to the superior court.

(b) The superior court may issue such orders and writs as may be necessary in aid of its jurisdiction on appeal. (Code 1933, § 6-114, enacted by Ga. L. 1972, p. 738, § 5.)

Cross references. — Appeals — probate court transcript not transmitted, Uniform Rules for the Probate Courts, Rule 9.3.

JUDICIAL DECISIONS

Meaning of "pleadings." — In a de novo proceeding, reference to "pleadings" generally refers to entire record sent up to superior court from lower tribunal and not only to appellant's petition for appeal. Judd v. Valdosta/Lowndes County Zoning Bd. of Appeals, 147 Ga. App. 128, 248 S.E.2d 196 (1978).

Cited in Tony v. Pollard, 248 Ga. 86, 281 S.E.2d 557 (1981); Mack v. Demming, 248 Ga. 117, 281 S.E.2d 591 (1981).

RESEARCH REFERENCES

Am. Jur. 2d. — 5 Am. Jur. 2d, Appellate Review, § 467 et seq.

5-3-29. De novo investigation.

An appeal to the superior court in any case where not otherwise provided by law is a de novo investigation. It brings up the whole record from the court below; and all competent evidence shall be admissible on the trial thereof, whether adduced on a former trial or not. Either party is entitled to be heard on the whole merits of the case. (Orig. Code 1863, § 3548; Code 1868, § 3571; Code 1873, § 3627; Code 1882, § 3627; Civil Code 1895, § 4469; Civil Code 1910, § 5014; Code 1933, § 6-501; Ga. L. 1972, p. 738, § 8; Ga. L. 1983, p. 884, § 3-1; Ga. L. 1986, p. 982, § 2.)

Editor's notes. — Ga. L. 1986, p. 982, § 25, not codified by the General Assembly, provided that that Act would apply to all cases filed on or after July 1, 1986.

Law reviews. — For annual survey of law of wills, trusts, and administration of estates, see 38 Mercer L. Rev. 417 (1986).

JUDICIAL DECISIONS

Analysis

General Consideration
Effect of Appeal on Inferior Court's Judgment
Scope of Appeal
Procedural Issues

General Consideration

All parties are brought up under this section whether the parties have appealed or not. Whether the parties have appealed or not the parties all have the right to appear and prosecute or defend as the case may be. Hanie v. Taylor, 4 Ga. App. 545, 61 S.E. 1054 (1908); Hunt v. Henderson, 178 Ga. App. 688, 344 S.E.2d 470 (1986).

Jury trial in superior court where factual issues involved. — An appeal is a de novo investigation, and in the superior court the appellant cannot be deprived of the right of trial by jury if questions of fact are involved. Goolsby v. Board of Drainage Comm'rs, 156 Ga. 213, 119 S.E. 644 (1923).

Appeal from court of ordinary (now probate court) brings whole case up for new hearing. Goodman v. Little, 213 Ga. 178, 97 S.E.2d 567 (1957).

O.C.G.A. § 5-3-29 provides that on appeal from a probate court all competent evidence shall be admissible in the trial de novo in the superior court and the whole record shall be brought up from below. Pendley v. Pendley, 251 Ga. 30, 302 S.E.2d 554 (1983).

Appeal of the magistrate court judgment to the superior court is a de novo investigation. Long v. Greenwood Homes, Inc., 285 Ga. 560, 679 S.E.2d 712 (2009).

Appeal from judgment allowing or refusing homestead. — When appeal is taken from judgment of ordinary, (now judge of probate court) in allowing or refusing homestead, whole case is brought up by appeal. Lynch v. Pace, 40 Ga. 173 (1869); Kirtland, Babcock & Bronson v. Davis, 43 Ga. 318 (1871).

Same rule applies in attachment. J. W. McGarrity & Co. v. Thomas, 9 Ga. App. 606, 71 S.E. 948 (1911).

Case on appeal from court of ordinary (now probate court) must be tried anew, as if no trial had been had. Hall v. First Nat'l Bank, 85 Ga. App. 498, 69 S.E.2d 679 (1952); Knowles v. Knowles, 125 Ga. App. 642, 188 S.E.2d 800 (1972); Mathews v. Mathews, 136 Ga. App. 833, 222 S.E.2d 609 (1975), cert. denied, 429 U.S. 844, 97 S. Ct. 123, 50 L. Ed. 2d 114 (1976).

Hearing required unless waived. — Although the Superior court is not required to conduct a hearing concerning the merits of the Department of Public Safety's decision to revoke the driver's license of an aggrieved party if the parties waive their right to be heard, the superior court cannot avoid the dictates of O.C.G.A. §§ 5-3-29 and 9-10-2 by simply failing to hold a hearing. Bowman v. Parrot, 200 Ga. App. 405, 408 S.E.2d 115, cert. denied, 200 Ga. App. 895, 408 S.E.2d 115 (1991).

Superior court not to review rulings of probate court. — It is not province of superior court on appeal to review and affirm or reverse rulings of ordinary (now judge of probate court), but to try issues anew and pass original judgments on questions involved as if there had been no previous trial. Hall v. First Nat'l Bank, 85 Ga. App. 498, 69 S.E.2d 679 (1952); Knowles v. Knowles, 125 Ga. App. 642, 188 S.E.2d 800 (1972); Mathews v. Mathews, 136 Ga. App. 833, 222 S.E.2d 609 (1975), cert. denied, 429 U.S. 844, 97 S. Ct. 123, 50 L. Ed. 2d 114 (1976).

Superior court erred in setting aside the year's support award for failure to provide evidence of an amount sufficient to constitute a year's support because the only issue properly before the court on appeal under O.C.G.A. § 5-3-29 was whether an objection had been made to the petitioner's petition for year's support. Because the superior court found that no objection had been made to the petition for year's support, the court erred in placing the burden of proof to show the amount suffi-

General Consideration (Cont'd)

cient for year's support upon the petitioner. The language of O.C.G.A. § 53-3-7(c) indicates that the petitioner shouldered that burden of proof only once an objection is made. Garren v. Garren, 316 Ga. App. 646, 730 S.E.2d 123 (2012).

Distinction between statutory appeal on merits and appeal by writ of error. — Statutory appeal providing for another trial in appellate court on merits of case is altogether different from writ of error on appeal for correction of errors in trial eventuating in judgment from which appeal is taken. In latter proceeding inquiry is into correctness of judgment upon pleading and evidence before trial court. Appellate court affirms or reverses in whole or in part the judgment on review and certifies the result to the trial court, where final judgment is entered. That procedure has nothing in common with that of a statutory appeal. The statutory appeal allows litigants in certain cases the right to another trial in superior court upon compliance with certain requisites. Trial in superior court is had without reference to evidence introduced in former trial, and is a de novo investigation. City of Macon v. Ries, 179 Ga. 320, 176 S.E. 21 (1934).

On appeal, it is action and not judgment that is examined. Abrams v. Lang, Sons, 60 Ga. 218 (1878).

Appeal under former Code 1933, § 6-201 (see O.C.G.A. § 5-3-2) placed the matter in the superior court for a de novo investigation under former Code 1933, § 6-501 (see O.C.G.A. § 5-3-29). Knowles v. Knowles, 125 Ga. App. 642, 188 S.E.2d 800 (1972).

Relinquishment of de novo appeal to court of appeals. — Defendant, by moving to dismiss the defendant's de novo appeal from a probate court to a superior court for failure to hold a timely trial under O.C.G.A. § 5-3-29, voluntarily relinquished his right to a de novo appeal to the court of appeals, and the defendant's conviction and sentence imposed by the probate court were, therefore, reinstated. Bailey v. State, 184 Ga. App. 890, 363 S.E.2d 172 (1987).

Cited in Tommey & Stewart v. Finney, 45 Ga. 155 (1872); Roberts v. Summers, 47 Ga. 434 (1872); In re Moseley, 17 F. Cas. 886 (S.D. Ga. 1873); Powell v. Perry, 63 Ga. 417 (1879); Fagan v. McTier, 81 Ga. 73, 6 S.E. 177 (1888); Brodhead v. Shoemaker, 44 F. 518, 111 L.R.A. 567 (N.D. Ga. 1890); Freeman v. Carr & Bro., 104 Ga. 718, 30 S.E. 935 (1898); Bryson v. Scott, 111 Ga. 196, 36 S.E. 619 (1900); Robinson v. McAlpin, 130 Ga. 489, 61 S.E. 115 (1908); Central Ga. Power Co. v. Cornwell, 139 Ga. 1, 76 S.E. 387, 1914A Ann. Cas. 880 (1912); Willingham v. Buckeye Cotton Oil Co., 13 Ga. App. 253, 79 S.E. 496 (1913); Byers v. Byers, 41 Ga. App. 671, 154 S.E. 456 (1930); Hill v. Hill, 55 Ga. App. 500, 190 S.E. 411 (1937); State Hwy. Bd. v. Long, 61 Ga. App. 173, 6 S.E.2d 130 (1939); Forrester v. Pullman Co., 66 Ga. App. 745, 19 S.E.2d 330 (1942); Rabun v. Planters Cotton Oil Co., 68 Ga. App. 37, 21 S.E.2d 922 (1942); Allen v. Allen, 71 Ga. App. 272, 30 S.E.2d 665 (1944); Bethea County v. Dixon, 72 Ga. App. 384, 33 S.E.2d 723 (1945); Hartley v. Holwell, 202 Ga. 724, 44 S.E.2d 896 (1947); Anderson v. Smith, 76 Ga. App. 171, 45 S.E.2d 282 (1947); Jones v. Cannady, 78 Ga. App. 453, 51 S.E.2d 551 (1949); Roe v. Pitts, 82 Ga. App. 770, 62 S.E.2d 387 (1950); Oxford v. Farr, 98 Ga. App. 776, 106 S.E.2d 911 (1958); McCray v. First Nat'l Bank, 103 Ga. App. 506, 120 S.E.2d 26 (1961); Brumbelow v. Brumbelow, 111 Ga. App. 665, 142 S.E.2d 855 (1965); Ingram v. Rooks, 221 Ga. 701, 146 S.E.2d 743 (1966); Undercofler v. White, 113 Ga. App. 853, 149 S.E.2d 845 (1966); Hodges v. Libbey, 120 Ga. App. 246, 170 S.E.2d 37 (1969); Olley Valley Estates, Inc. v. Fussell, 232 Ga. 779, 208 S.E.2d 801 (1974); Edge v. Edge, 134 Ga. App. 162, 213 S.E.2d 540 (1975); Ledford v. Farrow, 134 Ga. App. 591, 215 S.E.2d 344 (1975); City of Savannah Beach v. Thompson, 135 Ga. App. 63, 217 S.E.2d 304 (1975); Weeks v. Gwinnett County Bd. of Tax Equalization, 139 Ga. App. 37, 227 S.E.2d 865 (1976); Carter v. Carter, 139 Ga. App. 548, 228 S.E.2d 708 (1976); McKnight v. Mitchell, 142 Ga. App. 344, 235 S.E.2d 763 (1977); City of Smyrna v. Ruff, 240 Ga. 250, 240 S.E.2d 19 (1977); Judd v. Valdosta/Lowndes County Zoning Bd. of Appeals, 147 Ga. App. 128, 248 S.E.2d 196 (1978); Hunter v. Hunter, 149 Ga. App.

324, 254 S.E.2d 477 (1979); Rawlins v. Rawlins, 150 Ga. App. 534, 258 S.E.2d 187 (1979); Tony v. Pollard, 248 Ga. 86, 281 S.E.2d 557 (1981); Smith v. Smith, 165 Ga. App. 532, 301 S.E.2d 696 (1983); Gay v. Farley, 255 Ga. 174, 336 S.E.2d 235 (1985); General Accident Ins. Co. v. Wells, 179 Ga. App. 440, 346 S.E.2d 886 (1986); Anderson v. City of Alpharetta, 187 Ga. App. 148, 369 S.E.2d 521 (1988); Walton v. State, 261 Ga. 392, 405 S.E.2d 29 (1991); Barmore v. Himebaugh, 200 Ga. App. 868, 410 S.E.2d 46 (1991); Hooper v. Taylor, 230 Ga. App. 128, 495 S.E.2d 594 (1998); Clark v. Davis, 242 Ga. App. 425, 530 S.E.2d 49 (2000); Giles v. Vastakis, 262 Ga. App. 483, 585 S.E.2d 905 (2003); Candies v. Hulsey, 277 Ga. 630, 593 S.E.2d 353 (2004); Jessup v. Ray, 311 Ga. App. 523, 716 S.E.2d 583 (2011).

Effect of Appeal on Inferior Court's Judgment

Judgment appealed from and opposite judgment in superior court might both be free of error. — It is quite obvious that, with such latitude as to evidence as is given by this section, the judgment appealed from and a directly opposite judgment in appellate court, might both be free from error — each of them might be absolutely correct on the facts submitted, and the law applicable thereto. Abrams v. Lang, Sons, 60 Ga. 218 (1878).

Appeal from court of ordinary (now probate court) suspends, but does not vacate judgment. Snell v. Lopez, 91 Ga. App. 552, 86 S.E.2d 363 (1955).

No waiver of right to trial by jury. — Because: (1) by repealing former provisions of O.C.G.A. § 5-3-30, the Georgia legislature intended that appeals from the probate court to the superior court would continue without special limitations on the right to a jury trial; and (2) de novo appeals to the superior court from the probate court were to be tried by jury unless the right to a jury trial was waived, given that a widow specifically requested a jury trial, and hence did not waive the right, the trial court erred in denying the widow's request. Montgomery v. Montgomery, 287 Ga. App. 77, 650 S.E.2d 754 (2007).

Justice's court judgment remains operative, but incapable of enforcement pending appeal. Tilley v. King, 193 Ga. 602, 19 S.E.2d 281 (1942), later appeal, 69 Ga. App. 561, 26 S.E.2d 293 (1943).

Judgment against joint defendant is suspended pending appeal of nonsuit. — As to other joint defendant when the maker and endorser of a promissory note are jointly sued and judgment rendered against the endorser and nonsuit as to maker, judgment against an endorser is suspended until rendition of the case on appeal. Turnell v. Carter, 5 Ga. App. 847, 64 S.E. 114 (1909).

When appellee is successful on appeal, lien of judgment is binding from date originally rendered. — When on appeal from judgment in justice's court appellee is successful, lien of judgment will be taken as binding from date of the judgment's original rendition, and entitled to superiority over subsequently rendered judgment, notwithstanding provisions of former Code 1933, § 110-508 (see O.C.G.A. § 9-12-88). Tilley v. King, 193 Ga. 602, 19 S.E.2d 281 (1942), later appeal, 69 Ga. App. 561, 26 S.E.2d 293 (1943).

Appeal from a decision of a magistrate court is "a de novo investigation," in which the magistrate court's decision on the merits of the claim has no bearing. Howe v. Roberts, 259 Ga. 617, 385 S.E.2d 276 (1989).

Scope of Appeal

On appeal, either party is entitled to be heard on whole merits of case. Mathews v. Mathews, 136 Ga. App. 833, 222 S.E.2d 609 (1975), cert. denied, 429 U.S. 844, 97 S. Ct. 123, 50 L. Ed. 2d 114 (1976).

Duty of superior court upon overruling objections to petition. — If judge of superior court overrules demurrer (now motion to dismiss) and objections to petition to set aside judgment of court of ordinary (now probate court) it is the judge's duty to try issues made by such petition and defensive pleadings. Hall v. First Nat'l Bank, 85 Ga. App. 498, 69 S.E.2d 679 (1952).

Scope of Appeal (Cont'd)

Appeal imparts same jurisdiction as was possessed by inferior court. — When a guardian seeks compensation for unsuccessful effort by the guardian, as attorney at law and in apparent good faith, to have order of court of ordinary (now probate court) granting encroachment upon estates of the guardian's wards modified, set aside, or vacated, the superior court on de novo appeal is vested with same discretion in matter that court of ordinary had. Whitehurst v. Singletary, 77 Ga. App. 811, 50 S.E.2d 80 (1948).

Superior court, on appeal from court of ordinary, (now probate court) has no broader jurisdiction than that of court of ordinary. Snell v. Lopez, 91 Ga. App. 552, 86 S.E.2d 363 (1955).

Superior court on trial of appeal from court of ordinary (now probate court) has no broader powers than court of ordinary itself had. Goodman v. Little, 213 Ga. 178, 97 S.E.2d 567 (1957).

Appeal from court of ordinary (now probate court) brings whole case up for new hearing but with same jurisdiction as was possessed by court of ordinary. Knowles v. Knowles, 125 Ga. App. 642, 188 S.E.2d 800 (1972).

Rulings of inferior court as to law and facts may be adjudicated de novo on appeal. Garrison v. McGuire, 114 Ga. App. 665, 152 S.E.2d 624 (1966).

Issues allowable on appeal. — Any issue that may be made before tribunal originally hearing case may be made on appeal thereof to superior court when such appeal is a de novo investigation. City of Griffin v. Southeastern Textile Co., 79 Ga. App. 420, 53 S.E.2d 921 (1949).

Evidence which may be introduced. — Appeal to superior court from probate court is a de novo investigation, and competent evidence may be heard which was not introduced in probate court. Dukes v. Joyner, 234 Ga. 526, 216 S.E.2d 822 (1975).

Purpose of O.C.G.A. § 5-3-29 is to provide the parties to an appeal a de novo hearing, and "all competent evidence" may be introduced in the superior court regardless of whether it was submitted below. Lee v. Wainwright, 256 Ga. 478, 350 S.E.2d 238 (1986).

An appeal from the magistrate court was a de novo proceeding in which either party could adduce evidence additional to that originally presented in the magistrate court. Stamps v. Nelson, 290 Ga. App. 277, 659 S.E.2d 697 (2008).

Restriction on presentation of new matters on appeal. — While an appeal to the superior court from the probate court is a de novo investigation, the trial in the superior court is not a trial without limitation but is a new trial in which only the matter presented to the court below can be relitigated. Williams v. Calloway, 171 Ga. App. 286, 319 S.E.2d 500 (1984).

Suit on appeal is subject to attacks upon jurisdiction which could have been made below. — In case pending in superior court on appeal from judgment of justice of peace, defendant may plead any defense, including plea to jurisdiction of justice's court, which the defendant could have pled in that court, irrespective of whether, upon trial of case therein, this defense was pled. Smith v. Atlanta Mut. Ins. Co., 42 Ga. App. 254, 155 S.E. 535 (1930).

Since appeal from court of ordinary (now probate court) to superior court is a de novo proceeding, any defense or attack upon jurisdiction which could have been made in the court of ordinary can be made in superior court on appeal. Cromer v. Chambers, 104 Ga. App. 196, 121 S.E.2d 397 (1961).

Superior court may hear and sustain demurrer (now motion to dismiss) previously heard and overruled in county court. Bowman v. Bowman, 79 Ga. App. 240, 53 S.E.2d 244 (1949).

Application of section to appeal from dismissal by probate court for want of jurisdiction. — See Touchton v. Stewart, 222 Ga. 455, 150 S.E.2d 643 (1966).

Striking defendant on appeal discharges defendant from any liability in cause of action. — As hearing is de novo, striking defendant on appeal against whom judgment was rendered in justice's court operates to discharge such defendant from any liability in cause of action. Hanie v. Taylor, 4 Ga. App. 545, 61 S.E. 1054 (1908).

City charter provision permitting appeals from tax assessments to su-

perior court. — When city charter provides that a tax assessment may be appealed from taxing authorities of city to superior court, there to be disposed of as other appeal cases, such appeal is a de novo investigation and brings up the whole record, to be tried anew in superior court. City of Griffin v. Southeastern Textile Co., 79 Ga. App. 420, 53 S.E.2d 921 (1949).

Procedural Issues

Generally, same procedural rules apply in de novo review as in trials of other civil cases. Brown v. Frachiseur, 247 Ga. 463, 277 S.E.2d 16 (1981).

Defendant, though not joining in appeal, may make any timely and appropriate amendments to plea or answer already entered. Murray v. Marshall, 106 Ga. 522, 32 S.E. 634 (1899).

No greater duty is placed upon appellant to bring case to trial than upon appellee. While it is true that appellant is the moving party as far as appeal is concerned, once appeal and supporting record is docketed in superior court, it is entitled to de novo treatment. Etheridge v. Etheridge, 242 Ga. 101, 249 S.E.2d 569 (1978).

Appeal must include certified judgment or record. — When there is no certified judgment or record before the superior court as to judgment rendered by appeals board, appeal to superior court is incomplete. Fletcher v. Daniels, 211 Ga. 403, 86 S.E.2d 232 (1955).

Failure of magistrate to send up judgment rendered by the magistrate is no ground for dismissal. Pearce & Renfroe v. Renfroe Bros., 68 Ga. 194 (1881).

Absence of party. — Appeal, unlike an action, should not be dismissed because of absence of either party. Rousch v. Green, 2 Ga. App. 112, 58 S.E. 313 (1907).

Judgment on merits of affidavit of illegality does not preclude motion to dismiss affidavit on appeal. — That plaintiff in fi. fa. went to trial in justice's court on merits of affidavit of illegality, where judgment was rendered against illegality, did not preclude plaintiff in fi. fa. from making motion to dismiss affidavit of illegality on call of case in superior court, to which defendant had appealed. Norris v. Carter & Nelson, 32 Ga. App. 607, 124 S.E. 144 (1924).

Party may invoke summary judgment procedure in appeal to superior court. — An appeal to superior court from court of ordinary (now probate court) is subject to established procedures for civil actions, thus entitling a party to invoke summary judgment procedure. Woodall v. First Nat'l Bank, 118 Ga. App. 440, 164 S.E.2d 361 (1968).

Evidence of additional damages in trial de novo. — When plaintiff appealed to the state court from a magistrate court's decision dismissing the plaintiff's claim and awarding damages to the defendant on the defendant's counterclaim, and the plaintiff had notice of additional damages since the original counterclaim, the defendant could present evidence of additional damages of less than $5,000 relating to the defendant's counterclaim, without formal amendment of the defendant's pleadings. Jr. Mills Constr. v. Trichinotis, 223 Ga. App. 19, 477 S.E.2d 141 (1996).

It is not reversible error to allow jury to know outcome in inferior court. Kelley v. Kelley, 129 Ga. App. 257, 199 S.E.2d 399 (1973).

Letting jury know what judgment was rendered below will not render the jury's verdict void, although it is not a proper practice. Humphrey v. Johnson, 143 Ga. 703, 85 S.E. 830 (1915).

Reliance by jury upon record below in reaching the jury's decision. — Jury in superior court proceeding does not review and affirm or reverse rulings of probate judge, but hears all issues anew as if there had been no previous trial, and if the jury relies upon record below or allows the judgment below to influence the jury's decision, reversible error is committed. Allmond v. Johnson, 153 Ga. App. 59, 264 S.E.2d 544 (1980).

Summary judgment available in appeal from probate court's award for support. — Appeal of an application for a year's support award by a probate court is a de novo proceeding in the superior court, and as such, the appeal is subject to the established procedures for civil actions, thus entitling a party to invoke summary judgment. Bright v. Knecht, 182 Ga. App.

Procedural Issues (Cont'd)

820, 357 S.E.2d 159 (1987).

Issues never raised on appeal. — Upon a wife's request for year's support, because a son never presented argument or evidence to contest the amount sought by the wife, never sought a hearing on the amount, and failed to rebut the wife's claim of entitlement to that support, the son's claims of error on appeal from an order granting the wife summary judgment in the superior court lacked merit. In re Estate of Avery, 281 Ga. App. 904, 637 S.E.2d 504 (2006).

RESEARCH REFERENCES

Am. Jur. 2d. — 47 Am. Jur. 2d, Justices of the Peace, §§ 50, 51.

C.J.S. — 5 C.J.S., Appeal and Error, § 886 et seq.

ALR. — Review on appeal of evidence as to genuineness of disputed documents, 6 ALR 507; 12 ALR 212; 27 ALR 319.

May new trial or reversal for error as to measure of damages against one or more of the parties be restricted to those parties, 32 ALR 255.

First decision of intermediate court as law of the case on appeal to court of last resort from subsequent decision, 41 ALR 1078; 118 ALR 1286.

Evidence erroneously stricken out as proper for consideration by appellate court to sustain finding or verdict, 152 ALR 371.

Propriety and prejudicial effect of prosecutor's remarks as to victim's age, family circumstances, or the like, 50 ALR3d 8.

5-3-30. Calendaring appeal; waiver of trial by jury; monetary limitations inapplicable.

(a) Upon the filing of an appeal from magistrate court to superior court or state court, the appeal shall be placed upon the court's next calendar for nonjury trial. Such appeals from the magistrate court to superior court or state court shall be tried by the superior court or state court without a jury unless either party files a demand for a jury trial within 30 days of the filing of the appeal or the court orders a jury trial.

(b) Upon filing an appeal pursuant to subsection (a) of this Code section, the monetary limitations provided for in paragraph (5) of Code Section 15-10-2 shall no longer apply to any verdict and judgment entered by the superior or state court. (Laws 1805, Cobb's 1851 Digest, p. 183; Laws 1823, Cobb's 1851 Digest, p. 497; Code 1863, § 3551; Code 1868, § 3574; Code 1873, § 3630; Code 1882, § 3630; Civil Code 1895, § 4472; Civil Code 1910, § 5017; Code 1933, § 6-601; Ga. L. 1988, p. 253, § 1; Ga. L. 1998, p. 552, § 1; Ga. L. 2001, p. 1223, § 1.)

Editor's notes. — Ga. L. 1998, p. 552, § 2, not codified by the General Assembly, provides that the 1998 amendment to this Code section is applicable to appeals filed on or after July 1, 1998.

Cross references. — Juries, T. 15, C. 12.

Law reviews. — For article, "Trial Practice and Procedure," see 53 Mercer L. Rev. 475 (2001). For survey article on wills, trusts, guardianships, and fiduciary administration, see 60 Mercer L. Rev. 417 (2008).

JUDICIAL DECISIONS

Language of section is obligatory. — Language of section is obligatory, especially where it concerns and affects public interest as well as interest of appellant and failure to comply, unless excusable, will result in dismissal. Huber v. State, 140 Ga. App. 148, 230 S.E.2d 105 (1976).

No waiver of right to trial by jury. — Because: (1) by repealing former provisions of O.C.G.A. § 5-3-30, the Georgia legislature intended that appeals from the probate court to the superior court would continue without special limitations on the right to a jury trial; and (2) de novo appeals to the superior court from the probate court were to be tried by jury unless the right to a jury trial was waived, given that a widow specifically requested a jury trial, and hence did not waive the right, the trial court erred in denying the widow's request. Montgomery v. Montgomery, 287 Ga. App. 77, 650 S.E.2d 754 (2007).

Constitutional right to jury trial in dispossessory actions. — Where the appellants had sought a jury trial in a local magistrate court on the issue of possession in a landlord-tenant dispute, the appellee denied the appellants' request, the appellants filed a writ of prohibition against the appellee in the superior court, and the superior court denied the appellants' writ and issued a certificate of immediate review to the Supreme Court of Georgia, the magistrate court did not err in denying the appellants a jury trial, since the right to jury trial on appeal is expressly given in this Code section, and the appellants are not being denied a jury trial, but instead, only endure a procedural delay in the magistrate court before receiving a jury trial on appeal to the state or superior court. Hill v. Levenson, 259 Ga. 395, 383 S.E.2d 110 (1989).

Control of calendars and trial of cases are procedures in hands of court, not counsel. Etheridge v. Etheridge, 242 Ga. 101, 249 S.E.2d 569 (1978); Lackey v. DeKalb County, 156 Ga. App. 309, 274 S.E.2d 705 (1980).

No greater duty is placed upon appellant than upon appellee to bring case to trial. Lackey v. DeKalb County, 156 Ga. App. 309, 274 S.E.2d 705 (1980).

If court does not reach case during first term after entry, neither party is penalized. — It being express command of this section that appeal cases be tried by jury at first term after appeal has been entered, it would appear duty of clerk to place same upon trial calendar for first term after docketing. If it cannot be reached at that term, or should court otherwise defer the matter, neither party should be penalized because it has not been reached. Etheridge v. Etheridge, 242 Ga. 101, 249 S.E.2d 569 (1978); Lackey v. DeKalb County, 156 Ga. App. 309, 274 S.E.2d 705 (1980).

Jury is required on trial of appeals from county court to superior court. Johnson v. Ford, 92 Ga. 751, 19 S.E. 712 (1894).

Jury is to be taken from panels of traverse jurors and not from grand juries. Cronan v. Roberts & Co., 65 Ga. 678 (1880).

Jury trial in guardianship proceedings. — The legitimate public interest in an incapacitated adult's welfare, coupled with statutory scheme requiring a jury trial in appeals to the superior court from the probate court, compelled the conclusion that a jury trial was required in guardianship proceeding. In re Boles, 172 Ga. App. 111, 322 S.E.2d 319 (1984).

Judge may direct verdict for defendant where demanded by evidence. Callaway & Truitt v. Southern Ry., 126 Ga. 192, 55 S.E. 22 (1906).

Letting jury know what judgment was rendered below will not render its verdict void, although it is not a proper practice. Humphrey v. Johnson, 143 Ga. 703, 85 S.E. 830 (1915).

Cited in Montgomery v. Fouche, 125 Ga. 43, 53 S.E. 767 (1906); Culver v. Pierce, 148 Ga. 300, 96 S.E. 497 (1918); Goolsby v. Board of Drainage Comm'rs, 156 Ga. 213, 119 S.E. 644 (1923); Jones v. Cannady, 78 Ga. App. 453, 51 S.E.2d 551 (1949); United States v. Raines, 189 F. Supp. 121 (M.D. Ga. 1960); Gifford v. Courson, 224 Ga. 840, 165 S.E.2d 133 (1968); Bell v. Cronic, 248 Ga. 457, 283 S.E.2d 476 (1981); Anderson v. City of Alpharetta, 187 Ga. App. 148, 369 S.E.2d

521 (1988); Walton v. State, 261 Ga. 392, 405 S.E.2d 29 (1991); Davis v. Hawkins, 238 Ga. App. 749, 521 S.E.2d 10 (1999).

RESEARCH REFERENCES

Am. Jur. 2d. — 47 Am. Jur. 2d, Justices of the Peace, § 448 et seq.

5-3-31. Damages assessed for frivolous appeals.

If upon the trial of any appeal it shall appear to the jury that the appeal was frivolous and intended for delay only, they shall assess damages against the appellant and his security, if any, in favor of the appellee for such delay, not exceeding 25 percent on the principal sum which they shall find due, which damages shall be specially noted in their verdict. (Laws 1799, Cobb's 1851 Digest, p. 495; Code 1863, § 3552; Code 1868, § 3575; Ga. L. 1868, p. 132, § 2; Code 1873, § 3631; Code 1882, § 3631; Civil Code 1895, § 4473; Civil Code 1910, § 5018; Code 1933, § 6-602; Ga. L. 1983, p. 884, § 3-2.)

JUDICIAL DECISIONS

Analysis

General Consideration
Assessment of Damages
Application

General Consideration

Purpose of section. — Purpose of this section is to inflict punishment and to compensate respondent for delay, costs, and vexation caused by frivolous appeal. Garrison v. Wilcoxson, 11 Ga. 154 (1852); Adams v. Carnes, 111 Ga. 505, 36 S.E. 597 (1900); Hardy v. Truitt, 20 Ga. App. 529, 93 S.E. 149 (1917).

Exclusivity of remedy. — O.C.G.A. § 5-3-31 does not provide the exclusive remedy for imposition of sanctions for appeals to the superior court; the statute applies only to cases of appeal wherein the jury returns a verdict for a sum of money. Osofsky v. Board of Mayor & Comm'rs, 237 Ga. App. 404, 515 S.E.2d 413 (1998).

To justify assessment of damages, appeal must be both frivolous and intended for delay. Gunnels v. Deavours, 57 Ga. 177 (1876).

When appeal deemed for purpose of delay. — Appeal is intended to delay only when entirely without merit and entered merely to postpone creditor in collection of debt. Clark v. Fee, 86 Ga. 9, 12 S.E. 181 (1890).

Appellant's failure to submit evidence, by itself, is not conclusive of issue of intent to delay. Gilmore v. Wright, 20 Ga. 198 (1856).

In determining whether appeal is frivolous and intended to delay, the jury must consider all evidence. Garrison v. Wilcoxson, 11 Ga. 154 (1852).

Cited in Tommey & Stewart v. Finney, 45 Ga. 155 (1872); Robinson v. Medlock, 59 Ga. 598 (1877).

Assessment of Damages

For determination by jury. — Amount of damages (under subsection (a)) is for determination by jury, uninfluenced by opinion of court. McMillan v. Lawrence, Smith & Whilden, 25 Ga. 189 (1858).

Appropriate considerations in determining damages under section. — See McMillan v. Lawrence, Smith &

Whilden, 25 Ga. 189 (1858).

Maximum award only in extreme cases. — Only in extreme cases should 25 percent maximum damages be awarded. McMillan v. Lawrence, Smith & Whilden, 25 Ga. 189 (1858).

Application

O.C.G.A. § 5-3-31 applies only to appeals which are de novo investigations. Butlerhouse Maintenance Co. v. Greeson, 174 Ga. App. 637, 331 S.E.2d 46 (1985).

Section applicable only to cases when money verdicts are rendered. — Inasmuch as provisions of section are necessarily applicable to those cases only in which money verdicts are rendered, the judgment cannot be enforced in claim cases. Adams v. Carnes, 111 Ga. 505, 36 S.E. 597 (1900).

Section applicable to appeal by garnishee. Davis v. Rhodes, 112 Ga. 106, 37 S.E. 169 (1900).

Section not applicable to appeal of Workers' Compensation Board decisions. — Provisions of O.C.G.A. § 5-3-31 providing for the award of attorney's fees against a party bringing a frivolous appeal do not apply to appeals to the superior court of decisions of the Workers' Compensation Board pursuant to O.C.G.A. § 34-9-105. Butlerhouse Maintenance Co. v. Greeson, 174 Ga. App. 637, 331 S.E.2d 46 (1985).

Appeal presenting bona fide contest or seeking ruling on open or doubtful question. — If, after reviewing the whole matter the court believes that the plaintiff in error is presenting a bona fide contest over a colorable matter, though the plaintiff's view of the law may not in fact be well founded, or that the plaintiff is seeking a ruling upon an open or doubtful question, damages will be refused. United States Fid. & Guar. Co. v. Blankenship Plumbing Co., 153 Ga. App. 335, 265 S.E.2d 66 (1980).

Property alienated pending appeal is bound for payment of damages for frivolous appeal just as it is for payment of the rest of the amount of appeal judgment. Phillips v. Behn & Foster, 19 Ga. 298 (1856).

RESEARCH REFERENCES

Am. Jur. 2d. — 5 Am. Jur. 2d, Appellate Review, §§ 891, 892.

C.J.S. — 5 C.J.S., Appeal and Error, § 754.

ALR. — Award of damages for dilatory tactics in prosecuting appeal in state court, 91 ALR3d 661.

CHAPTER 4

CERTIORARI TO SUPERIOR COURT

Sec.
5-4-1. When certiorari shall lie; exception.
5-4-2. Petition for certiorari to probate judge generally.
5-4-3. Petition for certiorari to inferior judicatories generally.
5-4-4. Petition for certiorari in appeal case tried by jury in justice of the peace court generally [Repealed].
5-4-5. Bond and security required; certificate of payment of costs; oath of security; affidavit of indigence.
5-4-6. Time for application for writ; filing of petition; service of petition and writ.
5-4-7. Time for filing of answer; manner of service; effect of failure to perfect service.
5-4-8. Writing or dictation of answer by parties, attorneys, or interested persons; when verification required.
5-4-9. Filing of traverse or exception to answer; perfection of answer.
5-4-10. Amendment of petition, bond, answer, and traverse.
5-4-11. Conduct of hearing generally; trial by jury.
5-4-12. Grounds of error considered generally; scope of review; technical distinctions abolished.
5-4-13. Grant of writ for failure to prove venue or time of criminal offense.
5-4-14. Dismissal or return of writ to lower court with instructions; entry by superior court of final decision where no questions of fact involved.
5-4-15. Requirement of new trial when writ not answered.
5-4-16. Recovery of costs by plaintiff where certiorari sustained; recovery of costs by plaintiff where certiorari returned to lower court for new trial.
5-4-17. Recovery of costs by defendant generally.
5-4-18. Recovery of damages for frivolous certiorari.
5-4-19. Operation of writ of certiorari as supersedeas in civil cases.
5-4-20. Supersedeas of criminal conviction; bond; affidavit of indigence; effect of supersedeas.

Cross references. — Exercise of judicial power, Ga. Const. 1983, Art. VI, Sec. I, Para. IV. Procedure for appeals from decisions of superior court reviewing decisions of lower courts by certiorari, § 5-6-35. Description of extent of authority of superior court to exercise appellate jurisdiction and to exercise general supervision over all inferior tribunals, § 15-6-8.

JUDICIAL DECISIONS

Includable grounds. — For certiorari, petition must set forth all of grounds asserted as error but may include only those grounds that were insisted upon at trial or hearing. Further, when it does not appear from the record that those issues were made in the trial court, the issues can not be raised by certiorari in the superior court, or reviewed in the Court of Appeals. Willis v. Jackson, 148 Ga. App. 432, 251 S.E.2d 341 (1978).

RESEARCH REFERENCES

Am. Jur. 2d. — 14 Am. Jur. 2d, Certiorari, § 1 et seq.

C.J.S. — 14 C.J.S., Certiorari, § 1 et seq.

ALR. — Payment of fine, serving sentence, or discharge on habeas corpus, as waiver of right to review conviction, 18 ALR 867; 74 ALR 638.

5-4-1. When certiorari shall lie; exception.

(a) The writ of certiorari shall lie for the correction of errors committed by any inferior judicatory or any person exercising judicial powers, including the judge of the probate court, except in cases touching the probate of wills, granting letters testamentary, and of administration.

(b) Notwithstanding subsection (a) of this Code section, the writ of certiorari shall not lie in civil cases in the probate courts which are provided for by Article 6 of Chapter 9 of Title 15. (Orig. Code 1863, § 3957; Code 1868, § 3977; Code 1873, § 4049; Code 1882, § 4049; Civil Code 1895, § 4634; Civil Code 1910, § 5180; Code 1933, § 19-101; Ga. L. 1986, p. 982, § 3.)

Editor's notes. — Ga. L. 1986, p. 982, § 25, not codified by the General Assembly, provided that that Act would apply to all cases filed on or after July 1, 1986.

Law reviews. — For annual survey on trial practice and procedure, see 38 Mercer L. Rev. 383 (1986). For survey of 1995 Eleventh Circuit cases on trial practice and procedure, see 47 Mercer L. Rev. 907 (1996). For annual survey of law on administrative law, see 62 Mercer L. Rev. 1 (2010).

JUDICIAL DECISIONS

Analysis

General Consideration
Decisions Subject to Review by Certiorari
What Is Judicial Action
1. In General
2. Application

General Consideration

Editor's notes. — In light of the similarity of the provisions, decisions under former Code 1882, § 4157j; former Civil Code 1895, § 4149; former Civil Code 1910, § 4749; and former Code 1933, § 19-204 are included in the annotations for this Code section.

Section provides for review of decisions in exercise of judicial powers. — Certiorari is a remedy whereby a litigant may have review of judgment or decision of inferior judicatory or a person exercising judicial powers. Richardson v. Rector, 134 Ga. App. 116, 213 S.E.2d 488 (1975).

Legislative intent. — It was the intention of the framers of the Constitution, and of the legislature, to provide writ of certiorari to superior courts to all persons dissatisfied with judgments of inferior judicatories and who desire to have those judgments corrected by the superior court. Cochran v. City of Rockmart, 242 Ga. 732, 251 S.E.2d 259 (1978).

Right of certiorari is a constitutional right. Wrenn v. Bowden, 56 Ga. App. 713, 193 S.E. 456 (1937).

Constitutional as well as a statutory remedy. The legislature has provided by general law the manner and means for carrying out Ga. Const. 1976,

General Consideration (Cont'd)

Art. VI, Sec. IV, Para. V (see Ga. Const. 1983, Art. VI, Sec. I, Para. IV). Cochran v. City of Rockmart, 242 Ga. 732, 251 S.E.2d 259 (1978).

Constitutional limitation on legislature's power to provide for superior court review. — Only power and authority given by the Georgia Constitution to superior courts to correct errors in inferior courts, is by writ of certiorari. The legislature has no power to provide other means than those prescribed in the Georgia Constitution for correcting errors in inferior courts by superior courts. Cochran v. City of Rockmart, 242 Ga. 732, 251 S.E.2d 259 (1978).

Relationship to other laws. — Plaintiff's action seeking to set aside a reprimand from defendant city employer via writ of certiorari was remanded to state court because the cause of action was a uniquely state remedy for writ of certiorari to the state court, the resolution of which could turn on a conclusion that the conduct in question was in violation of federal law; the fact that the state court may look to federal law to determine whether to grant the relief sought by plaintiff did not confer subject matter jurisdiction on the federal court. Lockette v. City of Albany, No. 1:05-cv-39(HL), 2005 U.S. Dist. LEXIS 17080 (M.D. Ga. Aug. 11, 2005).

When errors complained of are sufficient to authorize certiorari, it should not be refused. — When errors complained of in petition for certiorari were sufficient in law to have authorized the judge to have sanctioned certiorari under former Code 1868, §§ 3977 and 3980 (see O.C.G.A. §§ 5-4-1 and 5-4-3), it was error to refuse to do so. McCardle v. Fogarty, 41 Ga. 626 (1871).

If there is specific remedy by certiorari, remedy of mandamus does not exist. Hayes v. Brown, 205 Ga. 234, 52 S.E.2d 862 (1949).

Writ of certiorari as full and adequate remedy at law. — Writ of certiorari ordinarily furnishes a full and adequate remedy at law for correction of errors in decisions by municipal corporations, courts, or councils, rendered in exercise of judicial powers; so that even though a property right may be primarily involved in such manner as would authorize an injured party to resort to equity, the injured party is not entitled to claim such relief, when the injured party has already appeared before municipal judicatory, and that body has rendered an adverse decision. Ballard v. Mayor of Carrollton, 194 Ga. 489, 22 S.E.2d 81 (1942); Wilson v. Latham, 227 Ga. 530, 181 S.E.2d 830, cert. denied, 404 U.S. 955, 92 S. Ct. 312, 30 L. Ed. 2d 272 (1971); Wallace v. Board of Regents of Univ. Sys. of Ga., 967 F. Supp. 1287 (S.D. Ga. 1997).

Payment of fine imposed by inferior court generally precludes certiorari. — Defendant who has paid fine imposed by police court, with alternative of imprisonment, cannot, after paying such fine, prosecute writ of error to review judgment, unless fine was paid under protest and under duress. Ellett v. City of College Park, 135 Ga. App. 269, 217 S.E.2d 374 (1975).

Writ of certiorari from justice's court lies only after final determination of case. — Writ of certiorari does not lie from decision of justice of peace, in case pending in justice's court, until after final determination of case in which decision was made. Felker v. Freeman, 46 Ga. App. 767, 169 S.E. 247 (1933).

Judgment of justice of peace refusing to allow amendment to petition is not final determination. Felker v. Freeman, 46 Ga. App. 767, 169 S.E. 247 (1933).

Review of recorder's court decisions. — Proper method for obtaining review of a decision of a recorder's court is either by direct appeal to the superior court, in the case of traffic violations, or by application for certiorari to the superior court. Franklin v. Recorder's Court, 174 Ga. App. 498, 330 S.E.2d 429 (1985).

The proper procedure for appealing decisions from a county recorder's court is by certiorari to the superior court. Smith v. Gwinnett County, 246 Ga. App. 865, 542 S.E.2d 616 (2000).

Review limited to record of hearing below. — Review under O.C.G.A. § 5-4-1 is limited to matters raised in the record of the hearing below. Baxter v. Fulton-DeKalb Hosp. Auth., 764 F. Supp.

1510 (N.D. Ga. 1991).

Certiorari available irrespective of questions or amount involved. — After verdict has been rendered by jury in justice's court, certiorari is available to party dissatisfied, in all cases, irrespective of character of questions involved or amount in controversy. Brown & Bigelow v. Parian Paint Co., 4 Ga. App. 632, 62 S.E. 95 (1908) (decided under former Civil Code 1895, § 4149).

Verdict, not judgment, is reviewed on certiorari. Western & A.R.R. v. Carson, 70 Ga. 388 (1883) (decided under former Code 1882, § 4157j).

Certiorari will not lie where appeal to jury in superior court has been entered. Miller v. Hensley, 65 Ga. 556 (1880) (decided under former Ga. L. 1878-79, p. 142, § 1); Boroughs v. White & Stone, 69 Ga. 841 (1883) (decided under former Code 1882, § 4157j); Neal v. Fox, 114 Ga. 164, 39 S.E. 860 (1901) (decided under former Civil Code 1895, § 4149).

Certiorari may be refused when evidence supports verdict. Stewart v. Murray, 14 Ga. App. 438, 81 S.E. 382 (1914) (decided under former Civil Code 1910, § 4749).

Certiorari may be refused although preponderance of evidence may be in favor of defendant. Mitchell v. Bennett, 17 Ga. App. 657, 87 S.E. 1092 (1916) (decided under former Civil Code 1910, § 4749).

Answer must show that verdict was rendered. Southern Ry. v. Chestnut Mt. Merchandise Co., 1 Ga. App. 731, 58 S.E. 247 (1907) (decided under former Civil Code 1895, § 4149).

Answer's failure to show that verdict was rendered will result in dismissal. Manning v. Mayor of Gainesville, 125 Ga. 239, 53 S.E. 1002 (1906) (decided under former Civil Code 1895, § 4149).

Voluntary dismissal of request for certiorari. — Absent any judicial determination that dismissal was required for lack of an approved bond, the petitioners were entitled to voluntarily dismiss the petitioners' first request for certiorari, filed pursuant to O.C.G.A. § 5-4-1, relying on the renewal statute codified at O.C.G.A. § 9-2-61(a), and file a second request after the 30-day limitation period expired. Buckler v. DeKalb County, 290 Ga. App. 190, 659 S.E.2d 398 (2008).

Firefighter did not have right to writ of certiorari. — Because the firefighter did not have a hearing, the firefighter was correct that the firefighter did not have a right to a writ of certiorari, O.C.G.A. § 5-4-1(a); however, pursuant to Georgia law, when no other specific legal remedy was available and a party had a clear right to have a certain act performed, a party could seek mandamus, O.C.G.A. § 9-6-20. Under Georgia law, this procedure could be used to compel a governmental body to act in compliance with the law, for instance to require a governmental board to hold a hearing as provided by law. East v. Clayton County, No. 10-15749, 2011 U.S. App. LEXIS 15925 (11th Cir. Aug. 1, 2011) (Unpublished).

Cited in Johnston v. Brenau College-Conservatory, 146 Ga. 182, 91 S.E. 85 (1916); Daniels v. Commissioners of Pilotage, 147 Ga. 295, 93 S.E. 887 (1917); Von Schmidt v. Noland Co., 176 Ga. 784, 169 S.E. 11 (1933); McDonald v. Georgia Fed'n of Labor, 178 Ga. 313, 173 S.E. 662 (1933); Gullatt v. Slaton, 189 Ga. 758, 8 S.E.2d 47 (1940); Butler v. City of Dublin, 191 Ga. 551, 13 S.E.2d 362 (1941); City of Atlanta v. Lopert Pictures Corp., 217 Ga. 432, 122 S.E.2d 916 (1961); Murdock v. Perkins, 219 Ga. 756, 135 S.E.2d 869 (1964); Manning v. A.A.B. Corp., 223 Ga. 111, 153 S.E.2d 561 (1967); Freeman v. City of Valdosta, 119 Ga. App. 345, 167 S.E.2d 170 (1969); Sonesta Int'l Hotels Corp. v. Colony Square Co., 482 F.2d 281 (5th Cir. 1973); McClung v. Richardson, 232 Ga. 530, 207 S.E.2d 472 (1974); Shantha v. Municipal Court, 240 Ga. 280, 240 S.E.2d 32 (1977); Housworth v. Glisson, 485 F. Supp. 29 (N.D. Ga. 1978); Mulling v. Wilson, 245 Ga. 773, 267 S.E.2d 212 (1980); Board of Trustees v. Christy, 154 Ga. App. 488, 269 S.E.2d 33 (1980); Kariuki v. DeKalb County, 253 Ga. 713, 324 S.E.2d 450 (1985); Lee v. Hutson, 810 F.2d 1030 (11th Cir. 1987); Hunter v. City of Warner Robins, 842 F. Supp. 1460 (M.D. Ga. 1994); Focus Entm't Int'l, Inc. v. Bailey, 256 Ga. App. 283, 568 S.E.2d 183 (2002).

Decisions Subject to Review by Certiorari

Availability generally. — Writ of certiorari to the superior court is a constitutional as well as statutory remedy available when a party is dissatisfied with a decision or judgment of an inferior judicatory exercising judicial or quasi-judicial powers. Flacker v. Berr-Nash Corp., 157 Ga. App. 638, 278 S.E.2d 180 (1981), overruled on other grounds, Smith v. Elder, 174 Ga. App. 316, 329 S.E.2d 511 (1985), overruled on other grounds as stated in, Norris v. Henry County, 255 Ga. App. 718, 566 S.E.2d 428 (2002).

Function of writ of certiorari is to review erroneous verdict or judgment. Gilbert v. Land Estates, Inc., 62 Ga. App. 845, 9 S.E.2d 914 (1940).

Certiorari lies to correct judgments which are irregular or erroneous. Sawyer v. City of Blakely, 2 Ga. App. 159, 58 S.E. 399 (1907); McDonald v. Farmers Supply Co., 143 Ga. 552, 85 S.E. 861 (1915).

Judgments which are wholly void. — Certiorari does not lie as to judgments which are wholly void. Sawyer v. City of Blakely, 2 Ga. App. 159, 58 S.E. 399 (1907); McDonald v. Farmers Supply Co., 143 Ga. 552, 85 S.E. 861 (1915).

Writ of certiorari does not lie to set aside a void finding or judgment. Anderson v. Ledbetter-Johnson Contractors, 62 Ga. App. 732, 9 S.E.2d 860 (1940).

Writ of certiorari unavailable to set aside verdict or judgment which is absolutely void. City of Cedartown v. Pickett, 193 Ga. 840, 20 S.E.2d 263 (1942), criticized, Frese v. Link, 76 Ga. App. 709, 47 S.E.2d 170 (1948); Thompson v. Allen, 69 Ga. App. 638, 26 S.E.2d 490 (1943).

Entities whose decisions are reviewable. — Writ of certiorari lies for correction of errors in decisions by municipal corporations, courts, or councils, like other inferior judicatories, when rendered in exercise of their judicial powers. City of Cedartown v. Pickett, 193 Ga. 840, 20 S.E.2d 263 (1942); 106 Forsyth Corp. v. Bishop, 362 F. Supp. 1389 (M.D. Ga. 1972), aff'd, 482 F.2d 280 (5th Cir. 1973), cert. denied, 422 U.S. 1044, 95 S. Ct. 2660, 45 L. Ed. 2d 696 (1975).

Termination of city employee. — City manager's decision approving the termination of a city employee was subject to review by a petition for a writ of certiorari. Salter v. City of Thomaston, 200 Ga. App. 536, 409 S.E.2d 88 (1991).

In the employee's case alleging that the employee was improperly terminated by the City of Atlanta, the city, under O.C.G.A. § 5-4-1(a), was not entitled to a writ of certiorari, reversing the decision of the City of Atlanta Civil Service Board reinstating the employee after finding that the employee had been wrongfully terminated; evidence supported the determination that the termination of the employee pursuant to the reduction in force violated a city ordinance. City of Atlanta v. Harper, 276 Ga. App. 460, 623 S.E.2d 553 (2005).

Although a trial court's decision to dismiss an action by dismissed city employees was erroneously based on the court's determination that the employees had failed to exhaust their administrative remedies from their claim that the reduction-in-force ordinance, Atlanta, Ga., Code § 114-55, was not properly followed, as they had properly appealed to the Service Board and the Board had denied their claims on appeal, the dismissal was proper for other reasons; after the Board's final decision denying the employees' appeals, they failed to properly and timely file a writ of certiorari in the trial court pursuant to O.C.G.A. §§ 5-4-1(a) and 5-4-6 in order to obtain review of that decision. Jordan v. City of Atlanta, 283 Ga. App. 285, 641 S.E.2d 275 (2007).

Trial court lacked subject-matter jurisdiction to review, pursuant to a writ of certiorari, the termination of a city employee because a city manager was not acting in a quasi-judicial capacity in permitting an employee to present evidence prior to finalizing the city manager's decision to terminate the employee; the city charter and personnel ordinance did not grant city employees a right to pretermination hearings. Goddard v. City of Albany, 285 Ga. 882, 684 S.E.2d 635 (2009).

Termination of county employee. — Certiorari provided an adequate post-deprivation remedy for reviewing the actions of a board of county commissioners

in terminating a county administrator. Board of Comm'rs v. Farmer, 228 Ga. App. 819, 493 S.E.2d 21 (1997).

Other employment actions. — Writ of certiorari was a remedy to correct errors committed by any inferior judicatory or any person exercising judicial powers, and since the county police sergeant's hearing on the county police sergeant's demotion was a quasi-judicial hearing, and the availability of petitioning for a writ of certiorari was not otherwise limited by law, the county police sergeant was authorized to seek relief in the trial court without first pursuing a discretionary appeal to the county board of commissioners. Crumpler v. Henry County, 257 Ga. App. 615, 571 S.E.2d 822 (2002).

Denial of "line of duty" disability benefits by county school employees board was judicial in nature, and review of the decision by certiorari was required. Starnes v. Fulton County Sch. Dist., 233 Ga. App. 182, 503 S.E.2d 665 (1998).

Exercises of legislative, executive or ministerial functions. — Writ of certiorari lies to correct errors or restrain excesses of jurisdiction of inferior courts and officers acting judicially only; the writ will, therefore, not be issued to officers whose functions and duties are ministerial, executive, or legislative and not judicial. Southeastern Greyhound Lines v. Georgia Pub. Serv. Comm'n, 181 Ga. 75, 181 S.E. 834, answer conformed to, 52 Ga. App. 35, 182 S.E. 204 (1935).

Certiorari is not an appropriate remedy to review or obtain relief from judgment, decision, or action of inferior judicatory or body rendered in exercise of legislative, executive, or ministerial functions. City of Cedartown v. Pickett, 193 Ga. 840, 20 S.E.2d 263 (1942); Presnell v. McCollum, 112 Ga. App. 579, 145 S.E.2d 770 (1965); 106 Forsyth Corp. v. Bishop, 362 F. Supp. 1389 (M.D. Ga. 1972), aff'd, 482 F.2d 280 (5th Cir. 1973), cert. denied, 422 U.S. 1044, 95 S. Ct. 2660, 45 L. Ed. 2d 696 (1975).

In determining whether a writ of certiorari will lie to a decision or judgment of an inferior court, a paramount question for consideration is whether there was exercised a judicial function as distinguished from a ministerial act, for certiorari is available for correction of erroneous judgments in exercise of judicial powers, but ordinarily is not a proper remedy to correct errors relating to ministerial acts. Hayes v. Brown, 205 Ga. 234, 52 S.E.2d 862 (1949).

Review of a recorder's court decision lies in the superior court by writ of certiorari. McMillian v. City of Rockmart, 653 F.2d 907 (5th Cir. 1981).

What Is Judicial Action

1. In General

What is judicial action. — Judicial action is an adjudication upon rights of parties who in general appear or are brought before tribunal by notice or process, and upon whose claims some decision or judgment is rendered; it implies impartiality, disinterestedness, a weighing of adverse claims, and is inconsistent with discretion on one hand — for tribunal must decide according to law and rights of parties — or with dictation on the other; for in first instance the court must exercise the court's own judgment under the law, and not act under a mandate from another power. Southeastern Greyhound Lines v. Georgia Pub. Serv. Comm'n, 181 Ga. 75, 181 S.E. 834, answer conformed to, 52 Ga. App. 35, 182 S.E. 204 (1935).

Character of action determinative. — Character of action in a given case must decide whether that action is judicial, ministerial, or legislative, or whether it be simply that of a public agent of the county or state, as in its varied jurisdiction it may by turns be each. Southeastern Greyhound Lines v. Georgia Pub. Serv. Comm'n, 181 Ga. 75, 181 S.E. 834, answer conformed to, 52 Ga. App. 35, 182 S.E. 204 (1935).

Test in determining whether proceeding is judicial. — In determining whether proceeding is judicial in character, question hinges not on whether parties at interest were in fact given an opportunity to be heard, but the test is whether parties at interest had a right under law to demand a trial in accordance with judicial procedures. South View Cem. Ass'n v. Hailey, 199 Ga. 478, 34 S.E.2d 863 (1945); What It Is, Inc. v. Jackson, 146 Ga. App. 574, 246 S.E.2d

What Is Judicial Action (Cont'd)
1. In General (Cont'd)

693, cert. denied, 242 Ga. 204, 249 S.E.2d 614 (1978).

Effect of fact that tribunal could have acted nonjudicially. — If a person or tribunal has right under proper delegated authority to act in judicial capacity, character of such judicial procedure, when had as prescribed, is not impaired because under the law such tribunal might have had alternative right to act ex parte without trial, but refused to exercise such right. South View Cem. Ass'n v. Hailey, 199 Ga. 478, 34 S.E.2d 863 (1945).

Fact of trial when none is authorized by statute. — Statute giving county commissioners in certain counties power to grant or refuse permission to establish cemeteries outside limits of incorporated towns does not confer upon such commission the duties and functions of a court, so that writ of certiorari might issue from its action taken upon any such application; rather the commission's action is merely entertainment and refusal of a request pertaining to executive duties of commissioners, and fact that there is a trial, when none is authorized under statute, does not operate to change nature and character of procedure. South View Cem. Ass'n v. Hailey, 199 Ga. 478, 34 S.E.2d 863 (1945).

Exercise of discretion does not render action taken judicial. — Fact that public agent exercises judgment or discretion in performance of duties does not make the agent's action or functions judicial. Southeastern Greyhound Lines v. Georgia Pub. Serv. Comm'n, 181 Ga. 75, 181 S.E. 834, answer conformed to, 52 Ga. App. 35, 182 S.E. 204 (1935).

Distinction between judicial and quasi-judicial action. — Performance of judicial acts under authority conferred upon courts is judicial in character, while performance of judicial acts under authority conferred upon other persons, boards, or tribunals is quasi-judicial. South View Cem. Ass'n v. Hailey, 199 Ga. 478, 34 S.E.2d 863 (1945).

Basic distinction between administrative and judicial act by officers other than judges is that a quasi-judicial action, contrary to an administrative function, is one in which all parties are as a matter of right entitled to notice and to a hearing, with opportunity afforded to present evidence under judicial forms of procedure; and that no one deprived of such rights is bound by action taken. South View Cem. Ass'n v. Hailey, 199 Ga. 478, 34 S.E.2d 863 (1945).

Chief distinction between legislative and judicial function is that former sets up rights or inhibitions, usually general in character; while latter interprets, applies, and enforces existing law as related to subsequent acts of persons amenable thereto. South View Cem. Ass'n v. Hailey, 199 Ga. 478, 34 S.E.2d 863 (1945).

2. Application

Decisions of trial judge of municipal court of Atlanta. — Certiorari to superior court lies from decisions of trial judge of municipal court of Atlanta, Fulton section, for party who wishes to complain of judgment, order, or ruling. Gavant v. Berger, 182 Ga. 277, 185 S.E. 506, answer conformed to, 53 Ga. App. 304, 185 S.E. 726 (1936); Wrenn v. Bowden, 56 Ga. App. 713, 193 S.E. 456 (1937).

Probate judge's refusal to entertain petition to commit incompetent veteran. — Refusal of court of ordinary (now probate court) to entertain jurisdiction of petition to commit incompetent World War I veteran to a United States hospital, is not reviewable by mandamus; certiorari is the appropriate remedy by which that judgment should be reviewed. Cheek v. Eve, 182 Ga. 30, 184 S.E. 700 (1936).

Decision, after trial, by governing body that alleged acts constitute nuisance. — Decision by governing body of municipality as to whether alleged acts constitute a nuisance in violation of city ordinance, and whether the nuisances should be abated as provided by other city ordinances, made after trial in which parties at interest participated, is a judicial determination from which certiorari lies, and not an exercise of mere legislative, executive, or ministerial functions. City of Cedartown v. Pickett, 193 Ga. 840, 20 S.E.2d 263 (1942).

Trial and conviction of police officer for conduct unbecoming an officer. — Trial and conviction of a police officer, pursuant to city ordinance, on charges of conduct unbecoming an officer and violation of a police department rule, is a judicial proceeding from final judgment in which a writ of certiorari will lie. Heath v. City of Atlanta, 67 Ga. App. 85, 19 S.E.2d 746 (1942).

Revocation of certificate by Board for Examination, Qualification, and Registration of Architects is a judicial act and certiorari to superior court is available. Beckanstin v. Dougherty County Council of Architects, 215 Ga. 543, 111 S.E.2d 361 (1959).

City council decision denying application for liquor license. — Restaurant owner's exclusive remedy from the city's denial of the owner's application for a liquor license was review of the city's decisions via writ of certiorari under O.C.G.A. § 5-4-1(a). The hearing on the owner's application was pursuant to notice, and the parties were provided with the opportunity to appear, to be represented by counsel, and to present evidence. Rozier v. Mayor, City of Savannah, 310 Ga. App. 178, 712 S.E.2d 596 (2011).

Hearing before a city procurement appeals hearing officer was a quasi-judicial proceeding as contemplated by O.C.G.A. § 5-4-1 because the ordinance authorizing the hearing entitled the litigants to a hearing "in accordance with judicial procedures" and because the hearing officer acted judicially, rather than administratively. Mack v. City of Atlanta, 227 Ga. App. 305, 489 S.E.2d 357 (1997).

Proceedings before civil service board of county are quasi-judicial in character. Since board therefore exercises judicial powers, writ of certiorari lies for correction of errors committed by the board. Thompson v. Dunn, 102 Ga. App. 164, 115 S.E.2d 754 (1960).

Adverse decisions of city personnel boards regarding discharge. — Discharged employees of city who are authorized to appeal their discharge to personnel board of city, are entitled to petition superior court for writ of certiorari from adverse decision of personnel board. Willis v. Jackson, 148 Ga. App. 432, 251 S.E.2d 341 (1978).

Decisions rendered by county boards of education. — County board of education is at times a court of limited jurisdiction, and the board's decisions rendered in this sphere are judicial in nature, and are therefore reviewable by writ of certiorari. Fuller v. Williams, 150 Ga. App. 730, 258 S.E.2d 538, rev'd on other grounds, 244 Ga. 846, 262 S.E.2d 135 (1979).

Decision of state university dismissing tenured professor. — Trial court properly dismissed a tenured professor's petition for writ of certiorari challenging the professor's dismissal from a state university because the hearing committee process resulting in the professor's dismissal was administrative, not judicial in nature; therefore, the trial court lacked jurisdiction over the matter. Laskar v. Bd. of Regents of the Univ. Sys. of Ga., No. A12A1831, 2013 Ga. App. LEXIS 202 (Mar. 15, 2013).

Board of trustees of Employees' Retirement System of Georgia is not a judicial body within the meaning of this section. Cantrell v. Board of Trustees of Employees' Retirement Sys., 135 Ga. App. 445, 218 S.E.2d 97 (1975), aff'd, 237 Ga. 287, 227 S.E.2d 379 (1976).

Decision of county board of zoning appeals denying variance. — County zoning ordinance may specify certiorari as the method for judicial review of a zoning board's denial of a variance because the board exercises judicial powers when the board rules on a variance application. Jackson v. Spalding County, 265 Ga. 792, 462 S.E.2d 361 (1995) (overruling International Funeral Servs., Inc. v. DeKalb County, 224 Ga. 707, 261 S.E.2d 625 (1979).

Decisions of police chief. — Because the police officer identified no evidence that employees seeking injured on the job benefits were entitled to notice, a hearing in accordance with judicial procedure, and an opportunity to present evidence, the police chief's action constituted the discretionary exercise of executive power; consequently, the superior court correctly determined that there was no judicial or quasi-judicial action below and properly

What Is Judicial Action (Cont'd)
2. Application (Cont'd)

dismissed the officer's petition for writ of certiorari under O.C.G.A. § 5-4-1. Laughlin v. City of Atlanta, 265 Ga. App. 61, 592 S.E.2d 874 (2004).

County authorities' order to sheriff to take charge of room in courthouse. — Action of county authorities in ordering sheriff to take charge of room in courthouse occupied by justice of peace was mere exercise of administrative power, and possessed no such attribute of judicial function as to permit certiorari therefrom under this section. McDonald v. Marshall, 185 Ga. 438, 195 S.E. 571 (1938).

Ruling of city council upholding the suspension of police officer was judicatory act, and certiorari would lie to review the ruling. Raughton v. Town of Fort Oglethorpe, 177 Ga. App. 171, 338 S.E.2d 754 (1985).

RESEARCH REFERENCES

Am. Jur. 2d. — 5 Am. Jur. 2d, Appellate Review, § 329 et seq. 14 Am. Jur. 2d, Certiorari, § 1 et seq. 47 Am. Jur. 2d, Justices of the Peace, § 49.

C.J.S. — 14 C.J.S., Certiorari, § 6 et seq. 24 C.J.S., Criminal Law, § 2330 et seq. 51 C.J.S., Justices of the Peace, § 430 et seq.

ALR. — Right of prosecution to writ of certiorari in criminal case, 91 ALR2d 1095.

5-4-2. Petition for certiorari to probate judge generally.

When either party in any case in any probate court lodges objections to any proceeding or decision in the case, affecting the real merits of the case, the party making the same shall offer the objections in writing, which shall be signed by himself or his attorney and, if the same are overruled by the court, the party may petition the superior court for a writ of certiorari, in which petition he shall plainly, fully, and distinctly set forth the errors complained of. If the court deems the objections to be sufficient, it shall forthwith issue a writ of certiorari, directed to the judge of the probate court, requiring him to certify and send up to the superior court, at the time specified in the writ, all the proceedings in the case. (Laws 1799, Cobb's 1851 Digest, p. 523; Code 1863, § 3958; Code 1868, § 3978; Code 1873, § 4050; Code 1882, § 4050; Civil Code 1895, § 4635; Civil Code 1910, § 5181; Code 1933, § 19-201.)

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Section to be strictly construed. — O.C.G.A. § 5-4-2 is construed strictly because the statute is in derogation of common law. Walden v. John D. Archbold Mem. Hosp., 197 Ga. App. 275, 398 S.E.2d 271 (1990), but see First Christ Holiness Church, Inc. v. Owens Temple First Christ Holiness Church, Inc., 282 Ga. 883, 655 S.E.2d 605 (2008).

Certiorari lies only as to issues raised in trial court. — Error which may be corrected by writ of certiorari is one made by tribunal whose judgment is being reviewed because of such error. When it does not appear from the record that the issue was made in the trial court, the issue cannot be raised for the first time by certiorari in superior court and reviewed in the Supreme Court. Smith v. Mayor of Macon, 202 Ga. 68, 42 S.E.2d 128, answer conformed to, 75 Ga. App. 136, 42 S.E.2d 569 (1947).

Constitutional question may not be raised for first time in petition for writ

of certiorari. Smith v. Mayor of Macon, 202 Ga. 68, 42 S.E.2d 128, answer conformed to, 75 Ga. App. 136, 42 S.E.2d 569 (1947).

Certiorari is a proper but not exclusive remedy, in a proper case, to correct error in decision of court of ordinary (now probate court). Stephens v. Bell, 41 Ga. App. 353, 153 S.E. 99 (1930).

Void judgments may be set aside only by certiorari proceedings. Latimer v. Burtz, 28 Ga. App. 691, 112 S.E. 912 (1922).

Special assignment of error necessary. — No questions are presented for review under section unless raised by special assignment of error. Huson v. Farmer, 53 Ga. App. 131, 185 S.E. 119 (1936) (see now O.C.G.A. § 5-4-2).

Written exceptions to decision of court of ordinary (now probate court) are necessary for certiorari. Morris v. Morris, 74 Ga. 826 (1885); Burdett v. Burdett, 130 Ga. 514, 61 S.E. 121 (1908).

Noncompliance with requirements as to setting forth errors. — Noncompliance with requirements of setting forth "plainly and distinctly the error complained of," and failure to set forth grounds of motion for new trial or attach the grounds to petition as an exhibit, is ground for dismissal. East River Nat'l Bank v. Ellman, 36 Ga. App. 263, 136 S.E. 799 (1927).

Former Civil Code 1910, § 5181 (see O.C.G.A. § 5-4-2) was inapplicable to decisions of ordinary (now judge of probate court) not sitting as a court; in such case, former Civil Code 1910, § 5183 (see O.C.G.A. § 5-4-3) applied § 5-4-3. Fortson v. Mattox, 67 Ga. 282 (1881); Davis v. James, 145 Ga. 325, 89 S.E. 203 (1916).

Section inapplicable to wrongful death action. — O.C.G.A. § 5-4-2 does not encompass the maintenance of a wrongful death action by the siblings of a decedent. Walden v. John D. Archbold Mem. Hosp., 197 Ga. App. 275, 398 S.E.2d 271 (1990), but see First Christ Holiness Church, Inc. v. Owens Temple First Christ Holiness Church, Inc., 282 Ga. 883, 655 S.E.2d 605 (2008).

Remedy for decision concerning homestead. — Unless provision is made for appeal, remedy of leasing party to complain of any error in judgment of ordinary (now judge of probate court) in setting apart or in refusing to set apart homestead, is by certiorari. Cunningham v. United States Sav. & Loan Co., 109 Ga. 616, 34 S.E. 1024 (1900); Fontano v. Mozley & Co., 121 Ga. 46, 48 S.E. 707 (1904).

Grant of temporary letters of administration. — Certiorari will lie to correct error of ordinary (now judge of probate court) who, in term time, on contest with parties before the ordinary, grants letters of administration pendente lite. Redd v. Dure, 40 Ga. 389 (1869).

When motion to dismiss is improperly sustained. — When demurrer (now motion to dismiss) to application to set aside fraudulent discharge granted an administrator is improperly sustained, writ of certiorari lies to correct such judgment. Seagraves v. W.E. Powell Co., 143 Ga. 752, 85 S.E. 760 (1915).

Probate judge's refusal to entertain petition to commit incompetent veteran. — Refusal of court of ordinary (now probate court) to entertain jurisdiction of petition to commit incompetent World War I veteran to a United States hospital, is not reviewable by mandamus; certiorari is appropriate remedy by which that judgment should be reviewed. Cheek v. Eve, 182 Ga. 30, 184 S.E. 700 (1936).

Correction of erroneous fact statements in exception. — Party excepting to judgment of ordinary (now judge of probate court) is entitled to have pointed out to the ordinary the alleged incorrect statement of fact in exceptions and to have opportunity to correct the errors or compel decision on exceptions as the exceptions stand, if exceptor is correct in the exceptor's contention that exceptions state facts. Guest v. Rucker, 77 Ga. App. 696, 49 S.E.2d 687 (1948).

Probate judge's refusal to certify exceptions due to misstated facts. — When the distributee and creditor cite administrator for settlement and, after judgment in case, file exception to judgment with ordinary (now judge of probate court), refusal of ordinary to certify to exceptions for reason that facts set out in exceptions are not true, is not such a judgment overruling exceptions as to be

the basis for a petition for writ of certiorari. Guest v. Rucker, 77 Ga. App. 696, 49 S.E.2d 687 (1948).

Cited in Barrett v. Jackson, 38 Ga. 181 (1868); Logan v. State, 56 Ga. App. 460, 192 S.E. 839 (1937); Head v. Waldrup, 193 Ga. 165, 17 S.E.2d 585 (1941); Brockett v. Maxwell, 73 Ga. App. 663, 38 S.E.2d 176 (1946); Gray v. Gunby, 206 Ga. 63, 55 S.E.2d 588 (1949); Miller v. Miller, 96 Ga. App. 469, 100 S.E.2d 594 (1957); Georgia Farm Bureau Mut. Ins. Co. v. DeKalb County, 167 Ga. App. 577, 306 S.E.2d 924 (1983).

OPINIONS OF THE ATTORNEY GENERAL

Procedure. — Certiorari is a proper procedure, upon election, for a defendant dissatisfied with the rulings of the probate court and, in response to the writ of certiorari, when issued by the superior court, the probate judge must certify and send to the superior court the entire record of the case. 1986 Op. Att'y Gen. No. U86-13.

RESEARCH REFERENCES

Am. Jur. 2d. — 5 Am. Jur. 2d, Appellate Review, § 333 et seq. 14 Am. Jur. 2d, Certiorari, § 62 et seq.

ALR. — Certiorari after judgment to test sufficiency of indictment or information as regards the offense sought to be charged, 150 ALR 743.

5-4-3. Petition for certiorari to inferior judicatories generally.

When either party in any case in any inferior judicatory or before any person exercising judicial powers is dissatisfied with the decision or judgment in the case, the party may apply for and obtain a writ of certiorari by petition to the superior court for the county in which the case was tried, in which petition he shall plainly and distinctly set forth the errors complained of. On the filing of the petition in the office of the clerk of the superior court, with the sanction of the appropriate judge endorsed thereon, together with the bond or affidavit, as provided in Code Section 5-4-5, it shall be the duty of the clerk to issue a writ of certiorari, directed to the tribunal or person whose decision or judgment is the subject matter of complaint, requiring the tribunal or person to certify and send up all the proceedings in the case to the superior court, as directed in the writ of certiorari. (Laws 1850, Cobb's 1851 Digest, p. 529; Code 1863, § 3960; Code 1868, § 3980; Code 1873, § 4052; Ga. L. 1878-79, p. 153, § 7; Code 1882, § 4052; Civil Code 1895, § 4637; Civil Code 1910, § 5183; Code 1933, § 19-203.)

JUDICIAL DECISIONS

Analysis

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1. In General
2. Sufficiency of Assignment of Error

General Consideration

Right of certiorari is a constitutional right, and may be used to review any judgment of an inferior judicatory. Young v. Broyles, 16 Ga. App. 356, 85 S.E. 366 (1915).

Right of certiorari, if pursued in due time, is unaffected by occurrences in lower court. Young v. Broyles, 16 Ga. App. 356, 85 S.E. 366 (1915).

Right of certiorari may be exercised without moving for new trial in trial court. Young v. Broyles, 16 Ga. App. 356, 85 S.E. 366 (1915).

Construction with O.C.G.A. § 51-1-27. — Upon the grant of certiorari in a medical malpractice action filed by plaintiff parents against a pediatrician, a nurse, and others, a Georgia trial court did not abuse the court's discretion by prohibiting the parents from showing that the nurse failed to pass the nursing board examination, as such evidence was irrelevant, and even if it could be said that the evidence had any probative value, it was substantially outweighed by the danger of undue prejudice. Snider v. Basilio, 281 Ga. 261, 637 S.E.2d 40 (2006).

Each party may have writ in the party's own favor in same cause, and pendency of first writ sued out is no ground for dismissing second. Cunningham v. Elliott, 92 Ga. 159, 18 S.E. 365 (1893).

Writ of certiorari as full and adequate remedy at law. — Writ of certiorari ordinarily furnishes a full and adequate remedy at law for correction of errors in decisions by municipal corporations, courts, or councils, rendered in exercise of judicial powers; so that even though a property right may be primarily involved in such manner as would authorize injured party to resort to equity, one is not entitled to claim such relief, when one has already appeared before a municipal judicatory, and that body has rendered an adverse decision. Ballard v. Mayor of Carrollton, 194 Ga. 489, 22 S.E.2d 81 (1942).

Absent sanction by judge, clerk is unauthorized to file application or issue writ of certiorari. Bellew v. State Hwy. Dep't, 127 Ga. App. 301, 193 S.E.2d 202 (1972).

Failure to obtain sanction is not amendable defect. — Failure to obtain the requisite sanction from the appropriate judge is not an amendable defect if the 30-day time requirement for applying for certiorari under O.C.G.A. § 5-4-6(a) has expired. Cobb County v. Herren, 230 Ga. App. 482, 496 S.E.2d 558 (1998).

Plaintiff may obtain order directing clerk to issue writ. — If clerk fails to issue writ of certiorari before term to which the writ is returnable, plaintiff may, if there has been no laches on the plaintiff's part, move the court for an order directing the clerk to issue a writ. Without such order, the clerk has no authority to issue a writ of certiorari subsequently to the term to which the writ was originally returnable, and a motion to dismiss will be sustained if one attempts to do so. Walea v. State, 121 Ga. 585, 49 S.E. 710 (1905).

When first petition is sanctioned, but not filed with clerk. — When petition for certiorari to review judgment of justice of peace was sanctioned, but was never filed in office of clerk of superior court, petition was a mere nullity; and second petition for certiorari in same case, presented to judge of superior court within 30 days from date of judgment complained of, is not subject to dismissal on ground that petitioner has no legal right to present second petition for certiorari in same case. Weaver v. Moss, 71 Ga. App. 329, 30 S.E.2d 779 (1944).

Factual statements of justice of peace, in answer to writ of certiorari presumed true until traversed. Shelton v. Doster, 99 Ga. App. 863, 109 S.E.2d 862 (1959).

Magistrate's return failing to send up proceedings. — Magistrate's return is incomplete when the return fails to certify and send up any proceedings in the case. Hardy v. Hardy, 2 Ga. App. 530, 58 S.E. 779 (1907).

An assignment of error that this duty was not complied with must be sustained.

General Consideration (Cont'd)

Stoufer v. Missenheimer, 26 Ga. App. 554, 106 S.E. 560 (1921), later appeal, 28 Ga. App. 350, 111 S.E. 692 (1922).

Failure of justice of peace to send up copies of proceedings in the justice's court when the proceedings are necessary to determination of cause is good ground for dismissal of certiorari; certiorari will not be dismissed because the magistrate fails to send up copies of proceedings when errors complained of in petition as verified by answer can be fully considered and determined without reference to such proceedings. Lynn v. Crapps, 47 Ga. App. 744, 171 S.E. 398 (1933).

When the magistrate has failed to certify and send up proceedings in the case, assignment of error that duty was not complied with must be sustained. Stoufer v. Missenheimer, 26 Ga. App. 554, 106 S.E. 560 (1921), later appeal, 28 Ga. App. 350, 111 S.E. 692 (1922).

Remedy to review superior court judge's refusal to sanction petition for certiorari is by writ of error to proper appellate court and not by petition to appellate court for mandamus to compel judge to sanction petition. Jones v. Anderson, 106 Ga. App. 590, 127 S.E.2d 719 (1962).

Action under Dram Shop Act. — Upon certiorari review, given proof of spoliation under former O.C.G.A. § 24-2-22 in an action filed against a tavern pursuant to Georgia's Dram Shop Act, O.C.G.A. § 51-1-40(b), the trial court erred in granting summary judgment to an injured party's guardian as the tavern's manager was aware of the potential for litigation and failed to preserve whatever videotaped evidence might have been captured as to whether one of the tavern's intoxicated patron's would soon be driving; hence, a rebuttable presumption arose against the tavern that the evidence destroyed would have been harmful to the tavern, rendering summary judgment inappropriate. Baxley v. Hakiel Indus., 282 Ga. 312, 647 S.E.2d 29 (2007).

Denial of writ improper. — Since the municipal court did not inquire into the defendant's understanding of the nature of the violation to which the defendant confessed guilt, and the record likewise did not show any factual basis for the plea independent of such an inquiry, the superior court erred in denying a writ of certiorari. Brownlee v. City of Atlanta, 212 Ga. App. 174, 441 S.E.2d 492 (1994).

Cited in McCardle v. Fogarty, 41 Ga. 626 (1871); Western & Atl. R.R. v. Jackson, 81 Ga. 478, 8 S.E. 209 (1888); Dixon v. State, 121 Ga. 346, 49 S.E. 311 (1904); Smith v. Marshall, 127 Ga. 374, 56 S.E. 416 (1907); Sapp v. Parrish, 3 Ga. App. 234, 59 S.E. 821 (1907); Thrasher v. Town of Center, 8 Ga. App. 391, 69 S.E. 36 (1910); Johnston v. Brenau College-Conservatory, 146 Ga. 182, 91 S.E. 85 (1916); Lowenstein v. Johnston, 23 Ga. App. 261, 98 S.E. 111 (1919); Partee v. Peters, 33 Ga. App. 694, 127 S.E. 660 (1925); Thompson v. Savannah Bank & Trust Co., 39 Ga. App. 809, 148 S.E. 621 (1929); O'Neal v. Lide, 45 Ga. App. 235, 164 S.E. 110 (1932); Statham v. State, 50 Ga. App. 165, 177 S.E. 522 (1934); Raley v. Board of Civil Serv. Comm'n, 61 Ga. App. 152, 5 S.E.2d 918 (1939); Cowart v. State, 62 Ga. App. 559, 8 S.E.2d 729 (1940); Butler v. City of Dublin, 191 Ga. 551, 13 S.E.2d 362 (1941); Lewenstein v. Curry, 75 Ga. App. 22, 42 S.E.2d 158 (1947); Titshaw v. Rushton, 83 Ga. App. 685, 64 S.E.2d 473 (1951); Beckerman v. City of Claxton, 92 Ga. App. 670, 89 S.E.2d 557 (1955); Morman v. Pritchard, 108 Ga. App. 247, 132 S.E.2d 561 (1963); Murdock v. Perkins, 219 Ga. 756, 135 S.E.2d 869 (1964); Manning v. A.A.B. Corp., 223 Ga. 111, 153 S.E.2d 561 (1967); Berry v. Consumer Credit, 124 Ga. App. 586, 184 S.E.2d 694 (1971); Sonesta Int'l Hotels Corp. v. Colony Square Co., 482 F.2d 281 (5th Cir. 1973); Goldstein v. Smith, 141 Ga. App. 493, 233 S.E.2d 864 (1977); International Funeral Servs., Inc. v. DeKalb County, 244 Ga. 707, 261 S.E.2d 625 (1979); Henson v. DeKalb County, 158 Ga. App. 348, 280 S.E.2d 393 (1981); Attwell v. Sears Roebuck & Co., 159 Ga. App. 811, 285 S.E.2d 199 (1981); Kariuki v. DeKalb County, 253 Ga. 713, 324 S.E.2d 450 (1985); Allen v. City of Marietta, 601 F. Supp. 482 (N.D. Ga. 1985); Copeland v. White, 178 Ga. App. 644, 344 S.E.2d 436 (1986); Fisher v. City of Atlanta, 212 Ga. App. 635, 442 S.E.2d 762 (1994).

Bond

Issuance of writ in criminal case from city court. — Application for writ of certiorari to correct errors alleged to have been committed in criminal court of Atlanta, need not be accompanied by bond conditioned for appearance of accused to answer and abide final order, sentence, and judgment of court. Laws v. State, 15 Ga. App. 361, 83 S.E. 279 (1914).

Bond not prerequisite to issuance of writ of certiorari in criminal case from city court. Malone v. State, 27 Ga. App. 53, 107 S.E. 358 (1921).

Bond as condition precedent to review by certiorari of recorder's court conviction. — Filing of bond or pauper's affidavit provided for under former Code 1933, §§ 19-214 and 19-215 (see O.C.G.A. § 5-4-20), condition precedent to application for certiorari to review judgment of conviction in recorder's court. West v. City of College Park, 116 Ga. App. 355, 157 S.E.2d 491 (1967).

Decisions from Which Certiorari Is Available

1. In General

Decisions of municipal corporations, courts, or councils rendered in judicial capacity. — Writ of certiorari lies for correction of errors in decisions by municipal corporations, courts, or councils, like other inferior judicatories, when rendered in exercise of their judicial powers. City of Cedartown v. Pickett, 193 Ga. 840, 20 S.E.2d 263 (1942); 106 Forsyth Corp. v. Bishop, 362 F. Supp. 1389 (M.D. Ga. 1972), aff'd, 482 F.2d 280 (5th Cir. 1973), cert. denied, 422 U.S. 1044, 95 S. Ct. 2660, 45 L. Ed. 2d 696 (1975).

Exercises of legislative, executive, or ministerial functions. — Certiorari is not an appropriate remedy to review or obtain relief from judgment, decision, or action of inferior judicatory or body rendered in exercise of legislative, executive, or ministerial functions. City of Cedartown v. Pickett, 193 Ga. 840, 20 S.E.2d 263 (1942); Presnell v. McCollum, 112 Ga. App. 579, 145 S.E.2d 770 (1965); 106 Forsyth Corp. v. Bishop, 362 F. Supp. 1389 (M.D. Ga. 1972), aff'd, 482 F.2d 280 (5th Cir. 1973), cert. denied, 422 U.S. 1044, 95 S. Ct. 2660, 45 L. Ed. 2d 696 (1975).

In determining whether a writ of certiorari will lie to a decision or judgment of an inferior court, a paramount question for consideration is whether there was exercised a judicial function as distinguished from a ministerial act, for certiorari is available for correction of erroneous judgments in exercise of judicial powers, but ordinarily is not a proper remedy to correct errors relating to ministerial acts. Hayes v. Brown, 205 Ga. 234, 52 S.E.2d 862 (1949).

Certiorari lies only as to issues raised in trial court. — Error which may be corrected by writ of certiorari is one made by tribunal whose judgment is being reviewed because of such error. When it does not appear from the record that issue was made in trial court, it cannot be raised for first time by certiorari in superior court and reviewed in the Supreme Court. Smith v. Mayor of Macon, 202 Ga. 68, 42 S.E.2d 128, answer conformed to, 75 Ga. App. 136, 42 S.E.2d 569 (1947).

Final determination required. — Appeal to the superior court from an order of the city courts may be taken only by petition for certiorari pursuant to O.C.G.A. § 5-4-3, and only from a "decision or judgment." The writ of certiorari does not lie to correct a judgment of an inferior judicatory until after a final determination of the case. Jenga v. Deveaux, 193 Ga. App. 436, 388 S.E.2d 361 (1989).

Certiorari will not lie to correct void judgment. McDonald v. Farmers Supply Co., 143 Ga. 552, 85 S.E. 861 (1915); Gravitt v. Mullins, 28 Ga. App. 806, 113 S.E. 61 (1922); Griggs v. City of Macon, 154 Ga. 519, 114 S.E. 899 (1922).

Party winning party's case completely in justice's court is not entitled to writ. Shope v. Fite & Boston, 91 Ga. 174, 16 S.E. 990 (1893).

When there are disputed issues of fact. — When in trial of case pending in justice's court, there are disputed issues of fact, judgment rendered by magistrate cannot be directly reviewed by writ of certiorari, but there must be appeal, either to jury in that court or to superior

Decisions from Which Certiorari Is Available (Cont'd)
1. In General (Cont'd)

court. Story v. Printup, 52 Ga. App. 818, 184 S.E. 752 (1936).

When no issue of fact, justice court's judgment is reviewable by certiorari, regardless of amount involved. Ray v. Rogers, 58 Ga. App. 804, 200 S.E. 193 (1938).

Availability of certiorari to test sufficiency of evidence to warrant verdicts or judgments. — Ray v. Rogers, 58 Ga. App. 804, 200 S.E. 193 (1938).

Available for decisions of any inferior judicatory. — O.C.G.A. § 5-4-3 has reference to the correction of errors in cases in which the writ of certiorari lies, and the writ shall apply to persons dissatisfied with the decision or judgment of any inferior judicatory. Pough v. State, 162 Ga. App. 63, 290 S.E.2d 300 (1982).

Review of a recorder's court decision. — Proper procedure for appealing decisions from a county recorder's court is by certiorari to the superior court. Smith v. Gwinnett County, 246 Ga. App. 865, 542 S.E.2d 616 (2000).

2. Application

Writ of certiorari lies when motion for new trial is overruled. Walker v. State, 8 Ga. App. 214, 68 S.E. 873 (1910).

Certiorari may be used as means of reviewing judgment upon motion for new trial. Young v. Broyles, 16 Ga. App. 356, 85 S.E. 366 (1915).

Justice court's dismissal for want of prosecution. — From judgment of justice's court dismissing case for want of prosecution, appeal to jury does not lie. If there is error in judgment, certiorari is remedy to have case reinstated. Dolvin, Davidson & Co. v. W.W. Stovall Co., 8 Ga. App. 37, 68 S.E. 488 (1910).

Analyzing the limits of the public duty doctrine. — Upon certiorari review by the Georgia supreme court to examine a determination by the court of appeals that the public duty doctrine did not extend to the official actions of building inspectors, but was limited to the police protection activities of law enforcement officers, the supreme court upheld that determination, as: (1) despite a building inspector's contrary claim, the terms "police protection" and "police power" are not synonymous; and (2) case law provides that the public duty doctrine addresses only the provision of police protection services traditionally done by police law enforcement personnel. Gregory v. Clive, 282 Ga. 476, 651 S.E.2d 709 (2007).

Certiorari granted from justice court's judgment in suit on unverified open account. Hardy v. Hardy, 2 Ga. App. 530, 58 S.E. 779 (1907).

Certiorari granted from justice court's judgment concerning forcible entry and detainer. Taylor v. Gay, 20 Ga. 77 (1856); McDonald v. Cousins, 23 Ga. 227 (1857).

Certiorari granted from justice court's judgment taxing costs. Hewett v. Robertson, 124 Ga. 920, 53 S.E. 456 (1906).

Certiorari granted from justice court's judgment in proceeding to strengthen attachment bond. Gregory v. Clark, 73 Ga. 542 (1884).

Juror's names omitted from jury list. — Certiorari from justice court's judgment denied when the jurors' names were omitted from jury list. Mitchell v. Bradberry, 76 Ga. 15 (1885).

Certiorari granted from justice court's judgment in suit establishing lost papers. Humphrey v. Johnston, 13 Ga. App. 557, 79 S.E. 530 (1913).

Section applicable to certiorari from city courts unless Act creating court provides otherwise. Miller v. State, 126 Ga. 558, 55 S.E. 405 (1906); Malone v. State, 27 Ga. App. 53, 107 S.E. 358 (1921).

Certiorari to superior court lies from decisions of trial judge of municipal court of Atlanta, Fulton section, for party who wishes to complain of judgment, order, or ruling. Gavant v. Berger, 182 Ga. 277, 185 S.E. 506, answer conformed to, 53 Ga. App. 304, 185 S.E. 726 (1936).

Writ of certiorari lies from judgment of police court. Davis v. City of Waycross, 10 Ga. App. 384, 73 S.E. 556 (1912).

Certiorari unavailable as to magistrate's judgment binding defendant over to answer to criminal offense. Griggs v. City of Macon, 154 Ga. 519, 114 S.E. 899 (1922).

Certiorari permitted from decision of ordinary (now judge of probate court) sitting as habeas corpus court. Chapman v. Woodruff, 34 Ga. 91 (1864); Malone v. State, 27 Ga. App. 53, 107 S.E. 358 (1921).

Certiorari permitted from decision of ordinary (now judge of probate court) under former Code 1873, §§ 738, 739, 740 (see O.C.G.A. § 44-9-59), governing removal of obstructions on rights-of-way. Fortson v. Mattox, 67 Ga. 282 (1881).

Certiorari permitted from decision of mayor and council acting in judicial capacity. Mayor of Macon v. Shaw, 16 Ga. 172 (1854); Carr v. City Council, 124 Ga. 116, 52 S.E. 300 (1905).

Certiorari permitted from decision of county commissioners ordering opening of private right-of-way. Leathers v. Furr, 62 Ga. 421 (1879).

Certiorari not available from ruling of plumbing inspector. City Council v. Loftis, 156 Ga. 77, 118 S.E. 666 (1923).

Appeal from decision of recorder's court. — Recorder's Court of Chatham County is not such a "like court" within the meaning of O.C.G.A. § 5-4-3 establishing this court's jurisdiction; therefore, the proper procedure for appealing from any decision of a recorder's court is by application for a writ of certiorari. Ferrell v. State, 160 Ga. App. 881, 289 S.E.2d 3 (1982).

Local constitutional amendment vesting the recorder's court of a county with jurisdiction to take and entertain pleas of guilty in misdemeanor cases does not authorize a direct appeal to the Court of Appeals and the writ of certiorari is still the method of appealing the writ. Pough v. State, 162 Ga. App. 63, 290 S.E.2d 300 (1982).

Proper method for obtaining review of a decision of a recorder's court is either by direct appeal to the superior court, in the case of traffic violations, or by application for certiorari to the superior court. Franklin v. Recorder's Court, 174 Ga. App. 498, 330 S.E.2d 429 (1985).

Hearing before county board of commissioners issuing "order" finding liability for business taxes and directing that a fieri facias be issued for the amount of taxes due does not constitute a decision of an inferior judicatory from which the taxpayer should petition for certiorari in the superior court where the hearing is not transcribed or recorded, but is memorialized only by the minutes of the meeting, the hearing is not conducted in accordance with judicial procedure, and the ordinance in question does not give an appellant as a matter of right a trial in accordance with judicial procedure. Accordingly, declaratory judgment relief is proper. Georgia Farm Bureau Mut. Ins. Co. v. DeKalb County, 167 Ga. App. 577, 306 S.E.2d 924 (1983).

Petition for Certiorari

1. In General

Special assignment of error necessary. — No questions are presented for review unless raised by special assignment of error. Huson v. Farmer, 53 Ga. App. 131, 185 S.E. 119 (1936).

Petition concerning judgment or ruling of court which assigns no error is an absolute nullity. Clements v. McCormick Harvesting Mach. Co., 115 Ga. 851, 42 S.E. 222 (1902); Green v. Patterson, 25 Ga. App. 374, 103 S.E. 437 (1920).

Assignments of error in petition for certiorari must be specific, and when based on rulings of trial court must specifically point out reasons why rulings are error. Grant v. State, 48 Ga. App. 162, 172 S.E. 89 (1933).

2. Sufficiency of Assignment of Error

Must specify wherein verdict or judgment is erroneous. — Petition merely objecting to judgment, without stating reason, is insufficient. Papworth v. City of Fitzgerald, 111 Ga. 54, 36 S.E. 311 (1900); Harrell v. City of Quitman, 17 Ga. App. 299, 86 S.E. 662 (1915).

Assignment of error stating only that judgment is contrary to law is insufficient. Davis v. Town of Gibson, 24 Ga. App. 813, 102 S.E. 466 (1920).

Assignments of error must be specific whether contained in bill of exceptions or in petition for certiorari, and, when based upon decision of trial court, must specifically point out reason why decision is error. Wall v. Hawker Pottery Co., 27 Ga. App. 255, 108 S.E. 134 (1921).

Petition for Certiorari (Cont'd)
2. Sufficiency of Assignment of Error (Cont'd)

Failure to point out error in rulings renders assignment of error insufficient. Illinois C.R.R. v. Banks, 31 Ga. App. 756, 122 S.E. 85 (1924).

Mere general averment of error, in connection with which there is no statement or assignment whatever as to how or wherein rulings complained of were erroneous, presents no case or question for decision by judge of the superior court. Chan v. Judge, 36 Ga. App. 13, 134 S.E. 925 (1926); Davis v. Lee, 38 Ga. App. 667, 145 S.E. 110 (1928).

When verdict or judgment is complained of, assignment of error, unless judgment is on demurrer (now motion to dismiss) or similar pleading or on motion for new trial, must specifically point out wherein verdict or judgment is erroneous. Feckoury v. Maloney, 40 Ga. App. 157, 149 S.E. 91 (1929).

General exception to judgment suffices when it is alleged error stems from erroneous antecedent ruling, provided specific assignments of error are made and preserved as to such antecedent rulings. Louisville & N.R.R. v. Lovelace, 26 Ga. App. 286, 106 S.E. 6 (1921).

Assignment of error upon jury charge must specify error or state alternate charge. — In petition for certiorari, assignment of error upon excerpt from charge of court presents no question for reviewing court when it is not pointed out wherein excerpt is erroneous, or why it should not have been given, or why different instructions should have been given. Maner v. State, 54 Ga. App. 282, 187 S.E. 692 (1936).

Must set forth ordinance allegedly violated or deny ordinance's existence. — Petition for certiorari from recorder's court, seeking review by superior court of judgment, is fatally defective when the petition does not set out copy of ordinance upon which charge or summons is predicated, or else a denial of its existence. Wright v. City of Atlanta, 61 Ga. App. 650, 7 S.E.2d 215 (1940).

Defendant's petition for writ of certiorari was fatally and fundamentally flawed, as the writ did not recite the provisions of the statute under which defendant was convicted, so the appellate court had no context within which to review the evidence. Collier v. Merck, 261 Ga. App. 831, 584 S.E.2d 1 (2003).

Petition for certiorari from conviction for violation of municipal ordinance should contain provisions of ordinance. — When it is sought to review by certiorari a conviction on charge of having violated a municipal ordinance, existence of which is admitted in petition for certiorari, provisions of ordinance should be stated in petition, but it is not necessary that ordinance be literally copied therein. Childrey v. City of Atlanta, 62 Ga. App. 107, 7 S.E.2d 919 (1940).

Because a city's petition for certiorari plainly and distinctly asserted the errors complained of, the superior court did not err in denying the city's motion to dismiss; moreover, the record reflected that the bar managers cited for violation of Atlanta, Ga., Code of Ordinances § 10-46 (1995) preserved the issue as to the constitutionality of the ordinance and the ordinance's enforcement. City of Atlanta v. Jones, 283 Ga. App. 125, 640 S.E.2d 698 (2006).

Certification of payment of costs and giving of security need not be attached to petition. — It is not necessary to attach to petition for certiorari a certificate of magistrate that costs have been paid and security given before sanction of petition of judge of superior court can be obtained. Jones v. Johnson & Ledbetter Constr. Co., 185 Ga. 323, 194 S.E. 902 (1938).

Completed transcript of evidence adduced at board of education hearing is not required for certiorari petition under section, although appellant may elect to incorporate it in petition. Booth v. Ware County Bd. of Educ., 223 Ga. 583, 157 S.E.2d 469 (1967).

Assignment of error that judgment complained of is contrary to law, truth, and justice, is insufficient. Huson v. Farmer, 53 Ga. App. 131, 185 S.E. 119 (1936).

OPINIONS OF THE ATTORNEY GENERAL

Writ granted only when error complained of is erroneous as a matter of law. — Under this section, writ of certiorari may be granted only when the judgment complained of is erroneous as a matter of law, and a petition seeking such writ must set forth legal errors committed in police court or other inferior tribunal and pray their correction by superior court. 1960-61 Op. Att'y Gen. p. 96.

Appeals from a municipal court conviction of a traffic offense may lie in the Court of Appeals or in the superior court depending on the status of the municipal court and the nature of the offense. 1985 Op. Att'y Gen. No. U85-18.

RESEARCH REFERENCES

Am. Jur. 2d. — 14 Am. Jur. 2d, Certiorari, § 52 et seq.

Am. Jur. Pleading and Practice Forms. — 5B Am. Jur. Pleading and Practice Forms, Certiorari, §§ 81, 88.

C.J.S. — 14 C.J.S., Certiorari, § 30. 51 C.J.S., Justices of the Peace, § 430 et seq.

5-4-4. Petition for certiorari in appeal case tried by jury in justice of the peace court generally.

Reserved. Repealed by Ga. L. 1983, p. 884, § 4-2, effective July 1, 1983.

Editor's notes. — This Code section was based on Ga. L. 1878-79, p. 142, § 1; Code 1882, § 4157j; Civil Code 1895, § 4149; Civil Code 1910, § 4749; Code 1933, § 19-204.

5-4-5. Bond and security required; certificate of payment of costs; oath of security; affidavit of indigence.

(a) Before any writ of certiorari shall issue, except as provided in subsection (c) of this Code section, the party applying for the same, his agent, or his attorney shall give bond and good security, conditioned to pay the adverse party in the case the sums sought as an award to be recovered, together with all future costs, and shall also produce a certificate from the officer whose decision or judgment is the subject matter of complaint that all costs which may have accrued on the trial below have been paid. The bond and certificate shall be filed with the petition for certiorari, and security on the bond shall be liable as securities on appeal.

(b) The person authorized to receive bond and security may compel the security tendered to swear upon oath the means by which he can fulfill the bond obligation. Such action shall exonerate from liability the person receiving the bond and security.

(c) If the party applying for the writ of certiorari makes and files with his petition a written affidavit that he is advised and believes that he has good cause for certiorari to the superior court and that because of

his indigence he is unable to pay the costs or give security, as the case may be, the affidavit shall in every respect answer instead of the certificate and bond above-mentioned. (Laws 1811, Cobb's 1851 Digest, pp. 523, 524; Code 1863, §§ 3962, 3963, 3964; Code 1868, §§ 3982, 3983, 3984; Code 1873, §§ 4054, 4055, 4056; Code 1882, §§ 4054, 4055, 4056; Civil Code 1895, §§ 4639, 4640, 4641; Ga. L. 1897, p. 33, § 1; Civil Code 1910, §§ 5185, 5186, 5187; Code 1933, §§ 19-206, 19-207, 19-208.)

JUDICIAL DECISIONS

Analysis

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General Consideration

Giving bond or making affidavit is condition precedent, in civil case, to issuance of writ. Page v. White, 77 Ga. App. 21, 47 S.E.2d 662 (1948).

Filing of bond or making of pauper affidavit is condition precedent to application to superior court for writ of certiorari. Bickers v. Georgia Real Estate Comm'n, 89 Ga. App. 815, 81 S.E.2d 535 (1954).

Petition must affirmatively show filing of bond or pauper affidavit and approval of clerk or judge. Bickers v. Georgia Real Estate Comm'n, 89 Ga. App. 815, 81 S.E.2d 535 (1954).

Failure to pay costs and give bond, or to make pauper's affidavit renders certiorari void. Quinn v. O'Neal, 57 Ga. App. 248, 194 S.E. 911 (1938).

Writ of certiorari in civil case is void when issued before applicant has given bond, or has made and filed affidavit in forma pauperis, in lieu of such bond. Page v. White, 77 Ga. App. 21, 47 S.E.2d 662 (1948).

When it affirmatively appears from petition for certiorari that there was failure to give bond or to make pauper affidavit, such failure renders the petition for certiorari void and an absolute nullity, and the petition cannot proceed. Bickers v. Georgia Real Estate Comm'n, 89 Ga. App. 815, 81 S.E.2d 535 (1954).

Court was correct in dismissing petition for writ of certiorari when it affirmatively appeared from the petition that no attempt had been made to comply with requirements of section relative to making of proper bond or execution of proper pauper's affidavit. Calloway v. Georgia Real Estate Comm'n, 89 Ga. App. 823, 81 S.E.2d 540 (1954).

Writ of certiorari is void, when the writ is issued in case where bond required by section, properly approved, has not been given. Fairfax Loan & Inv. Co. v. Turner, 49 Ga. App. 300, 175 S.E. 267 (1934).

Dismissal or writ of certiorari proper. — Certiorari is properly dismissed when record does not show that bond was filed with petition. Odom Bros. Co. v. Stovall, 28 Ga. App. 661, 112 S.E. 907 (1922).

Effect of failure to comply. — Superior court acquires no jurisdiction of case

when the party fails to comply with section. Hartsfield Co. v. Luddy, 45 Ga. App. 507, 165 S.E. 452 (1932).

Certiorari from municipal court proceeding regarding nuisance. — Proceeding in municipal court to determine question of whether nuisance existed was not criminal or quasi criminal in nature since the court cannot fine or imprison the defendant in error, and bond required for certiorari is that provided for in former Code 1933, §§ 19-206, 19-207, and 19-208 (see O.C.G.A. § 5-4-5) for civil proceedings, and a bond under Code 1933, §§ 19-214, 19-215, and 19-216 (see O.C.G.A. § 5-4-20) would not suffice. City of Atlanta v. Pazol, 95 Ga. App. 598, 98 S.E.2d 216 (1957).

Provisions of section are inapplicable to criminal cases. Brown v. State, 124 Ga. 411, 52 S.E. 745 (1905); Bickers v. Georgia Real Estate Comm'n, 89 Ga. App. 815, 81 S.E.2d 535 (1954) (decided under former Civil Code 1910, § 4185, now subsection (a) of this section).

Section inapplicable when certiorari is sought for review of conviction for violation of municipal ordinance. Ellett v. City of College Park, 233 Ga. 858, 213 S.E.2d 700 (1975).

Judicial notice. — Trial court erred by relying upon a county ordinance not properly in the record to support the court's conclusion that a writ of certiorari was an appropriate method of judicial review of actions undertaken by a county planning commission in approving a developer's plan to build a subdivision of town homes; as a result, the appellate court was precluded from reviewing the owners' constitutional challenge to the ordinance. Monterey Cmty. Council v. DeKalb County Planning Comm'n, 281 Ga. App. 873, 637 S.E.2d 488 (2006).

Construction with O.C.G.A. § 51-1-27. — Upon the grant of certiorari in a medical malpractice action filed by plaintiff parents against a pediatrician, a nurse, and others, a Georgia trial court did not abuse the court's discretion by prohibiting the parents from showing that the nurse failed to pass the nursing board examination, as such evidence was irrelevant, and even if it could be said that the evidence had any probative value, it was substantially outweighed by the danger of undue prejudice. Snider v. Basilio, 281 Ga. 261, 637 S.E.2d 40 (2006).

Arbitration proceedings. — Upon certiorari review, the Court of Appeals erroneously held that the arbitrator, and not the court, should have decided whether arbitration was barred by res judicata, as: (1) no presumption existed that an arbitrator was in a better position than a court to apply a legal doctrine such as res judicata; (2) the parties did not expressly reserve the issue for arbitration; and (3) there was no presumption under Georgia law that the application of a procedural bar such as res judicata was a matter to be determined exclusively by an arbitrator. Bryan County v. Yates Paving & Grading Co., 281 Ga. 361, 638 S.E.2d 302 (2006).

Action under Dram Shop Act. — Upon certiorari review, given proof of spoliation under former O.C.G.A. § 24-2-22 in an action filed against a tavern pursuant to Georgia's Dram Shop Act, O.C.G.A. § 51-1-40(b), the trial court erred in granting summary judgment to an injured party's guardian, as the tavern's manager was aware of the potential for litigation and failed to preserve whatever videotaped evidence might have been captured as to whether one of the tavern's intoxicated patron's would soon be driving; hence, a rebuttable presumption arose against the tavern that the evidence destroyed would have been harmful to the tavern, rendering summary judgment inappropriate. Baxley v. Hakiel Indus., 282 Ga. 312, 647 S.E.2d 29 (2007).

Cited in Fuller v. Arnold, 64 Ga. 599 (1880); Hendrix & McBurney v. Mason, 70 Ga. 523 (1883); Hester v. Keller, 74 Ga. 369 (1884); Baker & Lawrence v. McDaniel, 87 Ga. 18, 13 S.E. 130 (1891); Mohrman v. City Council, 103 Ga. 841, 31 S.E. 95 (1898); Hamilton & Co. v. Phenix Ins. Co., 107 Ga. 728, 33 S.E. 705 (1899); New York Life Ins. Co. v. Rhodes, 4 Ga. App. 25, 60 S.E. 828 (1908); American Inv. Co. v. Cable Co., 4 Ga. App. 106, 60 S.E. 1037 (1908); Foley & Williams Mfg. Co. v. Bell & Harrell, 4 Ga. App. 447, 61 S.E. 856 (1908); Sanford v. Wade, 17 Ga. App. 366, 86 S.E. 945 (1915); Le Bron v. Stewart, 26 Ga. App. 133, 105 S.E. 650 (1921); Roberts

General Consideration (Cont'd)

v. Selman, 34 Ga. App. 171, 128 S.E. 694 (1925); King v. Gafford, 43 Ga. App. 452, 159 S.E. 292 (1931); Howard v. Boone, 45 Ga. App. 356, 164 S.E. 470 (1932); Garvin v. Ray, 174 Ga. 905, 164 S.E. 677 (1932); Deep v. De Vane, 49 Ga. App. 323, 175 S.E. 386 (1934); Roberts v. Citizens Bank, 62 Ga. App. 584, 8 S.E.2d 900 (1940); Brooks v. Arline, 68 Ga. App. 791, 24 S.E.2d 230 (1943); Hunter v. Lanier, 74 Ga. App. 177, 39 S.E.2d 79 (1946); Delinski v. Dunn, 206 Ga. 825, 59 S.E.2d 248 (1950); Taylor v. City of Atlanta, 84 Ga. App. 739, 67 S.E.2d 143 (1951); Palmer Tire Co. v. Maxwell Bros. Furn. Co., 99 Ga. App. 87, 107 S.E.2d 695 (1959); Yield, Inc. v. City of Atlanta, 145 Ga. App. 172, 244 S.E.2d 32 (1978); Buckler v. DeKalb County, 290 Ga. App. 190, 659 S.E.2d 398 (2008).

Bond

1. In General

Provisions of subsection (a) are mandatory. Bickers v. Georgia Real Estate Comm'n, 89 Ga. App. 815, 81 S.E.2d 535 (1954).

Bond must be given and approved before writ issues. — Writ of certiorari in civil case, unless sued out in forma pauperis, is void if the writ be issued before applicant has given bond prescribed. Before writ of certiorari can properly issue it must appear from record that the writ has been duly approved, and to be duly approved the writ must, among other things, be approved before writ of certiorari issues. Butters Mfg. Co. v. Fraley, 46 Ga. App. 712, 169 S.E. 55 (1933).

Bond is condition precedent to issuance of writ, but not to sanction of petition for certiorari. Smith v. McCranie, 14 Ga. App. 721, 82 S.E. 307 (1914); Gragg Lumber Co. v. Collins, 37 Ga. App. 76, 139 S.E. 84 (1927).

Bond is required when pauper affidavit is not filed. Simon v. Mayor of Savannah, 4 Ga. App. 171, 60 S.E. 1036 (1908); Tuten v. Showalter, 14 Ga. App. 690, 82 S.E. 154 (1914); Belk v. Cannon, 19 Ga. App. 487, 91 S.E. 790 (1917).

Certiorari bond need not be under seal. A.R. King & Co. v. Cantrell, 4 Ga. App. 263, 61 S.E. 144 (1908).

Bond is not void because the bond includes provision not authorized by section. Scott v. Oxford, 105 Ga. App. 301, 124 S.E.2d 420 (1962).

Bond complying with section need not bind parties to pay stated penal sum. — When condition of bond complies with provisions of this section, fact that the bond does not bind parties to pay stated penal sum does not vitiate the bond. Bank of Am. Nat'l Trust & Sav. Ass'n v. Reserve Life Ins. Co., 90 Ga. App. 332, 83 S.E.2d 66 (1954).

Bond providing for payment of future costs, but not for recovery sought. — When plaintiff in certiorari has paid accrued costs and given bond providing for payment of all future costs, but not providing for payment of eventual condemnation money, the plaintiff has substantially complied with statute. Hartsfield Co. v. Luddy, 45 Ga. App. 507, 165 S.E. 452 (1932) (see O.C.G.A. § 5-4-2).

Bond providing penalty for less than amount sought as award. — When bond pursuant to section provides for penalty of $20.00 and $20.00 is insufficient to meet sum sought as award, bond is insufficient and certiorari should be dismissed. Gullatt v. Blakenship, 42 Ga. App. 139, 155 S.E. 353 (1930).

Party taking bond cannot delegate right under subsection (b) to justification by surety. — When party taking bond is State Personnel Board, by a majority of the board's members, nothing in the law gives it the right to delegate the board's right to justification by surety to any other officer. The board alone has power to approve or disapprove bond, and such authority cannot be exercised even by judge of superior court, or by clerk of trial court. When there is no approval of bond by judicial officer, writ must be dismissed. Scott v. Oxford, 105 Ga. App. 301, 124 S.E.2d 420 (1962).

Best way to show that proper bond has been given is to attach to petition a certified copy of the bond, with certificate of approval by proper officer, and allege affirmatively that bond was given and approved as required by law. Beard v. City of Atlanta, 91 Ga. App. 584, 86 S.E.2d 672 (1955).

Bond filed with first petition does not meet requirements of law as to a second petition. Yield, Inc. v. City of Atlanta, 152 Ga. App. 171, 262 S.E.2d 481 (1979).

2. Execution and Attestation

Certiorari bond may be executed by an agent. Porterfield v. City of La Grange, 60 Ga. App. 646, 4 S.E.2d 732 (1939).

Authority of agent to sign bond will be presumed, unless rebutted. Georgia-Alabama Bus. College v. Constitution Publishing Co., 8 Ga. App. 348, 69 S.E. 34 (1910).

Agent or attorney authorized to represent party in case may give bond. — Bond shall be given by party personally, or by the party's agent, either general or special, who is authorized to represent party in that particular case, or by attorney whose employment includes services in that case or who is authorized by party to give bond. Alabama M. Ry. v. Stevens, 116 Ga. 790, 43 S.E. 46 (1902).

Bond must be signed by surety. — When bond given by plaintiff in certiorari was not signed by any person or corporation as surety, the only signature thereto being that of principal (the plaintiff in certiorari), bond given did not meet requirements of section. Gleason v. Burgess, 46 Ga. App. 486, 167 S.E. 916 (1933).

When agent of surety signs bond, authority must expressly appear. — When on certiorari from trial court, certiorari bond is signed by one as agent for surety named thereon, authority of such agent must expressly appear. Taylor v. City of Atlanta, 84 Ga. App. 739, 67 S.E.2d 143 (1951); Edwards v. City of Atlanta, 88 Ga. App. 329, 76 S.E.2d 635 (1953).

When plaintiff sues on non-severable cause of action, both parties must sign bond, absent authority to the contrary. Harwell v. Marshall, 125 Ga. 451, 54 S.E. 93 (1906).

When corporation is surety, bond signed by the corporation's attorney must be accompanied by power of attorney. Hunter v. Lanier, 74 Ga. App. 177, 39 S.E.2d 79 (1946).

Bond for partnership. — When applicant for writ of certiorari is a partnership and bond required by section is not signed in firm name, nor by one professing to act for the partnership, proceedings are void. Camp, Saunders & Co. v. Bacon Fruit Co., 117 Ga. 149, 43 S.E. 425 (1903).

Commercial notary may attest signatures to certiorari bond. Hendrix & McBurney v. Mason, 70 Ga. 523 (1883).

Any attesting officer may witness a certiorari bond. Southern Ry. v. Oliver, 13 Ga. App. 5, 78 S.E. 684 (1913).

3. Approval

Bond must be approved by judge or justice of court in which case was originally tried. Butters Mfg. Co. v. Fraley, 46 Ga. App. 712, 169 S.E. 55 (1933).

Approval of bond required. — Bond given under section, to render the bond effectual, must in some manner be approved by judge or justice of court in which case was originally tried. Stover v. Doyle, 114 Ga. 85, 39 S.E. 939 (1901).

Applicability to petitions from appellate division of municipal court of Atlanta. — There being no special provision of law for any different procedure governing manner in which application for issuance of writ of certiorari may be made when directed to presiding judge of appellate division of Municipal Court of Atlanta, the bond required of petitioner in such a case must be properly and duly approved by presiding magistrate as condition precedent to issuing of writ of certiorari. Butters Mfg. Co. v. Fraley, 46 Ga. App. 712, 169 S.E. 55 (1933).

Trial judge must certify that amount of bond is approved and costs have been paid. — Under this section, it is necessary that in all applications for certiorari in civil cases bond be given in amount approved by trial judge and that such judge certify under the judge's own signature that bond has been approved and that costs have been paid; otherwise, certiorari is void. Veal v. Eagle Fire Ins. Co., 103 Ga. App. 757, 120 S.E.2d 674 (1961).

Fact of approval of bond given under section, must appear upon papers themselves. State v. Wynne, 4 Ga. App. 719, 62 S.E. 499 (1908).

Bond (Cont'd)
3. Approval (Cont'd)

Approval may appear on face of bond. Dykes v. Twiggs County, 115 Ga. 698, 42 S.E. 36 (1902); Southeastern Mut. Fire Ins. Co. v. Davison, 25 Ga. App. 83, 102 S.E. 460 (1920).

Bond cannot be approved by anyone other than judge or justice of trial court. Southern Ry. v. Oliver, 13 Ga. App. 5, 78 S.E. 684 (1913).

Clerk of court cannot approve bond. Tippins v. De Loach, 9 Ga. App. 362, 71 S.E. 497 (1911).

Approval of bond by clerk, or certification by clerk or other officer that costs have been paid, is insufficient. Veal v. Eagle Fire Ins. Co., 103 Ga. App. 757, 120 S.E.2d 674 (1961).

Commercial notary public cannot approve bond. Southeastern Mut. Fire Ins. Co. v. Davison, 25 Ga. App. 83, 102 S.E. 460 (1920).

Magistrate's statement that bond and security has been given. — Statement by trial magistrate in the magistrate's certificate to petition for certiorari, that the petitioner has given bond and security as required by law, is not an equivalent, nor a sufficient substitute, for the magistrate's approval of a certiorari bond. If bond is unapproved at date of the bond's filing with the petition, the bond is insufficient to authorize the clerk to issue a writ, and no subsequent approval which might be implied from the magistrate's certificate or otherwise can cure a deficiency. Butters Mfg. Co. v. Fraley, 46 Ga. App. 712, 169 S.E. 55 (1933).

No subsequent action approving or ratifying bond will save certiorari from dismissal. State v. Wynne, 4 Ga. App. 719, 62 S.E. 499 (1908); Butters Mfg. Co. v. Fraley, 46 Ga. App. 712, 169 S.E. 55 (1933).

Costs

Hearing officer could not waive bond requirement. — Trial court erred in granting a petition for a writ of certiorari as the petition was not accompanied by a bond as required by O.C.G.A. § 5-4-5(a), the hearing officer originally hearing the dispute did not have authority to waive the bond requirement, and a bond by amendment under O.C.G.A. § 5-4-10 was invalid as the bond was not approved by the hearing officer. Duty Free Air & Ship Supply, Inc. v. Atlanta Duty Free, LLC, 275 Ga. App. 381, 620 S.E.2d 616 (2005).

1. In General

Requirement that costs be paid is intended for protection of officers. Johns v. Lewis Drug Co., 120 Ga. 640, 48 S.E. 127 (1904).

Costs must be paid, not merely deposited. Abrahams v. Ryan, 61 Ga. 597 (1878).

Costs include costs accrued on trial resulting in verdict excepted to, but not costs accrued on previous hearings. Johns v. Lewis Drug Co., 120 Ga. 640, 48 S.E. 127 (1904); Standard Gas Prods. Co. v. Vismor, 31 Ga. App. 418, 121 S.E. 854 (1923).

2. Certificate

Writ may be sanctioned, although certificate of payment of costs is not filed. Fuller v. Arnold, 64 Ga. 599 (1880).

Applicability to Municipal Court of Atlanta. — There is nothing in act creating Municipal Court of Atlanta, or in any of the Acts amendatory thereof, which could be taken to change rule with respect to necessity of signing certificate as to costs by officer whose decision is subject-matter of complaint. Thoms v. John R. Thompson Co., 38 Ga. App. 779, 145 S.E. 533 (1928).

No certificate of payment of costs is required in forcible entry and detainer case. Taylor v. Gay, 20 Ga. 77 (1856).

Certificate not required when second writ of certiorari was procured under former Civil Code 1910, § 4381 (see O.C.G.A. § 9-2-61), when the first writ in the same case was dismissed. Standard Gas Prods. Co. v. Vismor, 31 Ga. App. 418, 121 S.E. 854 (1923).

Receipt of costs may satisfy requirement of certificate that costs have been paid. Western & Atl. R.R. v. Carder, 120 Ga. 460, 47 S.E. 930 (1904).

Statements held insufficient. — Mere statement that costs of certiorari in

municipal court have been paid is insufficient. Osborn v. Osborn, 70 Ga. 716 (1883).

Statement that all costs but three dollars allowed to garnishee for answering garnishment was insufficient. Buchanan v. Satterwhite, 22 Ga. App. 23, 95 S.E. 309 (1918).

Certificate made by clerk of court is insufficient. Davis v. Joiner, 1 Ga. App. 106, 58 S.E. 62 (1907).

Judge of superior court did not err in dismissing petition for certiorari which was accompanied by certificate as to payment of costs, signed only by deputy clerk of municipal court. Thoms v. John R. Thompson Co., 38 Ga. App. 779, 145 S.E. 533 (1928).

Affidavit of Indigence

1. In General

Language of subsection (c) is plain and mandatory. Garvin v. Ray, 174 Ga. 905, 164 S.E. 677 (1932); Bickers v. Georgia Real Estate Comm'n, 89 Ga. App. 815, 81 S.E.2d 535 (1954).

Writ of certiorari may be sanctioned even when improper affidavit has been filed with the clerk, but valid writ of certiorari may not issue in such case. Smith v. McCranie, 14 Ga. App. 721, 82 S.E. 307 (1914).

2. Contents

What must affidavit state. — Affidavit should allege that owing to poverty affiant is unable to give required security; merely stating that affiant is unable to give security, as required by law, is not sufficient. Roberts v. Selman, 34 Ga. App. 171, 128 S.E. 694 (1925).

Affidavit must state applicant is advised and believes applicant has good cause. — When affidavit in lieu of bond does not recite that applicant is advised and believes that the applicant has good cause for certiorari application is not sustainable. Williams v. Williams, 117 Ga. App. 161, 159 S.E.2d 456 (1968).

Omission of declaration in pauper affidavit that applicant "is advised" renders affidavit fatally defective. Garvin v. Ray, 174 Ga. 905, 164 S.E. 677 (1932).

Affidavit must state affiant is advised and believes the affiant has good cause for certiorari. Dorsey v. Black, 55 Ga. 315 (1875); Belk v. Cannon, 19 Ga. App. 487, 91 S.E. 790 (1917).

Applicant making affidavit stating only inability to pay costs. — When applicant for certiorari does not pay costs and give bond with security or make affidavit that owing to the applicant's poverty the applicant was unable to pay costs or give security, but makes affidavit only that the applicant is unable to pay costs, the judge of superior court may properly dismiss certiorari. Quinn v. O'Neal, 57 Ga. App. 248, 194 S.E. 911 (1938).

Affidavit stating party is unable to pay costs "and" rather than "or" give security is insufficient and writ issued in such case should be dismissed. Hackett v. Tate, 18 Ga. App. 453, 89 S.E. 535 (1916).

Writ of certiorari is void when pauper affidavit allowed in lieu of bond uses conjunctive "and," the pauper is unable to pay costs and give security instead of disjunctive "or," as required by section. Fairfax Loan & Inv. Co. v. Turner, 49 Ga. App. 300, 175 S.E. 267 (1934).

3. Who May Make Affidavit

Minor with sufficient discretion may make a pauper affidavit. Bowers v. Kanaday, 94 Ga. 209, 21 S.E. 458 (1894).

Agent cannot make a pauper affidavit. Hadden v. Larned, 83 Ga. 636, 10 S.E. 278 (1889).

Attorney at law cannot make a pauper affidavit. Selma, R. & D.R.R. v. Tyson, 48 Ga. 351 (1873).

Personal affidavit of partner cannot operate in favor of firm. Marlow & Bro. v. Hughes Lumber Co., 92 Ga. 554, 17 S.E. 922 (1893).

RESEARCH REFERENCES

Am. Jur. 2d. — 14 Am. Jur. 2d, Certiorari, § 72 et seq.

Am. Jur. Pleading and Practice Forms. — 5B Am. Jur. Pleading and Prac-tice Forms, Certiorari, §§ 81, 88.

C.J.S. — 14 C.J.S., Certiorari, § 53 et seq.

ALR. — Right to sue or appeal in forma pauperis as dependent on showing of financial disability of attorney or other nonparty or nonapplicant, 11 ALR2d 607.

What costs or fees are contemplated by statute authorizing proceeding in forma pauperis, 98 ALR2d 292.

5-4-6. Time for application for writ; filing of petition; service of petition and writ.

(a) All writs of certiorari shall be applied for within 30 days after the final determination of the case in which the error is alleged to have been committed. Applications made after 30 days are not timely and shall be dismissed by the court.

(b) The certiorari petition and writ shall be filed in the clerk's office within a reasonable time after sanction by the superior court judge; and a copy shall be served on the respondent, within five days after such filing, by the sheriff or his deputy or by the petitioner or his attorney. A copy of the petition and writ shall also be served on the opposite party or his counsel or other legal representative, in person or by mail; and service shall be shown by acknowledgment or by certificate of the counsel or person perfecting the service. (Laws 1838, Cobb's 1851 Digest, p. 528; Laws 1850, Cobb's 1851 Digest, p. 529; Ga. L. 1855-56, p. 233, § 16; Ga. L. 1858, p. 88, § 1; Code 1863, §§ 2861, 3965; Code 1868, §§ 2869, 3985; Code 1873, §§ 2920, 4057; Code 1882, §§ 2920, 4057; Ga. L. 1889, p. 84, § 1; Civil Code 1895, §§ 3771, 4642; Civil Code 1910, §§ 4365, 5188; Ga. L. 1924, p. 59, §§ 1, 2; Code 1933, §§ 19-209, 19-210; Ga. L. 1961, p. 190, §§ 2, 3.)

JUDICIAL DECISIONS

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General Consideration

Editor's note. — In light of the similarity of the statutory provisions, decisions under former Code 1933, § 19-212 are included in the annotations of this Code section.

Cited in Gregory v. Daniel & Son, 93 Ga. 795, 20 S.E. 656 (1894); Carson v. Mayor of Forsyth, 97 Ga. 258, 22 S.E. 955 (1895); Seagraves v. W.E. Powell Co., 143 Ga. 572, 85 S.E. 760 (1915); Hudson v. State, 21 Ga. App. 507, 94 S.E. 645 (1917); Bull & Son v. Armour Fertilizer Works, 26 Ga. App. 151, 105 S.E. 616 (1921); Johnson v. Barrett, 26 Ga. App. 781, 107 S.E. 168 (1921); Kirkland v. Luke, 30 Ga. App. 203, 117 S.E. 259 (1923); Russell v.

Kennington, 160 Ga. 467, 128 S.E. 581 (1925); Towery v. City of McCaysville, 38 Ga. App. 85, 142 S.E. 702 (1928); Jordan v. State, 172 Ga. 857, 159 S.E. 235 (1931); Hudson v. Higgins, 45 Ga. App. 358, 164 S.E. 688 (1932); Nalley & Co. v. Moore, 51 Ga. App. 718, 181 S.E. 429 (1935); Quinn v. O'Neal, 58 Ga. App. 628, 199 S.E. 359 (1938); Howard v. Williams, 72 Ga. App. 822, 35 S.E.2d 389 (1945); Washburn v. Thompson, 78 Ga. App. 133, 50 S.E.2d 761 (1948); Taylor v. Golian Steel & Iron Co., 86 Ga. App. 639, 72 S.E.2d 196 (1952); Bickers v. Georgia Real Estate Comm'n, 89 Ga. App. 815, 81 S.E.2d 535 (1954); Hipp v. City of East Point, 105 Ga. App. 775, 125 S.E.2d 672 (1962); Allison v. City of Atlanta, 109 Ga. App. 114, 135 S.E.2d 524 (1964); Murdock v. Perkins, 219 Ga. 756, 135 S.E.2d 869 (1964); Barrett v. City of Chamblee, 117 Ga. App. 205, 160 S.E.2d 278 (1968); Bellew v. State Hwy. Dep't, 127 Ga. App. 301, 193 S.E.2d 202 (1972); Goldstein v. Smith, 141 Ga. App. 493, 233 S.E.2d 864 (1977); Schaffer v. City of Atlanta, 144 Ga. App. 702, 242 S.E.2d 288 (1978); Williams v. Brownlee, 147 Ga. App. 831, 250 S.E.2d 567 (1978); Fulton County v. Williams, 150 Ga. App. 496, 258 S.E.2d 155 (1979); Mulling v. Wilson, 245 Ga. 773, 267 S.E.2d 212 (1980); Kaplan v. City of Atlanta, 158 Ga. App. 58, 279 S.E.2d 307 (1981); Village Ctrs., Inc. v. DeKalb County, 248 Ga. 177, 281 S.E.2d 522 (1981); Georgia Farm Bureau Mut. Ins. Co. v. DeKalb County, 167 Ga. App. 577, 306 S.E.2d 924 (1983); City of Atlanta v. Houston, 221 Ga. App. 61, 471 S.E.2d 12 (1996); Buckler v. DeKalb County, 290 Ga. App. 190, 659 S.E.2d 398 (2008).

Time for Filing Application

1. In General

Provisions of subsection (a) are mandatory. — Provisions of section are absolute and mandatory in respect of time within which writs of certiorari shall be applied for, and cannot be varied or departed from in exercise of any judicial discretion. Hitt v. City of Atlanta, 103 Ga. App. 717, 120 S.E.2d 339 (1961).

Petition must be presented within thirty days from rendition of verdict, if the petition does not complain of error in dismissing motion for new trial. Autrey & Peebles v. Carson Naval Stores Co., 29 Ga. App. 422, 115 S.E. 924 (1923).

Application for writ of certiorari must be made within 30 days of final determination of case in inferior court. Eisenberg v. Fuller, 148 Ga. App. 603, 252 S.E.2d 17 (1979).

Failure to obtain the requisite sanction from the appropriate judge is not an amendable defect if the 30-day time requirement for applying for certiorari under O.C.G.A. § 5-4-6(a) has expired. Cobb County v. Herren, 230 Ga. App. 482, 496 S.E.2d 558 (1998).

Although a trial court's decision to dismiss an action by dismissed city employees was erroneously based on the court's determination that the employees had failed to exhaust their administrative remedies from their claim that the reduction-in-force ordinance, Atlanta, Ga., Code § 114-55, was not properly followed, as they had properly appealed to the Service Board and the Board had denied their claims on appeal, the dismissal was proper for other reasons; after the Board's final decision denying the employees' appeals, the employees failed to properly and timely file a writ of certiorari in the trial court pursuant to O.C.G.A. §§ 5-4-1(a) and 5-4-6 in order to obtain review of that decision. Jordan v. City of Atlanta, 283 Ga. App. 285, 641 S.E.2d 275 (2007).

When judgment is not final, subsequent judgments pertaining to it are not final. — When verdict and judgment rendered in Municipal Court of Atlanta is not a final judgment, neither judgment of trial judge overruling motion for new trial excepting to such verdict and judgment, nor judgment of appellate division of that court affirming such judgment of trial judge, is a final judgment. Reed v. V.H. Kriegshaber & Son, 44 Ga. App. 64, 160 S.E. 560 (1931).

Filing of mandamus action does not excuse compliance with section. — Because certiorari and mandamus are completely different remedies as to subject matter, procedure, and nature of relief, filing a mandamus action does not excuse compliance with requirements of this section. Richardson v. Rector, 134 Ga.

Time for Filing Application (Cont'd)
1. In General (Cont'd)

App. 116, 213 S.E.2d 488 (1975).

Section does not deal with means of preserving exceptions to trial court rulings. — This section merely limits time after final judgment in which writ of certiorari may be applied for, but does not attempt to go into manner in which exceptions to orders and rulings prior to final judgment may be preserved. Taylor v. Golian Steel & Iron Co., 86 Ga. App. 639, 72 S.E.2d 196 (1952).

Certiorari from appeals in justice's court are from jury verdict. — It is from verdict of jury in appeal cases in justice's court that certiorari may be taken, not from judgment which justice may enter thereon. Western & A.R.R. v. Carson, 70 Ga. 388 (1883).

Fact of timely application must appear from record, unless answer of justice verifies that fact. Duke v. Story, 113 Ga. 112, 38 S.E. 337 (1901); Landrum v. Moss, 1 Ga. App. 216, 57 S.E. 965 (1907).

Section governs time for second application when first application dismissed for noncompliance. — When application for certiorari is a nullity, because of failure to comply with the requirement as to bond, time within which second application may be made was governed by former Civil Code 1910, §§ 4365, 5188 (see O.C.G.A. § 5-4-6), and was not extended by law as to renewal of cases within six months after dismissal under former Civil Code 1910, § 4381 (see O.C.G.A. § 9-2-61). Tuten v. Showalter, 14 Ga. App. 690, 82 S.E. 154 (1914); Autrey & Peebles v. Carson Naval Stores Co., 29 Ga. App. 422, 115 S.E. 924 (1923).

Renewal of previously dismissed, but timely certiorari in same cause. — When certiorari is applied for after expiration of statutory period from date of judgment complained of, petition should show on the petition's face that the petition is a renewal of a previously dismissed certiorari sued out within proper time in same cause, and that renewal is within six months from date of dismissal of previous certiorari. Unless all of these facts appear in petition for certiorari, the judge of superior court has no jurisdiction of case, and should refuse to sanction petition; and, if such petition is sanctioned, it should be dismissed when proper motion therefor is made upon hearing of certiorari. Smith v. City of Atlanta, 48 Ga. App. 853, 174 S.E. 171 (1934).

Valid writ of error suspends running of time limit for application for writ of certiorari. Gavant v. Berger, 51 Ga. App. 628, 181 S.E. 210 (1935).

Timely petition was improperly dismissed. — Superior court improperly dismissed as untimely appellant city's petition for a writ of certiorari challenging a civil service board's decision as the petition was timely filed for purposes of O.C.G.A. § 5-4-6(a) since: (1) the last day to file the petition fell on Thanksgiving Day; (2) the Friday after Thanksgiving day, like Thanksgiving day, was a legal holiday as set forth in O.C.G.A. § 1-4-1; and (3) the petition was filed on the very next business day, as allowed by O.C.G.A. § 1-3-1(d)(3). City of Atlanta v. Hector, 256 Ga. App. 665, 569 S.E.2d 600 (2002).

Eleventh of November, although a legal holiday, is included in computing 30-day period. — In computing 30 days within which petition for certiorari must be presented eleventh of November, although a legal holiday and last day, must be included. Freeman v. Beneficial Loan Soc'y, 42 Ga. App. 294, 155 S.E. 786 (1930).

2. What Are Final Judgments

Writ of certiorari lies only after rendition of judgment making final disposition of case, and then only to correct errors which affect such final judgment. It does not lie to correct errors affecting only judgment which is not final. Reed v. V.H. Kriegshaber & Son, 44 Ga. App. 64, 160 S.E. 560 (1931).

Writ of certiorari lies only after rendition of final judgment. Hayes v. Brown, 205 Ga. 234, 52 S.E.2d 862 (1949).

Final disposition of case in inferior court is prerequisite to writ of certiorari. Singer Mfg. Co. v. McNeal Paint & Glass Co., 117 Ga. 1005, 44 S.E. 801 (1903).

Absent final judgment, court is correct in refusing to act. — When there has been no final judgment rendered by

the state court, the superior court is correct in refusing to exercise the superior court's supervisory powers through a writ of certiorari. Attwell v. Sears Roebuck & Co., 159 Ga. App. 811, 285 S.E.2d 199 (1981).

Judgment of justice of peace, refusing to allow amendment to petition is not final determination. Felker v. Freeman, 46 Ga. App. 767, 169 S.E. 247 (1933).

Verdict and judgment against special plea of no partnership is not a final judgment. Reed v. V.H. Kriegshaber & Son, 44 Ga. App. 64, 160 S.E. 560 (1931).

Judgment sustaining motion to dismiss and granting leave to amend is not final judgment, judgment sustaining demurrer (now motion to dismiss) to petition, which grants leave to plaintiff to amend on pain of dismissing suit, is not a final judgment, and certiorari does not lie thereto. Massengale v. Colonial Hill Co., 34 Ga. App. 807, 131 S.E. 299 (1926).

Notice

Service on the opposite party within five days is mandatory and in the absence of such service the application for certiorari is properly dismissed. City of Atlanta v. Saunders, 159 Ga. App. 566, 284 S.E.2d 77 (1981).

Provisions for notice to opposite party are mandatory. Glover v. Berry Sch., 90 Ga. App. 232, 83 S.E.2d 22 (1954) (decided under former Code 1933, § 19-212).

Notice to opposite party is required unless prevented by unavoidable cause or waived in writing. — Notice to be given to opposite party in interest, that party's agent, or attorney, unless prevented by unavoidable cause or unless waived in writing, and when such notice is not given and it is not shown to be due to unavoidable cause, certiorari shall be dismissed unless waived in writing. Attebery v. City of Manchester, 76 Ga. App. 265, 45 S.E.2d 781 (1947) (decided under former Code 1933, § 19-212).

Failure to serve writ on judge whose decision is to be reviewed. — When it appears that the writ of certiorari has not been served upon the judge, or other officer whose decision is sought to be reviewed, 15 days previous to the term of court to which the return is to be made, the proceeding should be dismissed, unless it clearly appears that the failure to serve was in no way attributable to the fault of the party making application for the writ. City of Atlanta v. Saunders, 159 Ga. App. 566, 284 S.E.2d 77 (1981).

Failure to serve judge, not basis for dismissal. — Failure to properly serve respondent, a municipal court judge whose decision was being reviewed, was not a basis for dismissal when the judge made a general appearance and addressed the merits of the case. Hudson v. Watkins, 225 Ga. App. 455, 484 S.E.2d 24 (1997).

Failure to serve city. — "Opposite party" in a case of certiorari from a municipal court was the city, not the municipal court judge, and failure to serve the city warranted dismissal of the petition. Hudson v. Watkins, 225 Ga. App. 455, 484 S.E.2d 24 (1997).

Failure to serve board. — Superior court did not err in dismissing petition for certiorari from a decision of the Atlanta Civil Service Board, since the board was not named as a party as required by subsection (b) of O.C.G.A. § 5-4-6, and service of the petition on the City of Atlanta was not service on the City of Atlanta Civil Service Board as a matter of law. Fisher v. City of Atlanta, 212 Ga. App. 635, 442 S.E.2d 762 (1994).

O.C.G.A. § 5-4-10 may not be utilized to permit service beyond time permitted in O.C.G.A. § 5-4-6. City of Atlanta v. Saunders, 159 Ga. App. 566, 284 S.E.2d 77 (1981).

It is the actual filing of petition in clerk's office which gives the petition validity, but the petition cannot have any validity as such unless the petition is actually filed with the custodian upon whom the law casts duty of receiving the petition. Hunter v. City of Blue Ridge, 79 Ga. App. 719, 54 S.E.2d 510 (1949).

Giving of required notice must affirmatively appear from certiorari proceedings. — When it does not affirmatively appear from certiorari proceedings that required notice or a waiver thereof was given, proceedings are fatally defective, and superior court does not err in overruling and denying petition for

Notice (Cont'd)

certiorari. Williams v. State, 91 Ga. App. 124, 85 S.E.2d 91 (1954).

Personal service upon respondent is required. Gornto v. City of Brunswick, 119 Ga. App. 673, 168 S.E.2d 323 (1969).

Failure to comply with subsection (b) renders petition and writ invalid. — When certiorari was dismissed for want of compliance with provisions of former Civil Code 1910, §§ 4365, 5188 (see O.C.G.A. § 5-4-6), petition for certiorari and writ of certiorari were invalid, and for this reason there was no case pending which could be recommenced within six months as provided in § 9-2-61. Butters Mfg. Co. v. Sims, 47 Ga. App. 648, 171 S.E. 162 (1933) (decided under former Code 1933, § 19-210, prior to amendment by Ga. L. 1961, p. 190, § 3, now embodied in subsection (b) of O.C.G.A. § 5-4-6).

Jurisdiction over appeal from dismissal of petition for failure of service. — When sole question for review on appeal is dismissal of petition for certiorari because of failure of service, the Court of Appeals has jurisdiction of the appeal. Gornto v. City of Brunswick, 225 Ga. 128, 166 S.E.2d 349 (1969).

Failure to give notice to opposite party shall be mandatory ground for dismissal of certiorari unless prevented by unavoidable cause, or unless waived. Glover v. Berry Sch., 90 Ga. App. 232, 83 S.E.2d 22 (1954) (decided under former Code 1933, § 19-212).

Failure to give notice to opposite party is fatal to proceedings and subjects the proceedings to dismissal at any time before final judgment. Goldberg v. City of Atlanta, 71 Ga. App. 269, 30 S.E.2d 661 (1944) (decided under former Code 1933, § 19-212).

Acknowledgment of service does not estop one from claiming service was untimely. — Mere acknowledgment of service of notice of sanction of writ of certiorari does not estop person making acknowledgment from setting up that the same was, under the law relating thereto, served too late. Scott v. State, 75 Ga. App. 684, 44 S.E.2d 391 (1947) (decided under former Code 1933, § 19-212).

RESEARCH REFERENCES

Am. Jur. 2d. — 14 Am. Jur. 2d, Certiorari, § 52 et seq.

Am. Jur. Pleading and Practice Forms. — 5B Am. Jur. Pleading and Practice Forms, Certiorari, §§ 81, 88.

C.J.S. — 14 C.J.S., Certiorari, §§ 30 et seq., 41 et seq., 61 et seq.

ALR. — Applicability of statute of limitations or doctrine of laches to certiorari, 40 ALR2d 1381.

5-4-7. Time for filing of answer; manner of service; effect of failure to perfect service.

The answer to the writ of certiorari shall be filed in the clerk's office within 30 days after service thereof on the respondent unless further time is granted by the superior court. A copy of the answer shall be mailed or delivered to the petitioner by the respondent or by the clerk of the superior court. Failure to perfect service shall be grounds for continuance but shall not otherwise affect the validity of the proceedings. (Orig. Code 1863, § 3969; Code 1868, § 3989; Code 1873, § 4061; Code 1882, § 4061; Civil Code 1895, § 4646; Civil Code 1910, § 5195; Ga. L. 1918, p. 124, §§ 1, 2; Code 1933, § 19-301; Ga. L. 1961, p. 190, § 5.)

JUDICIAL DECISIONS

Analysis

General Consideration
Content and Sufficiency of Answer

General Consideration

Answer provides source of facts of case and rulings for reviewing court. — In certiorari case, answer of trial judge is only source from which knowledge of facts of case and rulings therein can be derived by reviewing court. Adams v. Bishop, 46 Ga. App. 32, 166 S.E. 460 (1932).

Only answer of justice embodies and can identify evidence before jury in the justice's court. Akridge v. Watertown Steam Engine Co., 77 Ga. 50 (1886).

If answer is not traversed, the answer becomes part of record. Mossman v. McKinley, 67 Ga. 391 (1881).

Burden is on applicant to cause timely answer by magistrate. — Burden is on applicant for certiorari to cause magistrate's answer to be filed within 30 days of service. Schaffer v. City of Atlanta, 151 Ga. App. 1, 258 S.E.2d 674 (1979), rev'd on other grounds, 245 Ga. 164, 264 S.E.2d 6 (1980).

Petition shall not be dismissed for insufficient affidavit when answer supports petition. — That affidavit in support of petition for certiorari is insufficient is no ground for dismissal after certiorari has been answered, if answer supports petition. Taylor v. Gay, 20 Ga. 77 (1856).

Dismissal under section due to petitioner's failure to act timely. — When plaintiff in certiorari was at fault, in failing to make appropriate motion in due time, and dismissal under former Code 1933, § 19-301 (see O.C.G.A. § 5-4-7) results from this fault, and not from bare failure of judge to file the judge's answer, such dismissal will not be affected by former Code 1933, § 19-502 (see O.C.G.A. § 5-4-15), which provided that when the trial judge dies before making the judge's answer to certiorari filed on the judge, a new trial will be granted. Mathis v. City of Nashville, 49 Ga. App. 309, 175 S.E. 383 (1934).

Cited in Bunn v. Henderson, 113 Ga. 609, 39 S.E. 78 (1901); Daniels v. State, 118 Ga. 18, 44 S.E. 818 (1903); Sutton v. State, 120 Ga. 865, 48 S.E. 342 (1904); J.M. High Co. v. Georgia Ry. & Power Co., 12 Ga. App. 505, 77 S.E. 588 (1913); Carroll v. Upchurch, 25 Ga. App. 646, 104 S.E. 16 (1920); Heinz v. Backus, 34 Ga. App. 203, 128 S.E. 915 (1925); Galfas v. City of Atlanta, 88 Ga. App. 385, 76 S.E.2d 641 (1953); Allison v. City of Atlanta, 109 Ga. App. 114, 135 S.E.2d 524 (1964); Copeland v. White, 172 Ga. App. 198, 322 S.E.2d 523 (1984).

Content and Sufficiency of Answer

Return or answer must constitute verification or denial, from record or otherwise, of material assertions in petition. Herault v. Department of Human Resources, 137 Ga. App. 446, 224 S.E.2d 480 (1976).

Answer should contain evidence in case or adopt statement of evidence contained in petition for certiorari in whole or in part. Norris v. Sibert & Robinson, 53 Ga. App. 440, 186 S.E. 199 (1936) (decided under former Code 1933, § 19-301, as it read prior to amendment by Ga. L. 1961, p. 190, § 5).

Sufficiency of answer is to be determined by whether it sufficiently verifies factual situation upon which alleged errors are predicated. Herault v. Department of Human Resources, 137 Ga. App. 446, 224 S.E.2d 480 (1976).

Answer substantially complying with section. Lunsford v. State, 60 Ga. App. 537, 4 S.E.2d 112 (1939) (decided under former Code 1933, § 19-301, as it read prior to amendment by Ga. L. 1961, p. 190, § 5).

Better practice when trial judge does not care to categorically admit or deny allegations of various paragraphs of petition for certiorari, but desires to stand on stenographic report of proceedings as truth of matters alleged, is

Content and Sufficiency of Answer (Cont'd)

in the judge's answer to each paragraph containing allegations as to evidence, objections of counsel, and rulings of the court, to quote pertinent part of report in reference to allegations made in each paragraph, instead of merely admitting allegations except insofar as the allegations may conflict with stenographic report attached. Lunsford v. State, 60 Ga. App. 537, 4 S.E.2d 112 (1939) (decided under former Code 1933, § 19-301, as it read prior to amendment by Ga. L. 1961, p. 190, § 5).

Answer from memory will suffice, if testimony was recollected. Colbert v. State, 118 Ga. 302, 45 S.E. 403 (1903); Harris v. Daly, 121 Ga. 511, 49 S.E. 609 (1904).

Original papers from trial court are not to be sent up on certiorari. Barfield v. McCombs, 89 Ga. 799, 15 S.E. 666 (1892).

Certificate of magistrate, required by former Civil Code 1910, §§ 5185, 5186, 5187 (see O.C.G.A. § 5-4-5) before sanction of certiorari will not operate as answer. Henry v. American Ry. Express Co., 25 Ga. App. 646, 104 S.E. 16 (1920).

RESEARCH REFERENCES

Am. Jur. 2d. — 14 Am. Jur. 2d, Certiorari, § 56 et seq.

5-4-8. Writing or dictation of answer by parties, attorneys, or interested persons; when verification required.

The answer shall not be written or dictated by either of the parties, or their attorneys, or any other person interested in the merits of the case. If made after the party making the same has retired from office, it shall be verified by affidavit. (Orig. Code 1863, § 3971; Code 1868, § 3991; Code 1873, § 4063; Code 1882, § 4063; Civil Code 1895, § 4648; Civil Code 1910, § 5197; Code 1933, § 19-303.)

JUDICIAL DECISIONS

First sentence of section is mandatory. Lee v. Continental Cas. Co., 20 Ga. App. 714, 93 S.E. 262 (1917).

Section applies where a second answer is prepared by former counsel in case. Lee v. Continental Cas. Co., 20 Ga. App. 714, 93 S.E. 262 (1917).

Section inapplicable to refusal to answer. Zachery v. State, 106 Ga. 123, 32 S.E. 22 (1898).

Section does not prevent justice from adopting recitals of fact in petition. Davis v. Rhodes, 112 Ga. 106, 37 S.E. 169 (1900).

Retired police justice may perfect answer, although the justice is assistant city attorney, if not counsel in case. Phillips v. City of Atlanta, 87 Ga. 62, 13 S.E. 201 (1891).

Oral objection may lie to unverified affidavit. Love v. Bush, 21 Ga. App. 436, 94 S.E. 626 (1917).

Cited in Combs v. State, 9 Ga. App. 840, 72 S.E. 284 (1911); Blackwood v. City of Social Circle, 125 Ga. App. 676, 188 S.E.2d 823 (1972).

RESEARCH REFERENCES

C.J.S. — 14 C.J.S., Certiorari, § 47 et seq.

5-4-9. Filing of traverse or exception to answer; perfection of answer.

The petitioner or defendant in certiorari may traverse or except to the answer of the respondent, which exceptions or traverse shall be filed in writing, specifying the defects, within 15 days after the filing of the answer; and, if the traverse or exceptions are sustained, the answer shall be perfected as directed by the court. (Orig. Code 1863, § 3970; Code 1868, § 3990; Code 1873, § 4062; Code 1882, § 4062; Civil Code 1895, § 4647; Civil Code 1910, § 5196; Code 1933, § 19-302; Ga. L. 1961, p. 190, § 6.)

JUDICIAL DECISIONS

Analysis

General Consideration
Decisions Prior to 1961 Amendment
1. In General
2. Timeliness of Exceptions
3. Application

General Consideration

Distinction between function of exceptions and function of traverse. — Function of exceptions to answer of magistrate to petition for certiorari is to specify defects in such answer, and such exceptions do not take place of traverse to answer whose function is to controvert truth of facts set forth in answer. West v. State, 103 Ga. App. 71, 118 S.E.2d 491 (1961).

Traverse of answer of trial judge must be verified affidavit. West v. State, 103 Ga. App. 71, 118 S.E.2d 491 (1961).

Absent traverse, answer is conclusive as to recital of facts. — Upon trial of certiorari when judge's answer to petition is untraversed, judge of superior court must take as true the statement of facts and evidence adduced upon the trial of case as contained in an answer and in those portions of the petition for certiorari verified thereby as true. West v. State, 103 Ga. App. 71, 118 S.E.2d 491 (1961).

Although the statute does not require that the answer be traversed, if no traverse is filed, the answer becomes conclusive as to recitals of fact contained therein, and the answer becomes the record on which the superior court is authorized to rule on the merits of the petition. Bembry v. Johnson, 152 Ga. App. 422, 263 S.E.2d 229 (1979).

Although a traverse to an answer is now optional, the recitals of fact contained in the answer are rendered conclusive when neither a traverse nor an exception is filed. This being so, the court is entitled to rely upon the factual recitals of the answer as a part of the record, and to use the recitals as a basis for the court's findings. Cox v. City of Lawrenceville, 168 Ga. App. 119, 308 S.E.2d 224 (1983).

Traverse and exception unnecessary when petition sufficiently establishes error and answer merely denies allegations. — When facts sufficient to establish error are alleged in petition and inferior court files answer merely denying these allegations, issues are sufficiently developed for superior

General Consideration (Cont'd)

court review and exception and subsequent traverse to answer are no longer necessary. Williamson v. City of Tallapoosa, 238 Ga. 522, 233 S.E.2d 777 (1977).

Cited in Phillips v. City of Atlanta, 79 Ga. 510, 4 S.E. 256 (1887); Daniels v. State, 118 Ga. 18, 44 S.E. 818 (1903); Fulton Bag & Cotton Mills v. Booze, 8 Ga. App. 430, 69 S.E. 494 (1910); DeBerry v. Spikes, 188 Ga. 222, 3 S.E.2d 719 (1939); Lunsford v. State, 60 Ga. App. 537, 4 S.E.2d 112 (1939); Boatright v. Moody, 210 Ga. 80, 77 S.E.2d 529 (1953); Ross v. City of Lilburn, 114 Ga. App. 428, 151 S.E.2d 490 (1966); Davey v. City of Atlanta, 130 Ga. App. 687, 204 S.E.2d 322 (1974); Eisenberg v. Fuller, 148 Ga. App. 603, 252 S.E.2d 17 (1979); Willis v. Jackson, 163 Ga. App. 26, 293 S.E.2d 498 (1982).

Decisions Prior to 1961 Amendment

Editor's notes. — The following decisions were rendered under this section as it read prior to amendment by Ga. L. 1961, p. 190, § 6, which added traverse (previously dealt with under a separate section) to its scope as well as a more specific time limit for filing of exceptions and traverse.

1. In General

Section prescribes method for correcting answer which omits evidence adduced upon trial. — If answer is subject to correction because it does not contain evidence adduced upon trial, proper method to make the evidence adequate and complete in that respect is prescribed by this section. Loomis v. City of Atlanta, 82 Ga. App. 346, 60 S.E.2d 397 (1950).

Section prescribes exclusive means for perfecting incomplete answer. — Section prescribes only means of perfecting answer and other relief cannot be granted to the plaintiff by the Supreme Court. Wyatt v. Turner, 40 Ga. 36 (1869); Stoner v. Magins, 116 Ga. 797, 43 S.E. 45 (1902); Tyner v. Leake, 117 Ga. 990, 44 S.E. 812 (1903).

Incomplete answer to writ of certiorari can be perfected only by exceptions taken thereto in manner prescribed by section. Macris v. Tsipourses, 35 Ga. App. 671, 134 S.E. 621 (1926).

Motion to dismiss answer will not lie to perfect it. Star Glass Co. v. Longley & Robinson, 64 Ga. 576 (1880).

Section provides remedy for both parties when answer of magistrate is not specific. Landrum v. Moss, 1 Ga. App. 216, 57 S.E. 965 (1907).

Written exceptions. — If defendant in certiorari is dissatisfied with answer, the defendant should file written exceptions thereto. Lynn v. Crapps, 47 Ga. App. 744, 171 S.E. 398 (1933).

Answer binds plaintiff in certiorari, even though incomplete and insufficient, unless exceptions are filed in accordance with section. Norris v. Sibert & Robinson, 53 Ga. App. 440, 186 S.E. 199 (1936).

Absent proper exceptions or traverse to answer of trial magistrate allegations thereof are conclusive. Wadsworth v. Olive, 53 Ga. App. 539, 186 S.E. 590 (1936).

Requirements when dissatisfied with answer. — Any party, dissatisfied with an answer to writ of certiorari must in due time either file exceptions thereto, or traverse same, and, failing to do either, is bound by recitals of fact contained in such answer. Davis v. Rhodes, 112 Ga. 106, 37 S.E. 169 (1900).

Absent exceptions, improper answer by trial judge will cause dismissal. — When there is an improper or incomplete answer by a trial judge to petition for certiorari, the judge of the superior court will not continue hearing on certiorari until answer is perfected and certiorari will be dismissed, unless exceptions thereto have been filed as provided in this section. Norris v. Sibert & Robinson, 53 Ga. App. 440, 186 S.E. 199 (1936).

When answer does not show that final judgment was rendered, judge may dismiss proceeding. Southern Ry. v. Leggett & Co., 117 Ga. 31, 43 S.E. 421 (1903); Hill v. Anderson Banking Co., 18 Ga. App. 41, 88 S.E. 749 (1916).

Exceptions will lie only when omissions are material to proper decision of case. Hardy v. Hardy, 2 Ga. App. 530, 58 S.E. 779 (1907).

When omissions in answer are immaterial to proper decision of case, exceptions will be overruled. Baird v. Smith, 124 Ga. 251, 52 S.E. 655 (1905).

2. Timeliness of Exceptions

Exceptions must be filed before hearing. Bailey v. Ware & Harper, 17 Ga. App. 492, 87 S.E. 712 (1916), later appeal, 19 Ga. App. 255, 91 S.E. 282 (1917).

Exceptions, if not filed within time prescribed, must be stricken. Chandler v. Baggett, 13 Ga. App. 333, 79 S.E. 179 (1913).

When exceptions are not presented on time by plaintiff, dismissal is proper. Humphries v. Nalley, 14 Ga. App. 804, 82 S.E. 357 (1914).

3. Application

Exceptions must specify defects. — Exceptions must be so definite, apt, and certain that magistrate may be able to understand exact nature of deficiency. Macris v. Tsipourses, 35 Ga. App. 671, 134 S.E. 621 (1926).

Section does not require that exceptions be verified by affidavit. Rumph v. Cleveland, 72 Ga. 189 (1883).

Party may except to judge's failure to send up copy of record. — When copies of pleading and other part of record are not certified and sent up with answer, it is error to overrule exceptions. Stoufer v. Missenheimer, 26 Ga. App. 554, 106 S.E. 560 (1921), later appeal, 28 Ga. App. 350, 111 S.E. 692 (1922).

Failure to attach copy of proceedings, where answer indicates intention to do so. — When, in certiorari proceeding, record does not show that any copy of proceedings was sent up with answer of trial judge, although statement of judge indicates intention to attach such papers, answer is incomplete in that respect. But if applicant for certiorari desires such information before superior court, it is the applicant's duty to except to the answer in order that the judge might be required to complete the answer. Beavers v. Cassells, 56 Ga. App. 146, 192 S.E. 249 (1937), aff'd, 186 Ga. 98, 196 S.E. 716 (1938).

Oral objection that answer of retired magistrate is not verified is sustainable. Love v. Bush, 21 Ga. App. 436, 94 S.E. 626 (1917).

Additional answer prepared before exceptions to original answer are sustained cannot become part of record, if objected to. Bailey v. Ware & Harper, 17 Ga. App. 492, 87 S.E. 712 (1916), later appeal, 19 Ga. App. 255, 91 S.E. 282 (1917).

When exceptions and traverse are both filed, court should dispose of exceptions first. Chandler v. Baggett, 13 Ga. App. 333, 79 S.E. 179 (1913).

5-4-10. Amendment of petition, bond, answer, and traverse.

Certiorari proceedings shall be amendable at any stage, as to matters of form or substance, as to the petition, bond, answer, and traverse; and a valid bond may by amendment be substituted for a void bond or no bond at all. (Code 1933, § 19-403, enacted by Ga. L. 1961, p. 190, § 9.)

JUDICIAL DECISIONS

Purpose of section. — This section has for the statute's obvious purpose the curing of certain procedural defects inherent in former certiorari mechanism by allowing amendments at any stage of appeal. Scott v. Oxford, 105 Ga. App. 301, 124 S.E.2d 420 (1962).

Section inapplicable to filing of late answer. — When motion to dismiss writ of certiorari preceded filing of late answer to petition for writ by respondent judge, dismissal is correct, since section does not apply to filing of a later answer. Schaffer v. City of Atlanta, 144 Ga. App. 702, 242 S.E.2d 288 (1978); City of Atlanta v. Saunders, 159 Ga. App. 566, 284 S.E.2d 77 (1981).

Ga. L. 1961, p. 190, § 9 (see O.C.G.A.

§ 5-4-10) could not be utilized to permit service beyond time permitted in former Code 1933, §§ 19-209 and 19-210 (see O.C.G.A. § 5-4-6). City of Atlanta v. Saunders, 159 Ga. App. 566, 284 S.E.2d 77 (1981).

Failure to serve cannot be cured by amendment. — Failure to serve the opposite party is not a defect which can be cured by amendment under O.C.G.A. § 5-4-10. Hudson v. Watkins, 225 Ga. App. 455, 484 S.E.2d 24 (1997).

Bond by amendment was invalid. — Trial court erred in granting a petition for a writ of certiorari as the petition was not accompanied by a bond as required by O.C.G.A. § 5-4-5(a), the hearing officer originally hearing the dispute did not have authority to waive the bond requirement, and a bond by amendment under O.C.G.A. § 5-4-10 was invalid as the bond was not approved by the hearing officer. Duty Free Air & Ship Supply, Inc. v. Atlanta Duty Free, LLC, 275 Ga. App. 381, 620 S.E.2d 616 (2005).

Right to amend found. — Absent any judicial determination that dismissal was required for lack of an approved bond, the petitioners were entitled to voluntarily dismiss the petitioners' first request for certiorari, filed pursuant to O.C.G.A. § 5-4-1, relying on the renewal statute codified at O.C.G.A. § 9-2-61(a), and file a second request after the 30-day limitation period had expired. Moreover, the petitioners had the right to amend the certiorari proceedings as to form or substance at any stage, including the right to amend, by substituting a valid bond for a void bond or no bond at all. Buckler v. DeKalb County, 290 Ga. App. 190, 659 S.E.2d 398 (2008).

Cited in Morman v. Pritchard, 108 Ga. App. 247, 132 S.E.2d 561 (1963); Ellett v. City of College Park, 233 Ga. 858, 213 S.E.2d 700 (1975); Yield, Inc. v. City of Atlanta, 144 Ga. App. 637, 242 S.E.2d 478 (1978); Willis v. Jackson, 163 Ga. App. 26, 293 S.E.2d 498 (1982).

RESEARCH REFERENCES

Am. Jur. 2d. — 14 Am. Jur. 2d, Certiorari, §§ 83 et seq., 107 et seq.

C.J.S. — 14 C.J.S., Certiorari, §§ 48, 68.

5-4-11. Conduct of hearing generally; trial by jury.

(a) Certiorari cases shall be heard by the court without a jury, in chambers or in open court, upon reasonable notice to the parties, at any time that the matters may be ready for hearing.

(b) Where a traverse to the answer has been filed and jury trial demanded, the matter may be tried at any time a jury is available therefor. (Orig. Code 1863, § 3972; Code 1868, § 3992; Code 1873, § 4064; Code 1882, § 4064; Civil Code 1895, § 4649; Civil Code 1910, § 5198; Code 1933, § 19-401; Ga. L. 1961, p. 190, § 7.)

RESEARCH REFERENCES

Am. Jur. 2d. — 14 Am. Jur. 2d, Certiorari, § 90 et seq.

C.J.S. — 14 C.J.S., Certiorari, § 86 et seq.

5-4-12. Grounds of error considered generally; scope of review; technical distinctions abolished.

(a) No ground of error shall be considered which is not distinctly set forth in the petition.

(b) The scope of review shall be limited to all errors of law and determination as to whether the judgment or ruling below was sustained by substantial evidence.

(c) All technical distinctions as to what questions will be considered, such as questions concerning judgments absolutely void or assignments of error drawing in question the legal constitution or jurisdiction of the tribunal below, are abolished. (Orig. Code 1863, § 3973; Code 1868, § 3993; Code 1873, § 4065; Code 1882, § 4065; Civil Code 1895, § 4650; Civil Code 1910, § 5199; Code 1933, § 19-402; Ga. L. 1961, p. 190, § 8.)

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Section applies where certiorari petition fails to set out all errors of trial court. Brown v. Alexander, 112 Ga. 247, 37 S.E. 368 (1900); Perry v. Brunswick & W. Ry., 119 Ga. 819, 47 S.E. 172 (1904).

Issues neither raised at trial nor in certiorari petition. — Question of freight charges not raised in justice's court on trial cannot properly be raised in superior court or Court of Appeals. Fine & Bro. v. Southern Express Co., 10 Ga. App. 161, 73 S.E. 35 (1911).

Writ of certiorari lies only for correction of errors committed in trial court, and no question, unless first raised there, can be considered by superior court or by this court. Cohen v. Finkovitch, 40 Ga. App. 94, 149 S.E. 66 (1929).

When it does not appear from record that certain issues were raised in the trial court, the issues cannot be raised by certiorari in the superior court. Bell v. City of Valdosta, 47 Ga. App. 808, 171 S.E. 572 (1933).

Issues neither raised at trial nor in certiorari petition cannot be reviewed by Court of Appeals. Bell v. City of Valdosta, 47 Ga. App. 808, 171 S.E. 572 (1933).

When issue not raised in petition for certiorari nor considered by the trial court, the appellate court is without authority to review the petition. Hodnett v. City of Atlanta, 145 Ga. App. 285, 243 S.E.2d 605 (1978).

Admission of illegal evidence at trial without objection is not ground for certiorari when both parties were represented by counsel. Cohen v. Finkovitch, 40 Ga. App. 94, 149 S.E. 66 (1929).

Supreme Court cannot hold dismissal of certiorari improper when petition sets forth no errors. Richards v. Little, 88 Ga. 176, 14 S.E. 207 (1891).

Petition must specify ruling complained of to avoid dismissal. — Petition which fails to point out as erroneous any specific ruling of judge who tried case, and which does not complain specifically of any ruling that was made by the judge during the trial, is properly dismissed. Cohen v. Finkovitch, 40 Ga. App. 94, 149 S.E. 66 (1929).

Petition must allege error specifically and distinctly so that reviewing court may understand grounds relied on. Lynn v. Crapps, 47 Ga. App. 744, 171 S.E. 398 (1933).

Petition must state what objection was made at trial. — Alleged error in admitting evidence cannot be considered by superior court when petition for certiorari does not state what, if any, objection was made when evidence was offered. Cohen v. Finkovitch, 40 Ga. App. 94, 149 S.E. 66 (1929).

Petition for certiorari from conviction for violation of municipal ordinance should contain provisions of ordinance. — Because a city's petition for certiorari plainly and distinctly asserted the errors complained of, the superior court did not err in denying the city's motion to dismiss; moreover, the record reflected that the bar managers cited for violation of Atlanta, Ga., Code of Ordinances § 10-46 (1995) preserved the issue as to the constitutionality of the ordinance and the ordinance's enforcement. City of Atlanta v. Jones, 283 Ga. App. 125, 640 S.E.2d 698 (2006).

Assignment of error that verdict was contrary to or unsupported by evidence is sufficient. Gresham v. Lee, 28 Ga. App. 576, 112 S.E. 524 (1922).

Assignment of error that verdict is contrary to law, truth, and justice is insufficient and dismissal is proper. Taft Co. v. Smith, 112 Ga. 196, 37 S.E. 424 (1900); Callaway v. City of Atlanta, 6 Ga. App. 354, 64 S.E. 1105 (1909); Huson v. Farmer, 53 Ga. App. 131, 185 S.E. 119 (1936).

When only error assigned is that dismissal below was erroneous, dismissal of petition will result. Hicks v. Smith, 28 Ga. App. 594, 112 S.E. 295 (1922).

Ground of motion for new trial that verdict is excessive is too general. Bart v. Scheider, 39 Ga. App. 467, 147 S.E. 430 (1929).

Overruling certiorari upon legal ground apparent in record. — Section does not preclude judge from overruling certiorari and affirming judgment of trial court upon legal ground apparent in record, without reference to reason given for judgment. Fowler v. King, 29 Ga. App. 500, 116 S.E. 54 (1923).

Any evidence test. — Appropriate standard of review to be applied to issues of fact on writ of certiorari to the superior court is whether the decision below was supported by any evidence. City of Atlanta Gov't v. Smith, 228 Ga. App. 864, 493 S.E.2d 51 (1997).

"Substantial evidence" test prescribed. — Bolton v. City of Newman, 22 Ga. App. 15, 95 S.E. 472 (1918), which established the "slight evidence" test as a correct test to be used in determining whether the superior court erred in "overruling" a petition for certiorari, is no longer the proper standard to be applied. Subsection (b) of O.C.G.A. § 5-4-12 prescribes the use of the "substantial evidence" test. Graham v. Wilkes, 188 Ga. App. 402, 373 S.E.2d 90 (1988).

Upon certiorari, judge of superior court has right to pass upon credibility of witnesses. Atlantic Coast Line R.R. v. Thomas, 12 Ga. App. 209, 77 S.E. 13 (1913).

Upon certiorari, judge of superior court may exercise original discretion as to correctness of verdict, which is not possessed by other courts of review. Atlantic Coast Line R.R. v. Thomas, 12 Ga. App. 209, 77 S.E. 13 (1913); Macon v. United States Fid. & Guar. Co., 41 Ga. App. 774, 154 S.E. 702 (1930).

Nature and extent of superior court judge's discretion in reviewing evidence upon certiorari. — Brown v. Mosteller, 181 Ga. 457, 182 S.E. 519 (1935).

Administrative ruling. — Standard of appellate court review of superior court decisions, that of "some" or "any evidence," is not intended to supervene or diminish the requirement that an administrative ruling be supported by substantial evidence. Wherever evidence before the administrative board is equivocal, the superior court errs in denying certiorari to determine whether the administrative board's ruling is supported by substantial evidence. Guntharp v. Cobb County, 168 Ga. App. 33, 307 S.E.2d 925 (1983).

Hearing before county board of commissioners issuing "order" finding liability for business taxes and directing that a fieri facias be issued for the amount of taxes due does not constitute a decision of an inferior judicatory from which the taxpayer should petition for certiorari in the superior court when the hearing is not transcribed or recorded, but is memorialized only by the minutes of the meeting, the hearing is not conducted in accordance with judicial procedure, and the ordinance in question does not give an appellant as a matter of right a trial in accordance with judicial procedure. Accordingly, declaratory judgment relief is

proper. Georgia Farm Bureau Mut. Ins. Co. v. DeKalb County, 167 Ga. App. 577, 306 S.E.2d 924 (1983).

Hearing officer's decision not reversible based on outcome of subsequent criminal trial. — Hearing officer affirmed a county's dismissal of a police officer for conduct unbecoming an officer based on an act of domestic violence; the officer sought a writ of certiorari under O.C.G.A. § 5-4-12(b). Reversal of the hearing officer's decision based on the officer's subsequently being found not guilty of all criminal charges stemming from the incident was improper as this occurred after the hearing officer's decision was issued, was not a part of the administrative record, and was irrelevant to the determination of whether the county properly terminated the officer's employment. DeKalb County v. Bull, 295 Ga. App. 551, 672 S.E.2d 500 (2009).

Cited in Long v. England, 28 Ga. App. 818, 113 S.E. 50 (1922); Logan v. State, 56 Ga. App. 460, 192 S.E. 839 (1937); Britt v. State, 65 Ga. App. 812, 16 S.E.2d 523 (1941); Morman v. Pritchard, 108 Ga. App. 247, 132 S.E.2d 561 (1963); City of Atlanta v. Whitten, 144 Ga. App. 224, 240 S.E.2d 771 (1977); International Funeral Servs., Inc. v. DeKalb County, 244 Ga. 707, 261 S.E.2d 625 (1979); Sullivan v. Brownlee, 174 Ga. App. 813, 331 S.E.2d 622 (1985); Lee v. Hutson, 810 F.2d 1030 (11th Cir. 1987); Foreman v. City of College Park, 199 Ga. App. 827, 406 S.E.2d 261 (1991); Bearden v. City of Austell, 212 Ga. App. 398, 441 S.E.2d 782 (1994).

RESEARCH REFERENCES

Am. Jur. 2d. — 14 Am. Jur. 2d, Certiorari, § 93 et seq.

C.J.S. — 14 C.J.S., Certiorari, § 92 et seq.

ALR. — Existence of jurisdictional facts found by inferior tribunal as subject of inquiry on certiorari, 5 ALR2d 675.

5-4-13. Grant of writ for failure to prove venue or time of criminal offense.

No judge of a superior court shall grant a writ of certiorari or sustain the writ in a criminal or quasi-criminal case on the ground that the venue was not proved in the trial court or that the time of the commission of the offense was not proved, unless there is a distinct allegation in the petition for the writ of failure to prove the venue or time and an allegation of error as to such matters. (Ga. L. 1911, p. 149, § 1; Code 1933, § 19-404.)

JUDICIAL DECISIONS

Petition for certiorari containing allegation that there was failure to prove venue suffices, even though it does not appear that the distinct question of venue was raised in the recorder's court. Garrett v. City of Atlanta, 152 Ga. 675, 110 S.E. 886 (1922).

Lack of proof of venue cannot be raised for first time in Court of Appeals. — When there is no distinct allegation of failure to prove venue in the trial court in a petition of certiorari to the superior court and no distinct brief of plaintiff in error, this section prohibits raising of question of lack of proof of venue for first time in Court of Appeals. Sturman v. State, 59 Ga. App. 498, 1 S.E.2d 467 (1939).

Where lack of proof of venue is not specifically raised by any general or special grounds of motion for new trial, that question may not be presented to the Court of Appeals. Charles v. State, 64 Ga. App. 265, 13 S.E.2d 44 (1941).

Cited in Parrish v. State, 10 Ga. App. 836, 74 S.E. 445 (1912); Rice v. City of

Eatonton, 15 Ga. App. 505, 83 S.E. 868 (1914).

RESEARCH REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d, Criminal Law, § 493.

Am. Jur. Pleading and Practice Forms. — 5B Am. Jur. Pleading and Practice Forms, Certiorari, §§ 81, 88.

5-4-14. Dismissal or return of writ to lower court with instructions; entry by superior court of final decision where no questions of fact involved.

(a) Upon the hearing of a writ of certiorari, the superior court may order the same to be dismissed or may return the same to the court from which it came with instructions.

(b) In all cases when the error complained of is an error in law which must finally govern the case, and the court is satisfied that there is no question of fact involved which makes it necessary to send the case back for a new hearing before the tribunal below, it shall be the duty of the judge of the superior court to make a final decision in the case without sending it back to the tribunal below. (Laws 1850, Cobb's 1851 Digest, p. 529; Code 1863, § 3975; Code 1868, § 3995; Code 1873, § 4067; Code 1882, § 4067; Civil Code 1895, § 4652; Civil Code 1910, § 5201; Code 1933, § 19-501.)

JUDICIAL DECISIONS

Analysis

General Consideration
Dismissal of Certiorari
Remand
Final Judgment on Certiorari
Modification of Sentence or Correction of Verdict on Certiorari

General Consideration

Section applies to certiorari from verdict of jury in justice court. Boroughs v. White & Stone, 69 Ga. 841 (1883).

Section inapplicable to disposition of possessory warrant case. Bush & Bro. v. Rawlins, 80 Ga. 583, 5 S.E. 761 (1888).

Petition containing no assignment of error is void. — Petition for certiorari which does not plainly and distinctly set forth assignment of error on any ruling, decision, or judgment of inferior judicatory is void. Wood v. Fairfax Loan & Inv. Co., 50 Ga. App. 123, 177 S.E. 260 (1934).

Valid, dismissed certiorari may be renewed under § 9-2-61, but void certiorari is not renewable. — When valid certiorari had been dismissed, it could be renewed within six months under provisions of former Code 1933, § 3-808 (see O.C.G.A. § 9-2-61), but a petition for certiorari void for any reason could not be renewed. Wood v. Fairfax Loan & Inv. Co., 50 Ga. App. 123, 177 S.E. 260 (1934).

Judgment of superior court sustaining first certiorari is equivalent to first grant of new trial, and will not be interfered with unless verdict or judgment set aside by the court was, as a matter of law, demanded. Macon v. United

States Fid. & Guar. Co., 41 Ga. App. 774, 154 S.E. 702 (1930).

Court may, upon final decision of case, direct magistrate to refund costs. — Such magistrate, though insolvent, may be compelled to perform the magistrate's official duty. Gault v. Wallis, 53 Ga. 675 (1875).

Cited in Dorsey v. Black, 55 Ga. 315 (1875); Crusselle v. Chastain, 76 Ga. 840 (1886); Rogers v. Bennett, 78 Ga. 707, 3 S.E. 660 (1887); Mathis v. Bagwell, 101 Ga. 167, 28 S.E. 638 (1897); Hubert v. Southern Live-Stock Ins. Co., 103 Ga. 294, 29 S.E. 938 (1898); Wilensky v. Brady, 121 Ga. 90, 48 S.E. 687 (1904); Strickland v. American Nat'l Bank, 34 Ga. App. 549, 130 S.E. 598 (1925); Shehane v. Wimbish, 34 Ga. App. 608, 131 S.E. 104 (1925); Flood v. Empire Inv. Co., 35 Ga. App. 266, 133 S.E. 60 (1926); Whitworth v. Carter, 39 Ga. App. 625, 147 S.E. 904 (1929); Sellers v. McNair, 42 Ga. App. 731, 157 S.E. 373 (1931); J.M. High Co. v. Arrington, 45 Ga. App. 392, 165 S.E. 151 (1932); Rogers v. Echols, 50 Ga. App. 711, 179 S.E. 131 (1935); Murphy v. Drum & Bugle Corps., 55 Ga. App. 293, 190 S.E. 67 (1937); Lewallen v. Dalton Auto & Mach. Co., 57 Ga. App. 328, 195 S.E. 305 (1938); Williams v. Smith, 66 Ga. App. 120, 17 S.E.2d 206 (1941); Sneed v. State, 72 Ga. App. 102, 33 S.E.2d 29 (1945); Roberson v. City of Rome, 72 Ga. App. 55, 33 S.E.2d 33 (1945); Deaton v. Taliaferro, 80 Ga. App. 685, 57 S.E.2d 215 (1950); Brinkman v. City of Gainesville, 83 Ga. App. 508, 64 S.E.2d 344 (1951); Law v. State, 92 Ga. App. 604, 89 S.E.2d 550 (1955); Rogers v. Mayor of Atlanta, 110 Ga. App. 114, 137 S.E.2d 668 (1964); Mayor of Atlanta v. Williams, 124 Ga. App. 802, 186 S.E.2d 480 (1971); Davey v. City of Atlanta, 130 Ga. App. 687, 204 S.E.2d 322 (1974); City of Atlanta v. Whitten, 144 Ga. App. 224, 240 S.E.2d 771 (1977); Hoyt v. Transfreight Lines, 160 Ga. App. 154, 286 S.E.2d 491 (1981); Lee v. Hutson, 810 F.2d 1030 (11th Cir. 1987); Johnson v. DeKalb County, 214 Ga. App. 756, 449 S.E.2d 311 (1994); City of Atlanta v. Houston, 221 Ga. App. 61, 471 S.E.2d 12 (1996).

Dismissal of Certiorari

"Dismiss" and "overrule" synonymous. — It would seem that the word "dismiss" under this section is in fact used in the sense synonymous with "overrule." Ray v. Cruce, 21 Ga. App. 539, 94 S.E. 899 (1918).

When judge's order uses "denied" instead of "dismissed," correction will be directed. Atlantic C.L.R.R. v. Peters, 32 Ga. App. 791, 124 S.E. 815 (1924).

Failure of judge to file proper answer will be sufficient reason to dismiss a certiorari, when no timely motion is made to perfect the answer. City of Atlanta v. Schaffer, 245 Ga. 164, 264 S.E.2d 6 (1980).

Dismissal for justice's failure to send up copies of proceedings. — Failure of justice of peace to send up copies of proceedings in the justice's court when the copies are necessary to determination of cause is good ground for dismissal of certiorari, but certiorari will not be dismissed when the magistrate fails to send up copies of proceedings when errors complained of in petition, as verified by answer can be fully considered and determined without reference to such proceedings. Lynn v. Crapps, 47 Ga. App. 744, 171 S.E. 398 (1933).

Dismissal of certiorari affirmed when legally justified for reason other than that assigned. — When order of judge of superior court dismissing petition for certiorari is proper and legally justified for reason other than that assigned by the judge, the judge's action will be affirmed. Anderson v. West Lumber Co., 51 Ga. App. 333, 179 S.E. 738 (1935).

Judgment overruling certiorari on merits will be affirmed when record indicates court lacked jurisdiction to entertain petition for certiorari. Gilbert v. Land Estates, Inc., 62 Ga. App. 845, 9 S.E.2d 914 (1940).

Certiorari renewed under former Civil Code 1910, § 4381 (see O.C.G.A. § 9-2-61) was properly dismissed when first certiorari was not dismissed on merits. Sheehan v. City Council, 8 Ga. App. 539, 69 S.E. 916 (1911).

Dismissal not proper, though evidence is doubtful whether writ was filed with petition. Spencer v. Gill, 23 Ga. 8 (1857).

No dismissal due to insufficiency of affidavit to support petition when answer supports petition. Taylor v. Gay, 20 Ga. 77 (1856).

Dismissal of Certiorari (Cont'd)

Failure to prosecute writ. — Dismissal is not proper for failure to prosecute writ when counsel for defendant removes papers. Hopkins, Allen & Co. v. Suddeth, 18 Ga. 518 (1855).

Remand

Case must be returned even though record shows that verdict lacks evidence to support the verdict. Alabama G.S.R.R. v. Austin, 112 Ga. 61, 37 S.E. 91 (1900); Patterson v. Central of Ga. Ry., 117 Ga. 827, 45 S.E. 250 (1903); Fain v. Pilcher & Booth, 31 Ga. App. 115, 120 S.E. 27 (1923).

Case may be returned even though record shows that verdict lacks evidence to support the verdict. This is so notwithstanding former certiorari in same case complaining of similar verdict was sustained. Alabama G.S.R.R. v. Austin, 112 Ga. 61, 37 S.E. 91 (1900); Patterson v. Central of Ga. Ry., 117 Ga. 827, 45 S.E. 250 (1903); Fain v. Pilcher & Booth, 31 Ga. App. 115, 120 S.E. 27 (1923).

In case when only error alleged is that verdict is contrary to law and evidence, it is erroneous to render final judgment in petitioner's favor, for the reason that in such case error complained of is not one of law which must finally govern the case. Tuten v. Towles, 36 Ga. App. 328, 136 S.E. 537 (1927).

When final determination of case tried in inferior court and carried by certiorari to superior court does not depend upon any controlling question of law, and there are issues of fact involved, superior court has no authority to render final judgment therein, although it may clearly appear from facts disclosed by record that verdict rendered in lower court was without evidence to support it. Smith v. J.J. Williamson & Sons, 43 Ga. App. 702, 159 S.E. 912 (1931).

Judge may give directions as to verdict on retrial in event evidence is same. — In such case, the court may direct that if evidence is substantially the same on the next trial, a verdict for the defendant should be rendered. Baker v. Kendrick, 9 Ga. App. 382, 71 S.E. 498 (1911).

When certiorari is sustained on ground that venue was not established. — When, upon conviction in criminal court of county, defendant applied for writ of certiorari to superior court of county on ground that state had failed to establish venue of case, and upon hearing, state admitted the state's failure to establish venue, it is proper for the superior court to sustain certiorari and remand the case to the trial court for another trial, and it is not proper for the superior court in such case to enter final judgment therein, as error complained of is not an error of law which must finally govern the case, and it cannot be known with certainty that evidence on another trial would be the same. Arnold v. State, 88 Ga. App. 710, 77 S.E.2d 550 (1953).

On new trial by superior court order, formal evidence of latter's judgment is unnecessary. — After case has been tried in justice's court and on certiorari new trial has been ordered, a new trial may be lawfully had in the magistrate's court without producing therein any formal evidence of a judgment rendered in superior court. Odell v. Dozier, 104 Ga. 203, 30 S.E. 813 (1898).

Final Judgment on Certiorari

When court must render final judgment on certiorari. — Provision of section, which requires judge of superior court to make a final decision in case which is before the judge on certiorari, is mandatory only when the nature of error complained of is such that the law forbids the result which was reached, no matter what testimony was, and regardless of what testimony may be adduced should there be another trial of the case. Atlantic Coast Line R.R. v. Thomas, 12 Ga. App. 209, 77 S.E. 13 (1913).

Wherever case can be determined as a matter of law, the court must make final disposition of the case. Longshore v. Collier, 37 Ga. App. 450, 140 S.E. 636 (1927).

When issues of fact are involved, case must be returned to lower court with instructions. Sapp v. Adams, 65 Ga. 600 (1880); Rogers v. Georgia R.R., 100 Ga. 699, 28 S.E. 457 (1897); Williams v. Bradfield, 116 Ga. 705, 43 S.E. 57

(1902); Jeffries v. Luke, 5 Ga. App. 157, 62 S.E. 719 (1908).

When court may render final judgment on certiorari. — Court may render final judgment on certiorari, when no issue of fact is involved, and error assigned is a question of law which must finally govern the case. James v. Smith & Bro., 62 Ga. 345 (1879); Cone Export & Comm'n Co. v. McCalla, 113 Ga. 17, 38 S.E. 336 (1901); Hewett v. Robertson, 124 Ga. 920, 53 S.E. 456 (1906); Porterfield v. Thompson, 4 Ga. App. 524, 61 S.E. 1055 (1908); Walton v. Shakespear, 18 Ga. App. 140, 88 S.E. 906 (1916); Dixon v. Pierce, 22 Ga. App. 291, 95 S.E. 995 (1918).

Discretion of court will not be controlled unless manifestly abused. Ayers v. Taylor, 54 Ga. 264 (1875).

When no dispositive question of law is presented. — Judge of superior court is not authorized to render final decision when there is no question of law before it which must finally govern case, and only issues of fact are involved. Sellers v. McNair, 42 Ga. App. 731, 157 S.E. 373 (1931).

When issues of fact are involved, final judgment cannot be passed on certiorari. Desvergers v. Kruger, 60 Ga. 100 (1878); Almand v. Georgia R.R. & Banking Co., 102 Ga. 151, 29 S.E. 159 (1897); Pittman v. Alexander, 19 Ga. App. 475, 91 S.E. 910 (1917).

If there is question of fact, whether disputed or not, court cannot enter final judgment. Hardison v. Gledhill, 72 Ga. App. 432, 33 S.E.2d 921 (1945). But see Rome R.R. v. Ransom, 78 Ga. 705, 3 S.E. 626 (1887); Longshore v. Collier, 37 Ga. App. 450, 140 S.E. 636 (1927).

When issues of fact are involved, superior court has no authority to render final judgment, and even though former judgment is without evidence to support the judgement, the superior court must remand the case for a new trial. Putnam v. Sewell, 86 Ga. App. 298, 71 S.E.2d 566 (1952).

When only question involves sufficiency of evidence to support finding in justice's court, superior court judge errs in rendering final judgment. Gowder v. Smith, 62 Ga. App. 647, 9 S.E.2d 197 (1940).

Court may make final disposition of case involving law and facts when latter not disputed. Longshore v. Collier, 37 Ga. App. 450, 140 S.E. 636 (1927). But see Hardison v. Gledhill, 72 Ga. App. 432, 33 S.E.2d 921 (1945).

Section permits final disposition of case, even though facts are involved, if not conflicting. Rome R.R. v. Ransom, 78 Ga. 705, 3 S.E. 626 (1887). But see Hardison v. Gledhill, 72 Ga. App. 432, 33 S.E.2d 921 (1945).

Certiorari may be sustained at instance of defendant, although evidence is conflicting. Hancock v. Allen, 29 Ga. App. 611, 116 S.E. 321 (1923).

Use of legal question involved in motion to dismiss, overruled below, to render final judgment. — Superior court judge may make use of question of law involved in demurrer (now motion to dismiss), which was wholly overruled by justice at trial, to dispose finally of case without sending the case back for a new hearing. Sellers v. McNair, 42 Ga. App. 731, 157 S.E. 373 (1931).

It is immaterial upon what ground judge based decision if the judgment on certiorari is correct. Nightingale v. Mayor of Brunswick, 26 Ga. App. 43, 105 S.E. 382 (1920); Hines v. Porter, 26 Ga. App. 178, 106 S.E. 16 (1921).

Modification of Sentence or Correction of Verdict on Certiorari

Sentence which does not exceed maximum of statute cannot be modified by the superior court. Johnson v. City of Hawkinsville, 27 Ga. App. 801, 110 S.E. 23 (1921).

Superior court has no power, under writ of certiorari, to modify sentence passed by city court and not imposing punishment beyond maximum prescribed by law. Sellers v. McNair, 42 Ga. App. 731, 157 S.E. 373 (1931).

When verdict exceeds amount claimed. — Court may under this section, with assent of plaintiff, correct verdict and judgment entered thereon by reducing the judgment to amount claimed in action, and then allow the judgment to stand. Seaboard Air-Line Ry. v. Christian, 115 Ga. 742, 42 S.E. 66 (1902).

When superior court properly overrules

Modification of Sentence or Correction of Verdict on Certiorari (Cont'd)

all grounds of petition for certiorari save one presenting point that verdict under review was contrary to law because for an amount larger than that sued for, that court may, with assent of the plaintiff, correct the verdict and judgment entered thereon by reducing the judgment to amount claimed in action, and then allow the judgment to stand. Sellers v. McNair, 42 Ga. App. 731, 157 S.E. 373 (1931).

If trial jury erred in finding interest, error should be corrected on certiorari. Carnes v. Mattox, 71 Ga. 515 (1883).

RESEARCH REFERENCES

Am. Jur. 2d. — 14 Am. Jur. 2d, Certiorari, §§ 85 et seq., 103 et seq.

Am. Jur. Pleading and Practice Forms. — 5B Am. Jur. Pleading and Practice Forms, Certiorari, §§ 81, 88.

C.J.S. — 14 C.J.S., Certiorari, §§ 92 et seq., 111 et seq.

ALR. — Existence of jurisdictional facts found by inferior tribunal as subject of inquiry on certiorari, 5 ALR2d 675.

5-4-15. Requirement of new trial when writ not answered.

In all cases pending in the superior courts upon certiorari from any inferior judicatory or any person exercising judicial powers, if the judge or other officer before whom the case was tried dies before answering the writ of certiorari or answers that he cannot or does not remember or recollect what occurred at the trial of the case and he therefore cannot or does not make answer to the same, it shall be the duty of the judge who granted the writ of certiorari forthwith to order a new trial of the case in the court below. (Ga. L. 1861, p. 63, § 1; Code 1868, § 3996; Code 1873, § 4068; Code 1882, § 4068; Civil Code 1895, § 4653; Ga. L. 1899, p. 38, § 1; Civil Code 1910, § 5202; Code 1933, § 19-502; Ga. L. 1933, p. 113, § 1.)

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Section applicable only when application for certiorari is valid and contains no fatal defect which renders it subject to dismissal. Miller v. Miller, 96 Ga. App. 469, 100 S.E.2d 594 (1957).

When justice answered but was ordered to amplify answer and died before doing so, section is inapplicable. Atlantic Coast Line R.R. v. Peters, 32 Ga. App. 791, 124 S.E. 815 (1924).

When plaintiff failed to make appropriate, timely motion, former Code 1933, § 19-502 (see O.C.G.A. § 5-4-14) did not affect dismissal under ormer Code 1933, § 19-301 (see O.C.G.A. § 5-4-7). Mathis v. City of Nashville, 49 Ga. App. 309, 175 S.E. 383 (1934).

Cited in Crine v. Morton Salt Co., 178 Ga. 754, 174 S.E. 347 (1934); Orr v. State, 55 Ga. App. 150, 189 S.E. 540 (1937); DeBerry v. Spikes, 188 Ga. 222, 3 S.E.2d 719 (1939); Delinski v. Dunn, 206 Ga. 825, 59 S.E.2d 248 (1950); Delinski v. Dunn, 207 Ga. 723, 64 S.E.2d 44 (1951).

RESEARCH REFERENCES

C.J.S. — 14 C.J.S., Certiorari, § 118 et seq.

5-4-16. Recovery of costs by plaintiff where certiorari sustained; recovery of costs by plaintiff where certiorari returned to lower court for new trial.

If after the hearing the certiorari is sustained and a final decision thereon is made by the superior court, the plaintiff may have judgment entered for the amount recovered by him in the court below, the costs paid to obtain the certiorari, and the costs in the superior court. If the certiorari is returned to the court below for a new hearing, the plaintiff shall have judgment entered for the costs in the superior court only, leaving the costs paid to obtain the certiorari to be awarded upon the final trial below. (Orig. Code 1863, § 3977; Code 1868, § 3998; Code 1873, § 4070; Code 1882, § 4070; Civil Code 1895, § 4655; Civil Code 1910, § 5204; Code 1933, § 19-504.)

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When certiorari is sustained, losing party is liable for costs in superior court. Walker v. Hillyer, 130 Ga. 466, 61 S.E. 8 (1908).

Costs paid by losing party cannot be recovered even though the losing party may finally succeed in lower court. Walker v. Hillyer, 130 Ga. 466, 61 S.E. 8 (1908).

Amount of costs taxed will aid in determining whether final judgment under former Civil Code 1910, § 5201 (see O.C.G.A. § 5-4-14) was rendered. Whiddon v. Atlantic Coast Line R.R., 21 Ga. App. 377, 94 S.E. 617 (1917).

Improperly taxed costs of certiorari may be written off on appeal. — When case is returned and costs paid to obtain certiorari are improperly taxed, the costs may be written off on appeal. Tison v. Savannah, Fla. & W. Ry., 97 Ga. 366, 24 S.E. 456 (1895); Haire v. McCardle, 107 Ga. 775, 33 S.E. 683 (1899).

Sustaining certiorari and returning case for another hearing discharge security on bond. — When certiorari is sustained and case sent back for another hearing, security thereon is discharged from further liability, and may become security on subsequent certiorari bond in same case. Western & Atl. R.R. v. Carder, 120 Ga. 460, 47 S.E. 930 (1904).

Cited in Williams v. Smith, 66 Ga. App. 120, 17 S.E.2d 206 (1941).

RESEARCH REFERENCES

Am. Jur. 2d. — 5 Am. Jur. 2d, Appellate Review, § 849 et seq.

5-4-17. Recovery of costs by defendant generally.

If the certiorari is dismissed and a final decision is made in the case by the superior court, the defendant in certiorari may have judgment entered in the superior court against the plaintiff and his security for the sum recovered by him, together with the costs in the superior court; and if the case is sent back to the court below, and there is a judgment in the case in favor of the defendant in the court below the security on the certiorari bond shall then be included as in case of security on appeal. (Orig. Code 1863, § 3978; Code 1868, § 3999; Code 1873,

§ 4071; Code 1882, § 4071; Civil Code 1895, § 4656; Civil Code 1910, § 5205; Code 1933, § 19-505.)

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Attorney fees are not "costs in the superior court" within the contemplation of O.C.G.A. § 5-4-17. Bearden v. City of Austell, 212 Ga. App. 398, 441 S.E.2d 782 (1994).

Judgment for defendant for amount recovered below, with costs, implies dismissal. — Judgment of superior court which, upon hearing of certiorari, is rendered in favor of defendant therein for amount recovered by the defendant in municipal court, with costs, implies dismissal of certiorari, and is not subject to exception that it was error to enter such judgment without either overruling or sustaining the certiorari. Phelps v. Belle Isle, 29 Ga. App. 571, 116 S.E. 217 (1923).

When certiorari dismissed for nonpayment of costs, judgment against plaintiff and surety cannot be dismissed. Ray v. Cruce, 21 Ga. App. 539, 94 S.E. 899 (1918).

When certiorari in bail trover action is dismissed and costs awarded. — When certiorari in bail trover action is dismissed, and judgment for costs of proceedings are taxed against the plaintiff, action on usual condemnation bond will lie for value of property, if lost or destroyed. Jones v. Funston, 22 Ga. App. 410, 95 S.E. 1003 (1918), later appeal, 23 Ga. App. 706, 99 S.E. 237 (1919), later appeal, 25 Ga. App. 92, 102 S.E. 541 (1920).

Cited in Carnes v. Mattox, 71 Ga. 515 (1883); Odell v. Dozier, 104 Ga. 203, 30 S.E. 813 (1898); Thompson v. Dean, 15 Ga. App. 757, 84 S.E. 205 (1915); Bailey v. Ware & Harper, 19 Ga. App. 255, 91 S.E. 275 (1917); Crine v. Morton Salt Co., 49 Ga. App. 150, 174 S.E. 723 (1934); Armstrong v. Mayor of Savannah, 250 Ga. 121, 296 S.E.2d 690 (1982).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 5B Am. Jur. Pleading and Practice Forms, Certiorari, §§ 81, 88.

C.J.S. — 14 C.J.S., Certiorari, § 53 et seq.

5-4-18. Recovery of damages for frivolous certiorari.

If it shall be made to appear that a certiorari was frivolous and was applied for without good cause or only for the purpose of delay, the presiding judge before whom the writ was heard, on motion of the opposite party, may order that damages totaling not more than 20 percent of the sum adjudged to be due be recovered by the defendant in certiorari against the plaintiff in certiorari and his security; and judgment may be entered and execution issued accordingly. (Ga. L. 1857, p. 104, § 2; Code 1863, § 3976; Code 1868, § 3997; Code 1873, § 4069; Code 1882, § 4069; Civil Code 1895, § 4654; Civil Code 1910, § 5203; Code 1933, § 19-503.)

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Cited in Miller Co. v. Anderson, 118 Ga. 432, 45 S.E. 365 (1903); Flood v. Empire Inv. Co., 35 Ga. App. 266, 133 S.E. 60 (1926).

RESEARCH REFERENCES

Am. Jur. 2d. — 5 Am. Jur. 2d, Appellate Review, §§ 891, 892.

5-4-19. Operation of writ of certiorari as supersedeas in civil cases.

The writ of certiorari, when granted in civil cases, shall operate as a supersedeas of the judgment until the final hearing in the superior court. (Laws 1850, Cobb's 1851 Digest, p. 529; Code 1863, § 3968; Code 1868, § 3988; Code 1873, § 4060; Code 1882, § 4060; Civil Code 1895, § 4645; Civil Code 1910, § 5191; Code 1933, § 19-213.)

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This section is a codification of common law. Dixon v. Sable, 147 Ga. 623, 95 S.E. 240 (1918).

Mere intention to apply for writ does not operate as a supersedeas. Seamans v. King, 79 Ga. 611, 5 S.E. 53 (1887).

There is no supersedeas prior to sanction of petition in absence of special order. Seamans v. King, 79 Ga. 611, 5 S.E. 53 (1887).

Certiorari stops case at stage where the case is when certiorari is served on magistrate; certiorari does not move case backwards. Taylor v. Gay, 20 Ga. 77 (1856); Board of Comm'rs v. Wimberly, 55 Ga. 570 (1876); Johns v. McBride, 28 Ga. App. 686, 112 S.E. 831 (1922).

If on hearing in superior court writ is denied, supersedeas ends and inferior court may proceed. Loeb v. Mangum, 134 Ga. 335, 67 S.E. 882 (1910); Equitable Life Assurance Soc'y v. Culp, 159 Ga. 874, 127 S.E. 225 (1925).

In bailable criminal cases, supersedeas stays execution of sentence, but does not discharge prisoner from confinement. Dixon v. State, 121 Ga. 346, 49 S.E. 311 (1904).

Cited in Waller v. Hogan, 92 Ga. 528, 17 S.E. 919 (1893); Gurr v. Gurr, 95 Ga. 559, 22 S.E. 304 (1895); King v. Haley, 146 Ga. 85, 90 S.E. 715 (1916); Hargett v. City of Columbus, 36 Ga. App. 628, 137 S.E. 911 (1927); Owens v. Watkins, 189 Ga. 311, 5 S.E.2d 905 (1939); McCants v. Underwood, 70 Ga. App. 641, 29 S.E.2d 287 (1944); 106 Forsyth Corp. v. Bishop, 362 F. Supp. 1389 (M.D. Ga. 1972).

RESEARCH REFERENCES

Am. Jur. 2d. — 14 Am. Jur. 2d, Certiorari, § 77.

C.J.S. — 14 C.J.S., Certiorari, § 59 et seq.

5-4-20. Supersedeas of criminal conviction; bond; affidavit of indigence; effect of supersedeas.

(a) Any person who has been convicted of any criminal or quasi-criminal offense or violation of any ordinance, in any inferior judicatory by whatever name called, except constitutional city courts or state courts, exercising criminal or quasi-criminal jurisdiction, who desires a writ of certiorari to review and correct the judgment of conviction in the case shall be entitled to a supersedeas of the judgment

if he files with the clerk of the court, or, if there is no clerk, with the judge thereof, or with the commissioners if it is a court presided over by commissioners with no clerk, a bond payable to the state, or, if the conviction is in a municipal court, payable to the municipality, in amount and with security acceptable to and to be approved by the clerk, judge, or majority of the commissioners, as the case may be, conditioned that the defendant will personally appear and abide the final judgment, order, or sentence upon him in the case. The bond, if payable to the state, may be forfeited in the same manner as any other criminal bond in any court having jurisdiction. If the bond is payable to the municipal corporation, it may be forfeited according to the procedure prescribed in the municipal ordinance or charter. Alternatively, an action may be brought on the bond in any court having jurisdiction. Upon the giving of bond the defendant shall be released from custody in like manner as defendants are released upon supersedeas bonds in criminal cases where a notice of appeal has been filed.

(b) If the defendant is unable because of his indigence to give bond and makes this fact appear by affidavit to be filed with the judge, clerk, or commissioners, as the case may be, the same shall operate as a supersedeas of the judgment; provided, however, that the defendant shall not be set at liberty unless he gives bond as prescribed in subsection (a) of this Code section.

(c) The supersedeas provided for in this Code section shall operate to suspend the judgment of conviction until the case is finally heard and determined by the superior court to which it is taken by certiorari or by the Court of Appeals upon appeal, provided that within the time prescribed by law the defendant shall apply for and procure the writs and remedies provided by law for reviewing the judgment complained of. The supersedeas shall be equally applicable whether the judge of the superior court to whom the petition for certiorari is presented sanctions it or refuses it, provided that within the time provided by law the defendant diligently files a notice of appeal.

(d) The object of this Code section is to provide a method by which a defendant may obtain a supersedeas so long as he is prosecuting or is entitled under the law to prosecute the proceeding brought or to be brought to review the conviction of which he is complaining, or any intermediate appellate judgment rendered thereon, in order that the defendant shall not be deprived of his right to apply to the courts by being compelled to serve his sentence or pay a fine before he has had the full opportunity allowed him by law of taking the necessary proceedings to correct and review his conviction. (Ga. L. 1902, p. 105, § 1; Ga. L. 1909, p. 148, §§ 1-3; Civil Code 1910, §§ 5192, 5193, 5194; Code 1933, §§ 19-214, 19-215, 19-216; Ga. L. 1982, p. 3, § 5.)

Cross references. — Bonds and recognizances generally, T. 17, C. 6.

JUDICIAL DECISIONS

Analysis

General Consideration
Applicability
Bond
1. In General
2. Execution and Signatures
3. Validity of Bond

General Consideration

Applies to certiorari from inferior judicatories exercising criminal or quasi-criminal jurisdiction. — In all cases for writ of certiorari from inferior judicatory exercising criminal or quasi-criminal jurisdiction, filing of bond, or making of pauper's affidavit, is condition precedent to application. Sauceman v. State, 209 Ga. 60, 70 S.E.2d 754 (1952).

Condition to certiorari from municipal court judgment. — Filing of bond or making of pauper affidavit, required under this section, relating to certiorari sued to review judgment of municipal court, is condition precedent to application for certiorari. Nilsen v. City of La Grange, 55 Ga. App. 676, 191 S.E. 175 (1937).

Condition precedent to review of conviction in recorder's court. — Filing of bond required by subsection (a) or pauper's affidavit provided for under subsection (b) is condition precedent to application for certiorari to review judgment of conviction in recorder's court. Long v. City of Crawfordville, 55 Ga. App. 182, 189 S.E. 685 (1937); West v. City of College Park, 116 Ga. App. 355, 157 S.E.2d 491 (1967).

Condition precedent to review of conviction in city court. — Filing of security bond or pauper's affidavit is condition precedent to application for certiorari to review judgment of conviction in city court. Ellett v. City of College Park, 135 Ga. App. 269, 217 S.E.2d 374 (1975).

Failure to give bond required by section authorizes refusal to sanction petition. Roberts v. Mayor of Colquitt, 17 Ga. App. 557, 87 S.E. 816 (1916).

Unless it appears that requirements as to giving bond have been fully complied with, petition for certiorari should not be sanctioned. Mantovani v. City of Atlanta, 43 Ga. App. 787, 160 S.E. 129 (1931).

Appearance-supersedeas bond in certiorari must be executed according to provisions of this section as condition precedent to sanctioning of the application. Soles v. City of Vidalia, 92 Ga. App. 839, 90 S.E.2d 249 (1955).

Failure to aver filing of bond or affidavit renders petition void. — Failure to aver in petition for certiorari that bond has been filed or affidavit made, renders petition void. Nilsen v. City of La Grange, 55 Ga. App. 676, 191 S.E. 175 (1937).

Petition sanctioned in spite of noncompliance with bond requirements should be dismissed on hearing. Mantovani v. City of Atlanta, 43 Ga. App. 787, 160 S.E. 129 (1931).

If writ has been improperly sanctioned, dismissal will be necessary. Flynn v. City of E. Point, 18 Ga. App. 729, 90 S.E. 372 (1916).

Dismissal proper for failure to file bond or make affidavit. — When neither bond nor the pauper affidavit in lieu thereof was filed in the mayor's court as provided by this section there was no error in dismissing certiorari. Archer v. City of Fayetteville, 14 Ga. App. 24, 80 S.E. 34 (1913).

Cited in Laws v. State, 15 Ga. App. 361, 83 S.E. 279 (1914); Hubert v. City of Thomasville, 18 Ga. App. 756, 90 S.E. 720 (1916); Ronemous v. State, 87 Ga. App. 588, 74 S.E.2d 676 (1953); Hodges v. Bruce, 209 Ga. 871, 76 S.E.2d 801 (1953); Beard v. City of Atlanta, 91 Ga. App. 584, 86 S.E.2d 672 (1955); Clegg v. City of

General Consideration (Cont'd)

Vidalia, 91 Ga. App. 852, 87 S.E.2d 362 (1955); Coleman v. Mayor of Savannah, 102 Ga. App. 664, 117 S.E.2d 186 (1960); City of Gainesville v. Butts, 127 Ga. App. 140, 193 S.E.2d 59 (1972); Ellett v. City of College Park, 233 Ga. 858, 213 S.E.2d 700 (1975); Mulling v. Wilson, 245 Ga. 773, 267 S.E.2d 212 (1980).

Applicability

Motion to vacate and set aside verdict and judgment in criminal case. — Hodges v. Balkcom, 209 Ga. 856, 76 S.E.2d 798 (1953).

No authority exists to fine or imprison defendant. — A case is not a criminal or quasi-criminal proceeding when issues before police committee of general council of city were in nature of a civil proceeding, and committee had no authority to fine or to deprive officer of the officer's liberty, but the only authority vested in the committee was to exonerate, to suspend, or to discharge. City of Atlanta v. Stallings, 72 Ga. App. 52, 33 S.E.2d 18 (1945).

Certiorari from proceeding in municipal court to determine whether nuisance exists. — Proceeding in municipal court to determine question of whether nuisance exists was not criminal or quasi-criminal in nature since the court cannot fine or imprison the defendant in error, and the bond required for certiorari was that provided for in former Code 1933, §§ 19-206, 19-207, 19-208 (see O.C.G.A. § 5-4-5) for civil proceedings, and bond under former Code 1933, §§ 19-214, 19-215, 19-216 (see O.C.G.A. § 5-4-20) would not suffice. City of Atlanta v. Pazol, 95 Ga. App. 598, 98 S.E.2d 216 (1957).

Review of revocation of probationary sentences is not review of judgment of conviction. — Defendants, who were confined upon revocation of probationary sentences and who sought review by certiorari of order of revocation, were not entitled to be released on bond, since the defendants were not seeking to review a judgment of conviction within the provisions of former Code 1933, §§ 19-214, 19-215, 19-216, and 27-901 (see O.C.G.A. §§ 5-4-20 and 17-6-1). Foster v. Jenkins, 210 Ga. 383, 80 S.E.2d 277 (1954).

Bond

1. In General

Bond shall be conditioned to abide final judgment of superior court as well as inferior court. — Bond approved by clerk of lower court, if there be one, conditioned to abide final judgment of superior court, as well as inferior court, must be filed as a condition precedent to obtaining writ of certiorari. Moon v. City of Jefferson, 10 Ga. App. 572, 73 S.E. 854 (1912).

Should be conditioned that defendant appear and abide by judgment. — Bond conditioned for appearance of defendant to abide final judgment of superior court is insufficient. It should be conditioned to appear "and" abide by final judgment, as the two conditions are not synonymous. Scott v. City of Camilla, 7 Ga. App. 689, 67 S.E. 846 (1910); Ruffin v. City of Millen, 18 Ga. App. 784, 90 S.E. 654 (1916).

Abrogation of bond. — When one convicted of misdemeanor in county criminal court has appealed by certiorari and successive writs of error all the way up to the Supreme Court of the United States, and verdict and sentence have been affirmed, and remittitur from the Court of Appeals of Georgia affirming such verdict and sentence has been made the judgment of superior court, such verdict and sentence become final; and when the defendant is thereafter arrested, the supersedeas certiorari bond executed in that case is abrogated and becomes functus officio, and the defendant is not thereafter entitled to remain at liberty by virtue of such bond. Hodges v. Balkcom, 209 Ga. 856, 76 S.E.2d 798 (1953).

2. Execution and Signatures

When agent for surety signs certiorari bond, agent's authority must expressly appear. — When on certiorari from trial court, certiorari bond is signed by one as agent for surety named thereon, authority of such agent must expressly appear. Taylor v. City of Atlanta, 84 Ga.

App. 739, 67 S.E.2d 143 (1951).

When attorney signs bond for surety without power of attorney attached. — When defendant in certiorari made a motion to dismiss certiorari for reason that surety on certiorari bond had executed the bond by the defendant's attorney and that the bond was not a valid bond, because no power of attorney was attached thereto showing authority of the attorney to sign the bond for the surety, the court properly sustained the motion and dismissed certiorari. Mantovani v. City of Atlanta, 43 Ga. App. 787, 160 S.E. 129 (1931).

3. Validity of Bond

Bond payable to city recorder charged with responsibilities involving forfeiture of appearance bonds. — When city recorder is person charged with responsibility of forfeiting appearance bonds when the bond's conditions have not been complied with, and the recorder necessarily does so for and on behalf of the city as such officer, petition showing that bond hereunder was made payable to city recorder or the recorder's successors in office affirmatively shows a valid contract between obligors and city for this purpose, and it was not subject to dismissal upon this ground. Soles v. City of Vidalia, 92 Ga. App. 839, 90 S.E.2d 249 (1955).

Bonds filed in municipal court, payable to Governor. — Bonds filed by defendants in municipal trial court, naming therein as obligee the Governor of Georgia and the Governor's successor in office are not legal bonds as are contemplated under provisions of this section, and failure of petitioners to give proper bond rendered the petition for certiorari void. Coleman v. Mayor of Savannah, 102 Ga. App. 664, 117 S.E.2d 186 (1960).

Filing of bond is not affirmatively established by allegations to that effect in petition. Hubert v. City of Thomasville, 18 Ga. App. 756, 90 S.E. 720 (1916).

Certificate of clerk or trial judge approving bond is not conclusive of bond's validity. — While certificate from clerk or presiding officer of trial court that bond has been accepted and approved should be accepted as prima facie true, it is not conclusive that proper bond has been given; and if bond itself is sent up with the record and shows on the bond's face that legal bond has not been given, certiorari should be dismissed. Mantovani v. City of Atlanta, 43 Ga. App. 787, 160 S.E. 129 (1931).

In petition for certiorari from recorder's court, approval of bond by city clerk is insufficient. — When, in petition for certiorari to superior court to correct judgment of recorder's court convicting the petitioner of violation of a city ordinance, instead of being approved by clerk of recorder's court or by recorder in absence of clerk, the supersedeas-appearance bond attached to petition was approved by the city clerk, the superior court did not err in overruling the petition for certiorari, as conditions precedent to application for certiorari, established by this section in such cases as this, are mandatory. Griffin v. City of Albany, 88 Ga. App. 229, 76 S.E.2d 436 (1953).

OPINIONS OF THE ATTORNEY GENERAL

Signing one's own bond and depositing security in cash. — Bond requirements do not specify posting of property bond, but only that bond should be "in amount and with security acceptable to and to be approved by the clerk"; apparently there would be no prohibition against a person signing the person's own bond and depositing required security in cash. 1963-65 Op. Att'y Gen. p. 32.

Whether a person signs the person's own bond and deposits the required security in cash addresses itself to sole discretion of clerk approving bond. 1963-65 Op. Att'y Gen. p. 32.

RESEARCH REFERENCES

Am. Jur. 2d. — 14 Am. Jur. 2d, Certiorari, §§ 21 et seq., 74 et seq.

ALR. — What costs or fees are contemplated by statute authorizing proceeding in forma pauperis, 98 ALR2d 292.

CHAPTER 5

NEW TRIAL

Article 1

General Provisions

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5-5-47. Right to give supersedeas bond for bailable offense upon filing of new trial motion; assessment and approval of bond.
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5-5-49. Trial of cases returned for new trial by appellate courts.
5-5-50. Standard for review by appellate court of first grant of new trial.
5-5-51. Written basis for exercise of judicial discretion for new trial.

Cross references. — Ga. Const. 1983, Art. VI, Sec. I, Para. IV.

RESEARCH REFERENCES

ALR. — Propriety of limiting to issue of damages alone new trial granted on ground of inadequacy of damages awarded, 98 ALR 941; 29 ALR2d 1199.

Right of trial court to grant new trial as affected by appellate proceedings, 139 ALR 340.

Power of trial court or judge to revoke order granting new trial in criminal case, 145 ALR 400.

ARTICLE 1

GENERAL PROVISIONS

5-5-1. Power of probate, superior, state, juvenile, and City of Atlanta courts.

(a) The superior, state, and juvenile courts and the City Court of Atlanta shall have power to correct errors and grant new trials in cases or collateral issues in any of the respective courts in such manner and under such rules as they may establish according to law and the usages and customs of courts.

(b) Probate courts shall have power to correct errors and grant new trials in civil cases provided for by Article 6 of Chapter 9 of Title 15 under such rules and procedures as apply to the superior courts. (Laws 1799, Cobb's 1851 Digest, p. 503; Code 1863, § 3636; Code 1868, § 3661; Code 1873, § 3712; Code 1882, § 3712; Civil Code 1895, § 5474; Civil Code 1910, § 6079; Code 1933, § 70-102; Ga. L. 1986, p. 982, § 4; Ga. L. 2000, p. 862, § 1.)

Editor's notes. — Ga. L. 1986, p. 982, § 25, not codified by the General Assembly, provided that that Act would apply to all cases filed on or after July 1, 1986.

Law reviews. — For annual survey on trial practice and procedure, see 38 Mercer L. Rev. 383 (1986). For survey of 1995 Eleventh Circuit cases on trial practice and procedure, see 47 Mercer L. Rev. 907 (1996). For annual survey article, "'Garbage In, Garbage Out': The Litigation Implosion Over the Unconstitutional Organization and Jurisdiction of the City Court of Atlanta," see 52 Mercer L. Rev. 49 (2000).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Penal Code 1895, § 1056 are included in the annotations for this Code section.

Section grants superior courts power to correct errors and grant new trials. Frank v. State, 142 Ga. 741, 83 S.E. 645, 1915D L.R.A. 817, writ of error denied, 235 U.S. 694, 35 S. Ct. 208, 59 L. Ed. 429 (1914) (decided under former Code 1933, § 70-102, at time when section referred only to superior courts; see O.C.G.A. § 5-5-1).

Superior court of the county in which defendant was convicted of murder had authority, on defendant's motion for new trial, to order an expert evaluation of the defendant, who was incarcerated beyond the boundaries of the county in which the court sat. Zant v. Brantley, 261 Ga. 817, 411 S.E.2d 869 (1992).

What constitutes a city court. — Welborne v. State, 114 Ga. 793, 40 S.E. 857 (1902) (decided under former Penal Code 1895, § 1056).

Municipal courts may hear motions for new trial. — In a dispossessory action, a municipal court erred in holding that the court lacked jurisdiction to hear a motion for new trial under O.C.G.A. § 5-5-1. The municipal's court enacting legislation, 1983 Ga. Laws 4453-4454, § 33, as well as Ga. Const. 1983, Art. VI, Sec. I, Para. IV, gave the court such jurisdiction. Nelson v. Powell, 293 Ga. App. 227, 666 S.E.2d 598 (2008).

New trials are granted by superior court as a court, not by a presiding judge in the judge's capacity as judge.

Allen v. State, 102 Ga. 619, 29 S.E. 470 (1897) (decided under former Penal Code 1895, § 1056).

New trial may be granted after trial before jury and before appeal. Eufaula Home Ins. Co. v. Plant & Cubbedge, 37 Ga. 672 (1868).

Discretion of trial court. — Trial court is vested with discretion in granting new trials. Martin & Sons v. Bank of Leesburg, 137 Ga. 285, 73 S.E. 387 (1911).

When trial judge refuses to order new trial on ground of inadequate damages in tort action, this court will interfere with that discretion only in case of manifest abuse. Brown v. Service Coach Lines, 71 Ga. App. 437, 31 S.E.2d 236 (1944).

Because the defendant did not rebut the presumption that counsel's conduct was within the broad range of professional conduct, because the trial court considered and rejected counsel's motion for a mistrial, and because an eyewitness could testify about the certainty of the eyewitness's identification, the defendant was not entitled to a new trial. Greenwood v. State, 309 Ga. App. 893, 714 S.E.2d 602 (2011).

Certiorari lies though court may grant new trial. — Although city court may have power to grant new trials, it is an inferior court whose final judgments may be reviewed by superior court upon certiorari. Archie v. State, 99 Ga. 23, 25 S.E. 612 (1896).

First grant of new trial by judge of superior court is never disturbed by appellate court, unless it is made to appear that in doing so the judge manifestly abused the discretion resting in the judge. Law v. Hodges, 53 Ga. App. 319, 185 S.E. 584 (1936).

Mere difference of opinion as to amount of recovery. — New trial should not be granted based on mere difference of opinion between appellate court and jury as to amount of recovery in action of tort for unliquidated damages. Something more must be disclosed to warrant interference, when substantial damages have been returned. Brown v. Service Coach Lines, 71 Ga. App. 437, 31 S.E.2d 236 (1944).

Bias, passion, prejudice, or mistake must appear to justify setting aside verdict. — When amount of verdict, though less than appellate court would have approved, does not afford such evidence of bias, passion, prejudice, or mistake as to justify setting the verdict aside as inadequate, the appellate court must affirm the verdict. Brown v. Service Coach Lines, 71 Ga. App. 437, 31 S.E.2d 236 (1944).

Presumption that trial judge knew rule as to obligation to approve jury's verdict. — In interpreting language of order overruling motion for new trial, appellate court must presume that trial judge knew rule as to obligation to approve jury's verdict devolving upon the judge, and that in overruling motion the judge did exercise this discretion, unless language of order indicates to the contrary and that court agreed to verdict against the court's own judgment and against dictates of the judge's own conscience, merely because the judge did not feel that the judge had the duty or authority to override findings of jury upon disputed issues of fact. Brown v. Service Coach Lines, 71 Ga. App. 437, 31 S.E. 236 (1944).

Damages rules and new trial rules exist independently. — Rules of law governing (1) right of jury to originally fix damages, (2) right of appellate court to grant new trial when verdict is alleged to be excessive or inadequate, and (3) right of trial judge to grant new trial when in the judge's discretion the judge thinks the verdict unfair, unjust, contrary to evidence, excessive, or too small, exist apart from and independent of each other. Brown v. Service Coach Lines, 71 Ga. App. 437, 31 S.E. 236 (1944).

Approval of verdict necessary to finalize verdict when party moves for new trial on general grounds. — Before verdict becomes final the verdict should, when losing party requires it by motion for new trial, receive approval of mind and conscience of trial judge. Until the judge's approval is given, the verdict does not become binding in a case when motion for new trial contains general grounds. Brown v. Service Coach Lines, 71 Ga. App. 437, 31 S.E.2d 236 (1944).

New trial may be granted on condition that plaintiff refuses to agree to reduction in verdict. Bank of

Oglethorpe v. Hicks, 15 Ga. App. 92, 82 S.E. 635 (1914); Carter v. Virginia-Carolina Chem. Co., 144 Ga. 488, 87 S.E. 415 (1915); Biggers v. Mathews, 144 Ga. 857, 88 S.E. 190 (1916).

Party may be eliminated by order of appellate court, so judgment is against other defendant. Lovell v. Frankum, 24 Ga. App. 261, 100 S.E. 575 (1919).

Motion for new trial cannot be used to withdraw guilty plea. — One who has filed plea of guilty in criminal case cannot move for new trial; neither before nor after sentence can a motion for a new trial be employed as a means of withdrawing a plea of guilty. Bearden v. State, 13 Ga. App. 264, 79 S.E. 79 (1913) (decided under former Penal Code 1910, § 1083).

Effect of judge's condemnatory language during sentencing. — Disqualification to render judgment on motion for new trial does not result from the judge's use of language condemnatory of the accused when imposing sentence. Harrison v. State, 20 Ga. App. 157, 92 S.E. 970 (1917) (decided under former Penal Code 1910, § 1083).

Restriction on superior court's jurisdiction on appeal from probate proceeding. — When appellant filed a motion in probate court to set aside or amend the probate of a will due to newly discovered evidence of a later will, the probate court properly dismissed the petition for lack of jurisdiction when the appellant was not a party to the original probate; on appeal, the jurisdiction of the superior court was limited to that of the probate court. In re Lott, 171 Ga. App. 25, 318 S.E.2d 688 (1984).

Cited in Vance v. Gamble, 95 Ga. 730, 22 S.E. 576 (1895); Cowart v. Strickland, 149 Ga. 397, 100 S.E. 447, 7 A.L.R. 1110 (1919); City of Macon v. Herrington, 198 Ga. 576, 32 S.E.2d 517 (1944); Church of God of Union Ass'y, Inc. v. City of Dalton, 216 Ga. 659, 119 S.E.2d 11 (1961); Bowen v. Ball, 215 Ga. App. 640, 451 S.E.2d 502 (1994).

OPINIONS OF THE ATTORNEY GENERAL

Probate courts do not have the authority to grant new trials. 1986 Op. Att'y Gen. No. U86-13.

RESEARCH REFERENCES

Am. Jur. 2d. — 58 Am. Jur. 2d, New Trial, § 7 et seq.

Am. Jur. Pleading and Practice Forms. — 18B Am. Jur. Pleading and Practice Forms, New Trial, § 1.

C.J.S. — 23 C.J.S., Criminal Law, § 1423 et seq. 66 C.J.S., New Trial, § 1 et seq.

ALR. — Propriety of limiting to issue of damages alone new trial granted on ground of inadequacy of damages awarded, 98 ALR 941; 29 ALR2d 1199.

Necessity that trial court give parties notice and opportunity to be heard before ordering new trial on its own motion, 23 ALR2d 852.

Grant of new trial on issue of liability alone, without retrial of issue of damages, 34 ALR2d 988.

Delay as affecting right to coram nobis attacking criminal conviction, 62 ALR2d 432.

Propriety of limiting to issue of damages alone new trial granted on ground of inadequacy of damages—modern cases, 5 ALR5th 875.

Excessiveness or adequacy of damages awarded for injuries causing mental or psychological damage, 52 ALR5th 1.

ARTICLE 2
GROUNDS

Cross references. — Requirement that motions for new trial in civil cases be predicated upon intrinsic defect not appearing on face of record or pleadings, § 9-11-60. Those errors in admission or exclusion of evidence which will not constitute grounds for granting new trial, § 9-11-61.

Law reviews. — For articles discussing the preparation of an amended motion for new trial and facts concerning appellate practice in general, prior to the adoption of the Appellate Practice Act, see 21 Ga. B.J. 424 (1959).

JUDICIAL DECISIONS

Error and injury are prerequisites. — Before new trial should be granted because of error committed on trial, not only error but injury must be shown. Mills v. State, 41 Ga. App. 834, 155 S.E. 104 (1930).

Legal error is a compound of both error and injury. In absence of either constituent element, the grant of new trial is not warranted. Norris v. Sikes, 102 Ga. App. 609, 117 S.E.2d 214 (1960).

Ground of motion for new trial must be complete in itself. Blakeney v. Bank of Hahira, 176 Ga. 190, 167 S.E. 114 (1932).

Ground of a motion for new trial should be complete within itself, and Supreme Court will not look to other portions of record for purpose of supplementing the record. Gibson v. State, 176 Ga. 384, 168 S.E. 47 (1933).

Each special ground of motion for new trial must be complete within itself; and when so incomplete as to require reference to brief of evidence, or to some other portion of record, in order to determine what was alleged error and whether such error was material, ground will not be considered by reviewing court. Bray v. C.I.T. Corp., 51 Ga. App. 196, 179 S.E. 925 (1935).

Ground of a motion for new trial should be complete within itself, and should not require resort to brief of evidence for a clear understanding of error it is claimed was committed. Johnson v. Phoenix Mut. Life Ins. Co., 180 Ga. 422, 179 S.E. 95 (1935).

Extraordinary motions for new trial are not favored. Smith v. State, 171 Ga. 402, 155 S.E. 676 (1930).

Grounds of motion for new trial not approved as true without qualification cannot be considered. Gay v. State, 173 Ga. 793, 161 S.E. 603 (1931).

When jury charge is based on unconstitutional statute. — Constitutionality of statute cannot be raised for first time in motion for new trial, but when the charge is given to the jury based upon statute which is unconstitutional, and counsel could not know nor anticipate that substance of statute would be given in charge to jury, counsel were not bound to raise question of constitutionality of statute before charge was given, and could assign error upon charge in motion for new trial. Wadley S. Ry. v. Faglee, 173 Ga. 814, 161 S.E. 847 (1931).

Judge cannot modify verdict after verdict's receipt and jury's disbursement. — If judge is not satisfied that verdict is returned is proper, before receiving verdict the judge may require the jury to return to room and correct the jury's verdict, under proper instructions from court or, after verdict is received and recorded and jury dispersed, the judge may grant a new trial. But the judge is without power to change and modify verdict after the verdict is received and recorded, and jury has dispersed. Ballard v. Turner, 147 Ga. App. 584, 249 S.E.2d 637 (1978).

Considered first grant when granted to party not previously awarded new trial. — Rule that first grant of new trial will not be disturbed, except when verdict is demanded by evidence, is applicable to case where two successive verdicts have been rendered, one for plaintiff and the other for defen-

dant, and when in each instance a new trial was granted. Schiefer v. Durden, 56 Ga. App. 167, 192 S.E. 388 (1937).

Cited in Cook v. Attapulgus Clay Co., 52 Ga. App. 610, 184 S.E. 334 (1936).

RESEARCH REFERENCES

ALR. — Abuse of witness by counsel as ground for new trial or reversal, 4 ALR 414.

Power of court to reduce or increase verdict without giving party affected the option to submit to a new trial, 53 ALR 779, 95 ALR 1163.

Power of trial court to dismiss defendant in criminal case for insufficiency of evidence after submitting case to jury or after verdict of guilty, 131 ALR 187.

Manifestation of emotion by party during civil trial as ground for mistrial, reversal, or new trial, 69 ALR2d 954.

Prior service on grand jury which considered indictment against accused as disqualification for service on petit jury, 24 ALR3d 1236.

Verdict-urging instructions in civil case admonishing jurors to refrain from intransigence, or reflecting on integrity or intelligence of jurors, 41 ALR3d 1154.

Recantation by prosecuting witness in sex crime as ground for new trial, 51 ALR3d 907.

Propriety of, or prejudicial effect of omitting or giving, instruction to jury, in prosecution for rape or other sexual offense, as to ease of making or difficulty of defending against such a charge, 92 ALR3d 866.

Judgment favorable to convicted criminal defendant in subsequent civil action arising out of same offense as ground for reversal of conviction, 96 ALR3d 1174.

Unauthorized view of premises by juror or jury in criminal case as ground for reversal, new trial, or mistrial, 50 ALR4th 995.

Court reporter's death or disability prior to transcribing notes as grounds for reversal or new trial, 57 ALR4th 1049.

Prosecutor's appeal in criminal case to racial, national, or religious prejudice as ground for mistrial, new trial, reversal, or vacation of sentence—modern cases, 70 ALR4th 664.

5-5-20. Verdict contrary to evidence and justice.

In any case when the verdict of a jury is found contrary to evidence and the principles of justice and equity, the judge presiding may grant a new trial before another jury. (Laws 1799, Cobb's 1851 Digest, p. 503; Code 1863, § 3637; Code 1868, § 3662; Code 1873, § 3713; Code 1882, § 3713; Civil Code 1895, § 5477; Penal Code 1895, § 1057; Civil Code 1910, § 6082; Penal Code 1910, § 1084; Code 1933, § 70-202.)

Law reviews. — For survey of cases dealing with criminal law and criminal procedure from June 1, 1977 through May 1978, see 30 Mercer L. Rev. 27 (1978).

JUDICIAL DECISIONS

Analysis

General Consideration
Judgment Notwithstanding Verdict
Application
1. In General
2. Adequacy of Damages
Appeal from Denial of New Trial

General Consideration

Section furnishes exact rule by which verdict is to be measured; by it a verdict is either right or wrong. Richmond & D.R.R. v. Allison, 89 Ga. 567, 16 S.E. 116 (1892) (see O.C.G.A. § 5-5-20).

Damages rules and new trial rules exist independently. — Rules of law governing (1) right of jury to originally fix damages, (2) right of appellate court to grant new trial when verdict is alleged to be excessive or inadequate, and (3) right of trial judge to grant new trial when in the judge's discretion the judge thinks the verdict "unfair, unjust, contrary to evidence, excessive, or too small," exist apart from and independent of each other. Brown v. Service Coach Lines, 71 Ga. App. 437, 31 S.E.2d 236 (1944).

Authority to grant new trial. — No court except the trial court is vested by O.C.G.A. §§ 5-5-20 and 5-5-21 with the authority to grant a new trial in a matter relating to the weight of the evidence. Clark v. State, 249 Ga. App. 97, 547 S.E.2d 734 (2001).

Duty of trial judge to exercise discretion. — Motion for new trial on grounds set forth in O.C.G.A. § 5-5-20 or O.C.G.A. § 5-5-21 addresses sound legal discretion of the trial judge and the law imposes upon the judge the duty of exercising this discretion. Kendrick v. Kendrick, 218 Ga. 460, 128 S.E.2d 496 (1962); Ricketts v. Williams, 240 Ga. 148, 240 S.E.2d 41 (1977), vacated on other grounds, 438 U.S. 902, 98 S. Ct. 3119, 57 L. Ed. 2d 1145 (1978).

Denial of new trial is in trial judge's discretion. — Denial of a new trial on the ground that the verdict is contrary to the evidence addresses itself only to the discretion of the trial judge. Witt v. State, 157 Ga. App. 564, 278 S.E.2d 145 (1981).

Trial court did not abuse the court's discretion in denying the defendant's motion for a new trial, as the defendant did not show that the defendant received ineffective assistance of counsel because the evidence was so overwhelming against the defendant that there was not a reasonable probability that the subpoena of the witness and the witness's testimony at trial would have produced a different result; in other words, the defendant did not show that the defendant was prejudiced by the alleged deficiency of defense counsel's failure to subpoena a witness. Cain v. State, 277 Ga. 309, 588 S.E.2d 707 (2003), overruled in part by Dickens v. State, 280 Ga. 320, 627 S.E.2d 587 (2006).

Motion for new trial addresses only errors of law and fact contributing to rendition of verdict; it does not pertain to motion to vacate judgment. Insurance Co. of N. Am. v. Eunice, 111 Ga. App. 135, 140 S.E.2d 918 (1965).

Motion for new trial must be made before trial court. — Argument that the verdict was against the weight of the evidence may only be made to a trial court in a motion for new trial and not to the appellate court on appeal as the appellate court has no discretion to grant a new trial based on such a claim. Teele v. State, 319 Ga. App. 448, 738 S.E.2d 277 (2012).

Standard for considering motion for new trial. — Trial court failed to apply the proper standard of review in considering a motion for new trial under O.C.G.A. § 5-5-20. A trial court could not grant judgment notwithstanding the verdict on an issue if "any evidence" existed to support that issue; by contrast, under § 5-5-20, a trial court could grant a motion for new trial if the verdict was contrary to the evidence. Moore v. Stewart, 315 Ga. App. 388, 727 S.E.2d 159 (2012).

Trial court applied incorrect standard. — When faced with a motion for new trial based on general grounds, the trial court had the duty to exercise the court's discretion and weigh the evidence. The trial court did not exercise the court's discretion when the court evaluated the general grounds by applying the standard of Jackson v. Virginia, 443 U.S. 307 (1979) to a motion for new trial based on the general grounds embodied in O.C.G.A. §§ 5-5-20 and 5-5-21. Walker v. State, 292 Ga. 262, 737 S.E.2d 311 (2013).

General ground that verdict is contrary to evidence means verdict lacks evidence to support the verdict. Hardwick v. Georgia Power Co., 100 Ga. App. 38, 110 S.E.2d 24 (1959).

Approval of verdict necessary to finalize verdict. — Before verdict becomes final the verdict should, when the losing party requires it by motion for new

General Consideration (Cont'd)

trial, receive approval of mind and conscience of trial judge. Until the judge's approval is given, the verdict does not become binding in case when motion for new trial contains general grounds. Brown v. Service Coach Lines, 71 Ga. App. 437, 31 S.E.2d 236 (1944).

Grounds for new trial known but omitted at time of motion cannot be raised in subsequent petition. — When, in former suit between same parties and relating to same subject matter, verdict was rendered against party, whose motion for new trial was afterwards voluntarily dismissed, a petition subsequently brought by such party to review and set aside verdict is properly dismissed on general demurrer (now motion to dismiss), when it appears that grounds for review were such as were known, or could by reasonable diligence have been discovered in time to incorporate those grounds in motion for new trial made in former case. Hubbard v. Whatley, 200 Ga. 751, 38 S.E.2d 738 (1946).

Cited in Holland v. Williams, 3 Ga. App. 636, 60 S.E. 331 (1908); Western & Atl. R.R. v. Hughes, 278 U.S. 496, 49 S. Ct. 231, 73 L. Ed. 473 (1929); Candler v. Smith, 50 Ga. App. 667, 179 S.E. 395 (1935); Davis v. State, 202 Ga. 13, 41 S.E.2d 414 (1947); Harper v. Hall, 76 Ga. App. 441, 46 S.E.2d 201 (1948); Devereaux v. State, 76 Ga. App. 498, 46 S.E.2d 528 (1948); Doyle v. Dyer, 77 Ga. App. 266, 48 S.E.2d 488 (1948); Lasseter v. Griffin, 77 Ga. App. 429, 49 S.E.2d 142 (1948); City of Griffin v. Southeastern Textile Co., 79 Ga. App. 420, 53 S.E.2d 921 (1949); Nance v. State, 84 Ga. App. 777, 66 S.E.2d 273 (1951); Foster v. Jones, 208 Ga. 320, 66 S.E.2d 743 (1951); Hight v. Steely, 86 Ga. App. 137, 70 S.E.2d 886 (1952); Garland v. Green, 209 Ga. 424, 73 S.E.2d 187 (1952); Hamilton v. State, 89 Ga. App. 159, 78 S.E.2d 875 (1953); Whitfield v. Washburn Storage Co., 99 Ga. App. 708, 109 S.E.2d 865 (1959); Hamby v. Hamby, 99 Ga. App. 808, 110 S.E.2d 133 (1959); Cohen v. Gotlieb, 108 Ga. App. 122, 132 S.E.2d 93 (1963); Rackard v. Merritt, 114 Ga. App. 743, 152 S.E.2d 701 (1966); Pinkerton & Laws Co. v. Atlantis Realty Co., 128 Ga. App. 662, 197 S.E.2d 749 (1973); Faulkner v. Western Elec. Co., 98 F.R.D. 282 (N.D. Ga. 1983); Southeast Grading, Inc. v. Grissom-Harrison Corp., 171 Ga. App. 298, 319 S.E.2d 121 (1984); Crump v. State, 183 Ga. App. 43, 357 S.E.2d 863 (1987); Glenridge Unit Owners Ass'n v. Felton, 183 Ga. App. 858, 360 S.E.2d 418 (1987); Powell v. State, 185 Ga. App. 464, 364 S.E.2d 599 (1988); Stinson v. State, 185 Ga. App. 543, 364 S.E.2d 910 (1988); Towns v. State, 185 Ga. App. 545, 365 S.E.2d 137 (1988); In re C.I.W., 229 Ga. App. 481, 494 S.E.2d 291 (1997); High v. Parker, 234 Ga. App. 675, 507 S.E.2d 530 (1998); Washington v. State, 276 Ga. 655, 581 S.E.2d 518 (2003).

Judgment Notwithstanding Verdict

New trial may be granted without demanding judgment n.o.v. for weight of evidence may be on one side, yet there is some to the contrary. Burnet v. Bazemore, 122 Ga. App. 73, 176 S.E.2d 184 (1970).

Motion for judgment n.o.v. may be denied without precluding grant of new trial; for though there may be some evidence in the verdict's favor, the verdict may still be against weight of the evidence. Burnet v. Bazemore, 122 Ga. App. 73, 176 S.E.2d 184 (1970).

Denial of new trial on general grounds, unexcepted to, precludes judgment notwithstanding verdict on appeal. — When trial judge denies motion for new trial on general grounds, the judge finds that the verdict is not against the weight of the evidence and therefore, of necessity, that there is evidence to support the verdict. That determination being unexcepted to, the law of the case is established and the appellate court cannot find on motion for judgment n.o.v. that there is no evidence to support the verdict or that the evidence demands a verdict for the movant. Burnet v. Bazemore, 122 Ga. App. 73, 176 S.E.2d 184 (1970).

Effect of motion for judgment notwithstanding verdict when some evidence supports verdict. — When there is any evidence supporting the verdict, grounds of motion for judgment notwithstanding the verdict, that such verdict was contrary to evidence and contrary to principles of justice and equity, merely

invoke discretion of trial court on question of whether new trial should be granted on weight of evidence. Crosby Aeromarine, Inc. v. Hyde, 115 Ga. App. 836, 156 S.E.2d 106 (1967).

Application

1. In General

In first grant of new trial, trial judge has broad discretion. Garrett v. Garrett, 128 Ga. App. 594, 197 S.E.2d 739 (1973).

Denial of new trial becomes law of case as to grounds contained in motion. — Absent specific appeal from ruling on motion for new trial or enumerating it as error, denial of motion becomes law of case as to all grounds contained therein. Burnet v. Bazemore, 122 Ga. App. 73, 176 S.E.2d 184 (1970).

Grant of new trial under section does not create statutory double jeopardy bar. — Grant of new trial under former Code 1933, § 70-202 (see O.C.G.A. § 5-5-20) or former Code 1933, § 70-206 (see O.C.G.A. § 5-5-21) did not result in statutory double jeopardy bar under Ga. L. 1968, p. 1249, § 1 (see O.C.G.A. § 16-1-8(d)(2)). Ricketts v. Williams, 240 Ga. 148, 240 S.E.2d 41 (1977), vacated on other grounds, 438 U.S. 902, 98 S. Ct. 3119, 57 L. Ed. 2d 1145 (1978).

Trial court's written order granting a new trial on the general grounds was in compliance with the requirements of O.C.G.A. § 5-5-51. Jackson Nat'l Life Ins. Co. v. Snead, 231 Ga. App. 406, 499 S.E.2d 173 (1998).

Successful motion precludes later plea of former jeopardy. — Motion for new trial if granted at trial level is a forfeiture of any right to plead former jeopardy because of grant of new trial. Ricketts v. Williams, 240 Ga. 148, 240 S.E.2d 41 (1977), vacated on other grounds, 438 U.S. 902, 98 S. Ct. 3119, 57 L. Ed. 2d 1145 (1978).

If no evidence supports finding, new trial must be granted. Branch v. Anderson, 47 Ga. App. 858, 171 S.E. 771 (1933).

Overruling general grounds of motion is proper where some evidence supports verdict. — When trial judge has exercised discretion vested in the judge by law, and there is some evidence to support the verdict, the judgment overruling general grounds of motion for new trial is not error. Kendrick v. Kendrick, 218 Ga. 460, 128 S.E.2d 496 (1962).

New trial properly denied. — Trial court properly denied defendant's motion for a new trial, as the evidence presented, when coupled with the victim's clear and unfettered identification of the defendant from a photo array, which was not impermissibly suggestive, supported the defendant's convictions, and the defendant failed to show that trial counsel, who had over 30 years of criminal defense experience, was ineffective and that there was a reasonable likelihood that but for the alleged errors, the outcome would have been different. McIvory v. State, 268 Ga. App. 164, 601 S.E.2d 481 (2004).

Defendant's motion for a new trial was properly denied as defendant's claim that the defendant was denied the right of access to the courts by conduct of the prison authorities as such conduct occurred in a post-conviction setting and did not go to the fundamental fairness of the trial as required by O.C.G.A. § 5-5-20 et seq. Tarvin v. State, 277 Ga. 509, 591 S.E.2d 777 (2004).

Motion for a new trial by one member of the limited liability company (LLC) in an action against other members was properly denied, as resignation by another member from LLC did not constitute a breach of fiduciary duty under the LLC's operating agreement or Georgia law; the remaining member failed to show that the members who resigned from the LLC were prohibited from forming a competing business or soliciting customers of the LLC. James E. Warren, M.D., P.C. v. Weber & Warren Anesthesia Servs., 272 Ga. App. 232, 612 S.E.2d 17 (2005).

In a suit on a guaranty, the trial court did not err in denying a guarantor's motion for a new trial on general grounds, as the jury's award fell within the range of damages established by the evidence, the guarantor consented to the bank's modification of the terms of one of the loans, and the guarantor failed to demonstrate prejudice by the court's instructions. Beasley v. Wachovia Bank, 277 Ga. App. 698, 627 S.E.2d 417 (2006).

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Because the appellant failed to supply the appellate court with the entire trial transcript in the record on appeal, but only included the pretrial motions and the opening statements at trial, without a complete transcript the court of appeals had to presume that the evidence supported the jury's verdict; thus, a new trial was not warranted. Parekh v. Wimpy, 288 Ga. App. 125, 653 S.E.2d 352 (2007), cert. denied, No. S08C0520, 2008 Ga. LEXIS 319 (Ga. 2008).

Trial court properly denied a motion for new trial based on the claim by a dentist and a dental center that a former employee failed to present evidence on the employee's claim of intentional infliction of emotional distress that the dentist's actions in harassing the employee were extreme and outrageous or that the emotional distress suffered by the employee was severe; the evidence of the dentist's pervasive pattern of harassing behavior demonstrated the extreme and outrageous nature of the dentist's conduct, and the severity of the emotional distress suffered by the employee was evidenced by the fact that the employee became so fearful of the dentist that the employee obtained a gun and kept the gun under the employee's bed until the employee moved out of state. Ferman v. Bailey, 292 Ga. App. 288, 664 S.E.2d 285 (2008).

Trial court did not err in denying a defendant's motion for a new trial pursuant to O.C.G.A. §§ 5-5-20 and 5-5-21 based on newly discovered evidence because the "new" evidence—that the defendant's girlfriend got "five hundred" from the defendant in connection with the incident—did not come to the defendant's knowledge since the prior trial, and the girlfriend's alleged perjury would not in itself constitute grounds for a new trial. Jackson v. State, 294 Ga. App. 555, 669 S.E.2d 514 (2008).

Trial court did not err in denying a defendant's motion for a new trial or the defendant's motion for a directed verdict because the evidence was sufficient for the trial court to find the defendant guilty of burglary in violation of O.C.G.A. § 16-7-1(a) beyond a reasonable doubt where the back window of a home was broken and police found the defendant hiding in a closet under a pile of clothing. Williams v. State, 297 Ga. App. 723, 678 S.E.2d 95 (2009).

Although the condemnee claimed that the verdict was contrary to law and the evidence because the Department of Transportation's (DOT) expert failed to give any value to the condemnee's loss of access to approximately 3,800 feet of frontage, the condemnee's claim failed because the record reflected that the expert explained that any access to the DOT bypass along the approximately 3,811 feet of frontage taken along with the 13.022 acres would be limited by the bypass itself and that the condemnee never owned access rights to the bypass. Moreover, the expert explained further that the frontage had been considered in the valuation of the property. RNW Family P'ship, Ltd. v. DOT, 307 Ga. App. 108, 704 S.E.2d 211 (2010).

Motion for a new trial was properly denied because: (1) the evidence was sufficient to support the crimes for which the defendant was convicted; (2) the trial court did not abuse the court's discretion by denying the defendant's motion for a change of venue due to pretrial publicity because the excusal percentage of jurors for cause was not indicative of such prejudice as would have mandated a change in venue; (3) no showing of an improper communication from a bailiff to the jury was shown; (4) the trial court properly instructed the jury and did not err in denying the defendant's requested instructions; and (5) a cumulative error rule was inapplicable. Gear v. State, 288 Ga. 500, 705 S.E.2d 632 (2011).

Trial court did not err in denying the defendant's motion for new trial pursuant to O.C.G.A. §§ 5-5-20 and 5-5-21 because the jury was authorized to conclude that the defendant was guilty of child molestation in violation of O.C.G.A. § 16-6-4(a)(1); under the Child Hearsay Statute, former O.C.G.A. § 24-3-16 (see now O.C.G.A. § 24-8-820), the jury was entitled to consider the victim's out-of-court statements as substantive evidence, and the victim was made available

at trial for confrontation and cross-examination, at which time the jury was allowed to judge the credibility of the victim's accusations. Hargrave v. State, 311 Ga. App. 852, 717 S.E.2d 485 (2011).

Trial court did not err in denying the defendant's motion for new trial because the evidence was sufficient to authorize the defendant's conviction for possessing more than one ounce of marijuana; the defendant was presumed to have exclusive possession and control of the marijuana that a police officer found in the car the defendant was driving. Nix v. State, 312 Ga. App. 43, 717 S.E.2d 550 (2011).

Trial court did not err in denying the defendant's motion for a new trial because the evidence established the defendant's commission of child molestation, O.C.G.A. § 16-6-4(a), and aggravated child molestation, O.C.G.A. § 16-6-4(c), and supported the verdict; the victim's prior inconsistent statements concerning the defendant's acts of sodomy were allowed to serve as substantive evidence of the defendant's guilt. Stepho v. State, 312 Ga. App. 495, 718 S.E.2d 852 (2011).

Trial court did not err in denying the defendant's motion for new trial because the evidence was sufficient for a rational factfinder to find the defendant guilty beyond a reasonable doubt of false imprisonment, O.C.G.A. § 16-5-41(a), burglary, O.C.G.A. § 16-7-1(a), and aggravated assault, O.C.G.A. § 16-5-21(a)(2); defense counsel thoroughly cross-examined the victim, the responding officers, and the investigator regarding the victim's demeanor after the attack, the victim's description of the attack and the attacker, and the inconsistencies between what the victim told each of them, and determinations of witness credibility and the weight to give the evidence presented was solely within the province of the jury. Pennington v. State, 313 Ga. App. 764, 723 S.E.2d 13 (2012).

When motion for new trial denied. — It is correct for the trial court to deny a motion for new trial when it cannot be said that the verdict of the jury was contrary to the evidence and without evidence to support the verdict. Hill Aircraft & Leasing Corp. v. Tyler, 161 Ga. App. 267, 291 S.E.2d 6 (1982).

If any evidence supports finding of jury, and no error otherwise committed, verdict will stand. Bill Jones Motors, Inc. v. Mitchell, 100 Ga. App. 185, 110 S.E.2d 555 (1959).

In determining whether there is any evidence supporting verdict, conflicts are resolved to favor verdict. Drake v. State, 241 Ga. 583, 247 S.E.2d 57 (1978), cert. denied, 440 U.S. 928, 99 S. Ct. 1265, 59 L. Ed. 2d 485 (1979).

It is not error to refuse new trial if verdict is supported by evidence. Hornbuckle v. State, 76 Ga. App. 111, 45 S.E.2d 98 (1947).

When second trial necessary anyway. — New trial is inappropriate when same verdict and judgment will necessarily result on second trial. Georgia Power Co. v. City of Decatur, 181 Ga. 187, 182 S.E. 32 (1935), aff'd sub nom. Georgia Ry. & Elec. Co. v. City of Decatur, 297 U.S. 620, 56 S. Ct. 606, 80 L. Ed. 925 (1936).

When evidence authorizes verdict for either party. — When transcript contains evidence which, if believed by the jury, was quite sufficient to authorize the verdict, it is of no moment that evidence would also have authorized the verdict in some amount for the plaintiff since the jury weighed the evidence and made the jury's choice which is the jury's duty and function. Daniels v. Hartley, 120 Ga. App. 294, 170 S.E.2d 315 (1969).

Verdict contrary to law and issues raised by pleadings. — That verdict is contrary to law and contrary to issues made by pleadings is a question which may be raised by motion for new trial. Hubbard v. Whatley, 200 Ga. 751, 38 S.E.2d 738 (1946).

Verdict in favor of party whose evidence does not correspond with pleadings justifies new trial. Western & Atl. R.R. v. Hunt, 116 Ga. 448, 42 S.E. 785 (1902).

Fact that verdict is large will not prevent approval if any evidence supports the verdict. Southern Ry. v. Brock, 132 Ga. 858, 64 S.E. 1083 (1909).

Verdict in amount within range covered by testimony will not be set aside as unsupported by evidence, though the verdict may not correspond with contentions of either party. Langston v.

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Langston, 42 Ga. App. 143, 155 S.E. 494 (1930).

Counsel's remark not grounds for mistrial. — Denial of defendant's motion for a new trial based on the prosecutor's remark in closing that the defendant had gone into the robbery business was proper and the remark was not the basis for a mistrial under O.C.G.A. § 5-5-20 since there was sufficient evidence to convict defendant of robbery and the jury's verdict was not contrary to the evidence and principles of justice and equity. Phillips v. State, 259 Ga. App. 331, 577 S.E.2d 25 (2003).

No abuse in granting new trial. — Because there was expert evidence that supported a finding of negligence and causation against physicians and their employers in a medical malpractice action by a patient, a verdict in the physicians' favor was not absolutely demanded, and the trial court did not abuse the court's discretion in granting the patient's motion for new trial, pursuant to O.C.G.A. §§ 5-5-20 and 5-5-50, after the jury rendered a verdict in favor of the physicians. Bhansali v. Moncada, 275 Ga. App. 221, 620 S.E.2d 404 (2005).

After a jury entered a special verdict finding that the corporation had notice of an earlier deed securing property in the corporation's declaratory judgment action to determine the priority of the corporation's deed over the earlier deed, the corporation's motion for a new trial was properly granted on the ground that the recordation of the earlier deed was so defective as to provide no notice under O.C.G.A. § 44-14-39; the trial court did not abuse the court's discretion in granting a new trial, even though the court's grant of judgment notwithstanding the verdict was improper on the ground that evidence supported the jury's verdict, because the evidence, construed in the corporation's favor as required under O.C.G.A. § 5-5-20, did not absolutely demand a verdict that the corporation had actual notice of the earlier deed. Page v. McKnight Constr., 282 Ga. App. 571, 639 S.E.2d 381 (2006).

Premature motion properly denied. — As a deed grantor's motion for a new trial based on the weight of the evidence pursuant to O.C.G.A. §§ 5-5-20 and 5-5-21 was premature, it was void and a trial court's denial thereof was not error; further, there could be no review thereof on appeal as an independent error. Dae v. Patterson, 295 Ga. App. 818, 673 S.E.2d 306 (2009).

2. Adequacy of Damages

Determination is within discretion of trial court. — Determination of question as to whether verdict for damages is inadequate in legal sense, lies within the sound discretion of the trial court. Brown v. Service Coach Lines, 71 Ga. App. 437, 31 S.E.2d 236 (1944).

Mere difference of opinion as to amount of recovery. — New trial should not be granted based on mere difference of opinion between appellate court and jury as to amount of recovery in action of tort for unliquidated damages. Something more must be disclosed to warrant interference when substantial damages have been returned. Brown v. Service Coach Lines, 71 Ga. App. 437, 31 S.E.2d 236 (1944).

Bias, passion, prejudice, or mistake must appear to justify setting aside. — When amount of verdict, though less than appellate court would have approved, did not afford such evidence of bias, passion, prejudice, or mistake as to justify setting the verdict aside as inadequate, appellate court must affirm the verdict. Brown v. Service Coach Lines, 71 Ga. App. 437, 31 S.E.2d 236 (1944).

When judge can conscientiously acquiesce in verdict, trial judge should approve verdict. — If trial court can conscientiously acquiesce in amount of verdict, though it may not exactly accord with the court's best judgment or though some other finding might seem somewhat more satisfactory to the judge's mind, and if the judge's sense of justice is reasonably satisfied, the judge should, in absence of some material error of law affecting trial, approve the verdict, and the appellate court will uphold the judge in so doing, and will not say that the judge abused the judge's discretion. Brown v. Service Coach

Lines, 71 Ga. App. 437, 31 S.E.2d 236 (1944).

Inadequacy of damages for pain and suffering. — Amount of damages returned by jury in verdict, for pain and suffering, sustained because of alleged negligence, being governed by no other standard than enlightened conscience of impartial jurors, the question of inadequacy of verdict is not one which can be raised by general grounds in motion for new trial. Trammell v. Atlanta Coach Co., 51 Ga. App. 705, 181 S.E. 315 (1935); Brown v. Garcia, 154 Ga. App. 837, 270 S.E.2d 63 (1980).

Exorbitant damages. — Trial court erred in denying a railroad's motion for a new trial when the jury verdict awarding an injured employee substantially more than the employee requested for pain and suffering was clearly intended to punish the railroad, which was impermissible under the Federal Employers' Liability Act, 45 U.S.C. § 51 et seq., as: (1) the jury found that the employee was 50 percent negligent; (2) the employee's condition had improved, and the employee was attending school, evidencing an ability to adapt to the disability and to improve the employee's economic situation; and (3) the employee's counsel infected closing argument with a plea to the jury to punish the railroad or to reach a verdict that would affect the jury's conduct. Norfolk S. Ry. v. Blackmon, 262 Ga. App. 266, 585 S.E.2d 194 (2003).

Appeal from Denial of New Trial

Appellate court does not have same discretion as trial judge who approved verdict. Southern Ry. v. Brock, 132 Ga. 858, 64 S.E. 1083 (1909).

Supreme Court does not have discretion to grant new trial on grounds enumerated in section; it can only review evidence to determine if there is any evidence to support verdict. Drake v. State, 241 Ga. 583, 247 S.E.2d 57 (1978), cert. denied, 440 U.S. 928, 99 S. Ct. 1265, 59 L. Ed. 2d 485 (1979).

Appellate courts have no discretion regarding new trials for verdict against weight of evidence. Gledhill v. Brown, 44 Ga. App. 670, 162 S.E. 824 (1932).

Trial judge's discretion regarding adequacy of damages, will not be interfered with by appellate courts absent manifest abuse. Brown v. Service Coach Lines, 71 Ga. App. 437, 31 S.E.2d 236 (1944).

When the trial judge refuses to order a new trial on ground of inadequate damages in tort action, this court will interfere with that discretion only in case of manifest abuse. Brown v. Service Coach Lines, 71 Ga. App. 437, 31 S.E.2d 236 (1944).

First grant of new trial is not normally reviewable by appellate courts. — First grant of new trial to either party will never be reversed by appellate courts, unless verdict set aside by trial judge was absolutely demanded. Gledhill v. Brown, 44 Ga. App. 670, 162 S.E. 824 (1932).

Appellate courts are powerless to interfere with first grant of new trial unless verdict set aside was demanded. Garrett v. Garrett, 128 Ga. App. 594, 197 S.E.2d 739 (1973).

Ruling on motion for new trial under this section or former Code 1933, § 70-206 (see O.C.G.A. § 5-5-21) does not amount to any ruling on evidence as a matter of law, and as a result, first grant of new trial is not normally reviewable by appellate courts. Ricketts v. Williams, 240 Ga. 148, 240 S.E.2d 41 (1977), vacated on other grounds, 438 U.S. 902, 98 S. Ct. 3119, 57 L. Ed. 2d 1145 (1978).

When trial judge discharges duty to review evidence, Supreme Court cannot review factual issues. — When trial judge has discharged the judge's duty to review evidence, the Supreme Court has no power under the Constitution to pass judgment on issues of fact made by evidence. Merritt v. State, 190 Ga. 81, 8 S.E.2d 386 (1940).

Presumption that trial judge knew rule as to obligation to approve jury's verdict. — In interpreting language of order overruling motion for new trial, the appellate court must presume that the trial judge knew rule as to obligation to approve jury's verdict devolving upon the judge, and that in overruling motion the judge did exercise this discretion, unless language of order indicates to contrary and that court agreed to verdict against the judge's own judgment and against

Appeal from Denial of New Trial (Cont'd)

dictates of the judge's own conscience, merely because the judge did not feel that the judge had the duty or authority to override findings of the jury upon disputed issues of fact. Brown v. Service Coach Lines, 71 Ga. App. 437, 31 S.E.2d 236 (1944).

When there is doubt, appellate courts must decide in favor of verdicts. Branch v. Anderson, 47 Ga. App. 858, 171 S.E. 771 (1933).

Appellate court cannot set aside verdict on general grounds trial judge could have relied upon. — In considering case in which verdict of jury has approval of trial judge, the appellate court is without power to set verdict aside on general grounds upon which the trial judge, in exercise of discretion vested in the judge, might have set the verdict aside. Gledhill v. Brown, 44 Ga. App. 670, 162 S.E. 824 (1932).

Appeal from denial of new trial on general grounds raises question whether evidence supported verdict. — When appeal is from judgment denying party's motion for new trial and motion is based solely on general grounds, only query for reviewing court is whether evidence supported verdict. Daniels v. Hartley, 120 Ga. App. 294, 170 S.E.2d 315 (1969).

Any of general grounds for new trial are addressed to the discretion of the trial judge and on appeal these general grounds pose the sole question, was there any evidence to support verdict. Burnet v. Bazemore, 122 Ga. App. 73, 176 S.E.2d 184 (1970).

Setting aside verdict on evidentiary grounds. — Court of Appeals can set aside verdict on evidentiary grounds only when totally unsupported. Court of Appeals was established to correct errors of law, and can only set verdict aside, on evidentiary grounds, as being contrary to law, in that the verdict lacks any evidence by which the verdict could be supported. Gledhill v. Brown, 44 Ga. App. 670, 162 S.E. 824 (1932).

Verdict of jury which has approval of trial judge will not be set aside by Court of Appeals if the verdict is supported by any evidence. Branch v. Anderson, 47 Ga. App. 858, 171 S.E. 771 (1933).

While appellate division of Municipal Court of Atlanta may, as any other court of review, grant a new trial when there is no evidence to support the verdict, since there was some evidence on which the verdict could be based, and such verdict had the approval of the trial judge, the appellate division of the Municipal Court of Atlanta erred in granting a new trial. Turner v. Masonic Relief Ass'n, 52 Ga. App. 374, 183 S.E. 350 (1936).

When verdict is supported by some evidence and the verdict has approval of the trial judge, the verdict will not be disturbed by the appellate court as to general grounds of motion for a new trial. Western & Atl. R.R. v. Fowler, 77 Ga. App. 206, 47 S.E.2d 874 (1948).

When verdict is supported by some evidence and is approved by the trial court, the Court of Appeals is without authority to interfere. McDowell v. State, 78 Ga. App. 116, 50 S.E.2d 633 (1948); Humphries v. State, 78 Ga. App. 139, 50 S.E.2d 799 (1948); Newsome v. State, 78 Ga. App. 332, 50 S.E.2d 828 (1948).

Although evidence might authorize different verdict, when there is enough to support verdict found, judgment of trial court refusing new trial on general grounds will not be disturbed. Wright v. State, 76 Ga. App. 483, 46 S.E.2d 516 (1948); Marcus v. State, 76 Ga. App. 581, 46 S.E.2d 770 (1948); Ramer v. State, 76 Ga. App. 678, 47 S.E.2d 174 (1948); Whitfield v. Wheeler, 76 Ga. App. 857, 47 S.E.2d 658 (1948), overruled on other grounds, Caskey v. Underwood, 89 Ga. App. 418, 79 S.E.2d 558 (1953).

In passing upon general grounds of motion for new trial, appellate court will not disturb trial court's refusal to grant new trial if there is any evidence to support the judgment. Hopkins v. Sicro, 107 Ga. App. 691, 131 S.E.2d 243 (1963).

Defendant could challenge the sufficiency of the evidence by appealing the denial of the defendant's motion for new trial, even though the defendant did not invoke such a ruling from the court at trial. Jones v. State, 219 Ga. App. 780, 466 S.E.2d 667 (1996).

Denial of motion for new trial not to be interfered with absent abuse of discretion. — Denial of ordinary motion for new trial, like denial of extraordinary motion, when based upon conflicting evidence, will not be corrected absent abuse of discretion. Sumner v. Sumner, 186 Ga. 390, 197 S.E. 833 (1938).

Denial of defendant's motion for new trial was reversed as the defendant's right to be present at trial under Ga. Const. 1983, Art. I, Sec. I, Para. XII was violated when the trial court questioned a juror in chambers without defense counsel or the prosecutor present, dismissed the juror, and replaced the juror with an alternate; the defendant did not acquiesce in the illegal proceedings and repudiated counsel's silent waiver of the juror's rights at the juror's first opportunity, the hearing on a motion for a new trial, at which the defendant was represented by new counsel. Sammons v. State, 279 Ga. 386, 612 S.E.2d 785 (2005).

Although the defendant received effective assistance from trial counsel, because the defendant did not waive or abandon the defendant's claims under O.C.G.A. §§ 5-5-20 and 5-5-21, the trial court erred in denying the defendant's motion for new trial. Hartley v. State, 299 Ga. App. 534, 683 S.E.2d 109 (2009).

Denial of defendant's motion for new trial upheld. — It was not an abuse of discretion to deny a new trial motion brought by a trustee who was found to have breached the trustee's fiduciary duty to trust beneficiaries by making distributions to a cotrustee under a trust's encroachment provision because the trustee breached the trustee's duty to protect the trust corpus as: (1) the trustee inconsistently required the cotrustee to provide supporting evidence for corpus distributions and let the cotrustee exceed an allotted budget; and (2) the beneficiaries were damaged by the resulting reduction in trust corpus. Reliance Trust Co. v. Candler, 315 Ga. App. 495, 726 S.E.2d 636 (2012).

Even though the trial court did not explicitly cite O.C.G.A. §§ 5-5-20 and 5-5-21, the language used by the trial court in the court's discretionary determinations that the evidence at trial was not "sufficiently close" to warrant the grant of a new trial as to either the guilt/innocence or the sentencing verdicts indicated that the trial court did in fact exercise the court's discretion under the relevant statutory provisions. Brockman v. State, 739 S.E.2d 332, No. S12P1490, 2013 Ga. LEXIS 201 (2013).

When the evidence supports judgment rendered without jury. — When the evidence is sufficient to support the judgment of the court trying the case by agreement without intervention of the jury, on a motion for new trial, the verdict will not be disturbed by the appellate court. Carter v. State, 77 Ga. App. 60, 47 S.E.2d 815 (1948).

Function of appellate court in reviewing verdict. — Barring error by the trial court, the jury's verdict must be upheld unless it can be shown that there is no substantial evidence to support the verdict, considering the evidence in the light most favorable to appellees, and clothing the verdict with all reasonable inferences to be deduced therefrom. Thus, the United States Court of Appeals' sole function is to ascertain if there is a rational basis in the record for the jury's verdict. Columbus Bank & Trust Co. v. Cohn, 644 F.2d 1040 (5th Cir. 1981).

Evidence viewed in light most favorable to upholding verdict. — It is of no consequence on review of the denial of a motion for new trial based on the sufficiency of the evidence that the evidence adduced at trial would have authorized a verdict for either party. A reviewing court must view the evidence in a light most favorable to upholding the jury's verdict and any evidence which supports the jury's verdict is sufficient to sustain the trial court's denial of a motion for new trial based on the sufficiency of the evidence. Clark v. United Ins. Co. of Am., 199 Ga. App. 1, 404 S.E.2d 149 (1991).

RESEARCH REFERENCES

Am. Jur. 2d. — 58 Am. Jur. 2d, New Trial, § 245 et seq.

C.J.S. — 23 C.J.S., Criminal Law, §§ 1972, 1973. 66 C.J.S., New Trial, § 117 et seq.

ALR. — Abuse of witness by counsel as ground for new trial or reversal, 4 ALR 414.

Power of court to reduce or increase verdict without giving party affected the option to submit to a new trial, 53 ALR 779; 95 ALR 1163.

Power of trial court to dismiss defendant in criminal case for insufficiency of evidence after submitting case to jury or after verdict of guilty, 131 ALR 187.

Court's power to grant new trial as to both defendants, over their objection, because of verdict holding employer and absolving employee for latter's negligence, 16 ALR2d 969.

Propriety of limiting to issue of damages alone new trial granted on ground of inadequacy of damages awarded, 29 ALR2d 1199.

Prejudicial effect of misconduct by one other than juror during authorized view by jury in civil case, 45 ALR2d 1128.

Verdict for money judgment which finds for party for ambiguous or no amount, 49 ALR2d 1328.

Disclosure in criminal case of juror's political, racial, religious, or national origin prejudice against accused or witnesses as ground for new trial or reversal, 91 ALR2d 1120.

Discussion, during jury deliberation, of possible insurance coverage as prejudicial misconduct, 47 ALR3d 1299.

Standard for granting or denying new trial in state criminal case on basis of recanted testimony—modern cases, 77 ALR4th 1031.

Propriety of limiting to issue of damages alone new trial granted on ground of inadequacy of damages—modern cases, 5 ALR5th 875.

Excessiveness or adequacy of damages awarded for injuries causing mental or psychological damage, 52 ALR5th 1.

Inattention of juror from sleepiness or other cause as ground for reversal or new trial, 59 ALR5th 1.

5-5-21. Verdict against weight of evidence.

The presiding judge may exercise a sound discretion in granting or refusing new trials in cases where the verdict may be decidedly and strongly against the weight of the evidence even though there may appear to be some slight evidence in favor of the finding. (Ga. L. 1853-54, p. 46, § 3; Code 1863, § 3641; Code 1868, § 3666; Code 1873, § 3717; Code 1882, § 3717; Civil Code 1895, § 5482; Penal Code 1895, § 1058; Civil Code 1910, § 6087; Penal Code 1910, § 1085; Code 1933, § 70-206.)

Law reviews. — For survey of cases dealing with criminal law and criminal procedure from June 1, 1977 through May 1978, see 30 Mercer L. Rev. 27 (1978).

JUDICIAL DECISIONS

Analysis

General Consideration
Judgment Notwithstanding Verdict
Application
Appeal or Certiorari From Denial of New Trial

General Consideration

General grounds for new trial are addressed to discretion of trial judge. Burnet v. Bazemore, 122 Ga. App. 73, 176 S.E.2d 184 (1970).

Authority to grant new trial. — No court except the trial court is vested by O.C.G.A. §§ 5-5-20 and 5-5-21 with the authority to grant a new trial in a matter relating to the weight of the evidence. Clark v. State, 249 Ga. App. 97, 547 S.E.2d 734 (2001).

Defendant claimed on appeal that a conviction for the unauthorized possession of drugs by an inmate, in violation of O.C.G.A. § 42-5-18(b), was contrary to law, contrary to the evidence, and against the weight of the evidence, and that, on that basis, it was error for the trial court to deny a motion for a new trial, but, under O.C.G.A. § 5-5-21, only the trial court had the authority to grant a new trial on the ground that the verdict was contrary to the weight of the evidence. Collinsworth v. State, 276 Ga. App. 58, 622 S.E.2d 419 (2005).

Defendant's argument that the verdict convicting the defendant of the involuntary manslaughter of defendant's 17-month-old son was decidedly and strongly against the weight of the evidence could only be made to a trial court in a motion for new trial, not to an appellate court on appeal. The appellate court did not have the discretion to grant a new trial on these grounds. Lewis v. State, 304 Ga. App. 831, 698 S.E.2d 365 (2010).

Discretion rests solely with trial judge. — Discretion to grant or refuse motions for new trials because verdict is strongly and decidedly against weight of evidence rests solely in presiding judge. Gledhill v. Brown, 44 Ga. App. 670, 162 S.E. 824 (1932); Turner v. Masonic Relief Ass'n, 52 Ga. App. 374, 183 S.E. 350 (1936).

Trial judge alone has the authority to grant new trial on ground that the verdict is strongly and decidedly against weight of evidence. Josey v. State, 197 Ga. 82, 28 S.E.2d 290 (1943); Wright v. State, 173 Ga. App. 408, 326 S.E.2d 584 (1985); Hood v. State, 192 Ga. App. 150, 384 S.E.2d 242 (1989); Dixon v. State, 192 Ga. App. 845, 386 S.E.2d 719 (1989); Madaris v. State, 207 Ga. App. 145, 427 S.E.2d 110 (1993).

Duty upon trial judge to exercise discretion. — Motion for a new trial on grounds set forth in former Code 1933, §§ 70-202 and 70-206 (see O.C.G.A. §§ 5-5-520 and 5-5-21) addressed the sound legal discretion of the trial judge and the law imposes upon the judge the duty of exercising this discretion. Kendrick v. Kendrick, 218 Ga. 460, 128 S.E.2d 496 (1962); Ricketts v. Williams, 240 Ga. 148, 240 S.E.2d 41 (1977), vacated on other grounds, 438 U.S. 902, 98 S. Ct. 3119, 57 L. Ed. 2d 1145 (1978).

Trial court failed to apply the proper standard in assessing the weight of the evidence as requested by the defendant in the defendant's motion for new trial under O.C.G.A. § 5-5-21. The issue was not whether the evidence was sufficient to support the verdict, but whether the verdict was against the weight of the evidence. Manuel v. State, 289 Ga. 383, 711 S.E.2d 676 (2011).

When faced with a motion for new trial based on general grounds, the trial court had the duty to exercise the court's discretion and weigh the evidence. The trial court did not exercise the court's discretion when the court evaluated the general grounds by applying the standard of Jackson v. Virginia, 443 U.S. 307 (1979) to a motion for new trial based on the general grounds embodied in O.C.G.A. §§ 5-5-20 and 5-5-21. Walker v. State, 292 Ga. 262, 737 S.E.2d 311 (2013).

Discretion to grant new trials should be exercised with caution. Ricketts v. Williams, 242 Ga. 303, 248 S.E.2d 673 (1978), vacated on other grounds, 438 U.S. 902, 98 S. Ct. 3119, 57 L. Ed. 2d 1145 (1978).

New trial should be granted only when evidence preponderates heavily against verdict. — Power to grant new trial under this section should be invoked only in exceptional cases in which evidence preponderates heavily against verdict. Ricketts v. Williams, 242 Ga. 303, 248 S.E.2d 673 (1978), vacated on other grounds, 438 U.S. 902, 98 S. Ct. 3119, 57 L. Ed. 2d 1145 (1978) (see O.C.G.A. § 5-5-20).

Discretion duty applies no matter how many verdicts have gone against

General Consideration (Cont'd)

movant. — In all cases when motion for new trial is being passed on by trial judge, no matter how many verdicts have gone against losing party, law places on the judge a solemn responsibility to exercise discretion in granting or refusing new trial. Mills v. State, 188 Ga. 616, 4 S.E.2d 453 (1939).

On motion for new trial, court may weigh evidence and consider credibility of witnesses. If court reaches conclusion that verdict is contrary to weight of evidence and that miscarriage of justice may have resulted, verdict may be set aside and new trial granted. Ricketts v. Williams, 242 Ga. 303, 248 S.E.2d 673 (1978), cert. denied, 439 U.S. 1135, 99 S. Ct. 1059, 59 L. Ed. 2d 97 (1979).

Trial court did not apply the wrong standard in denying a defendant's motion for new trial by noting, in response to the defendant's argument that the eyewitnesses were not credible, that the credibility of the witnesses was for the jury unless "they were just way in left field." Tolbert v. State, 313 Ga. App. 46, 720 S.E.2d 244 (2011).

All conflicts are resolved to favor verdict in determining whether there is any evidence supporting the verdict. Drake v. State, 241 Ga. 583, 247 S.E.2d 57 (1978), cert. denied, 440 U.S. 928, 99 S. Ct. 1265, 59 L. Ed. 2d 485 (1979).

Inference in favor of verdict. — After verdict, in passing upon motion for new trial, that view of the evidence which is most unfavorable to the accused must be taken, for every presumption and every inference is in favor of the verdict. Brown v. State, 71 Ga. App. 522, 31 S.E.2d 85 (1944).

Motion for new trial must be made before trial court. — Argument that the verdict was against the weight of the evidence may only be made to a trial court in a motion for new trial and not to the appellate court on appeal as the appellate court has no discretion to grant a new trial based on such a claim. Teele v. State, 319 Ga. App. 448, 738 S.E.2d 277 (2012).

Cited in Richmond & D.R.R. v. Allison, 89 Ga. 567, 16 S.E. 116 (1892); Western & Atl. R.R. v. Hughes, 278 U.S. 496, 49 S. Ct. 231, 73 L. Ed. 473 (1929); Jackson Disct. Co. v. Merck, 50 Ga. App. 381, 178 S.E. 208 (1935); Candler v. Smith, 50 Ga. App. 667, 179 S.E. 395 (1935); Rogers v. Rogers, 52 Ga. App. 548, 184 S.E. 404 (1936); Southern Ry. v. Lunsford, 57 Ga. App. 53, 194 S.E. 602 (1937); Carter v. Powell, 57 Ga. App. 360, 195 S.E. 466 (1938); Davis v. State, 202 Ga. 13, 41 S.E.2d 414 (1947); Halliburton v. Collier, 75 Ga. App. 316, 43 S.E.2d 339 (1947); Law v. State, 92 Ga. App. 604, 89 S.E.2d 550 (1955); Martin v. State, 95 Ga. App. 519, 98 S.E.2d 105 (1957); O'Quinn v. James, 127 Ga. App. 94, 192 S.E.2d 507 (1972); Kramer v. Hopper, 234 Ga. 395, 216 S.E.2d 119 (1975); Wilson v. State, 145 Ga. App. 33, 243 S.E.2d 304 (1978); Hembree v. Ideal Bldrs., Inc., 158 Ga. App. 574, 281 S.E.2d 328 (1981); Johnson v. Wills Mem. Hosp. & Nursing Home, 178 Ga. App. 459, 343 S.E.2d 700 (1986); Crump v. State, 183 Ga. App. 43, 357 S.E.2d 863 (1987); Glenridge Unit Owners Ass'n v. Felton, 183 Ga. App. 858, 360 S.E.2d 418 (1987); Stinson v. State, 185 Ga. App. 543, 364 S.E.2d 910 (1988); Towns v. State, 185 Ga. App. 545, 365 S.E.2d 137 (1988); Hart v. Fortson, 263 Ga. 389, 435 S.E.2d 45 (1993); Willis v. State, 263 Ga. 597, 436 S.E.2d 204 (1993); United Servs. Auto. Ass'n v. Gottschalk, 212 Ga. App. 88, 441 S.E.2d 281 (1994); Harper v. State, 213 Ga. App. 611, 445 S.E.2d 300 (1994); Leeks v. State, 226 Ga. App. 227, 483 S.E.2d 691 (1997); In re C.I.W., 229 Ga. App. 481, 494 S.E.2d 291 (1997); High v. Parker, 234 Ga. App. 675, 507 S.E.2d 530 (1998); Taylor v. State, 259 Ga. App. 457, 576 S.E.2d 916 (2003); Mitchell v. State, 262 Ga. App. 759, 586 S.E.2d 686 (2003); Newton v. State, 261 Ga. App. 762, 583 S.E.2d 585 (2003); Celestin v. State, 296 Ga. App. 727, 675 S.E.2d 480 (2009); Delgiudice v. State, 308 Ga. App. 397, 707 S.E.2d 603 (2011); Hargrave v. State, 311 Ga. App. 852, 717 S.E.2d 485 (2011); Nix v. State, 312 Ga. App. 43, 717 S.E.2d 550 (2011); Stepho v. State, 312 Ga. App. 495, 718 S.E.2d 852 (2011).

Judgment Notwithstanding Verdict

New trial may be granted without demanding a judgment n.o.v. for the weight of evidence may be on one side, yet

there be some to the contrary. Burnet v. Bazemore, 122 Ga. App. 73, 176 S.E.2d 184 (1970).

Motion for judgment n.o.v. may be denied without precluding grant of new trial; for though there may be some evidence, the verdict may still be against the weight of the evidence. Burnet v. Bazemore, 122 Ga. App. 73, 176 S.E.2d 184 (1970).

Denial of new trial on general grounds unexcepted to preclude judgment notwithstanding verdict on appeal. — When trial judge denies motion for new trial on general grounds, the judge finds that verdict is not against weight of evidence and therefore, of necessity, that there is evidence to support the verdict. That determination being unexcepted to, the law of the case is established and the appellate court cannot find on motion for judgment n.o.v. that there is no evidence to support verdict or that evidence demands a verdict for the movant. Burnet v. Bazemore, 122 Ga. App. 73, 176 S.E.2d 184 (1970).

Application

Proper standard of review. — In a prosecution for, inter alia, hijacking a motor vehicle, a trial court incorrectly applied the standard in Jackson v. Virginia, 443 U.S. 307 (1979), when deciding a defendant's challenge in a motion for a new trial as to the weight of the evidence; the trial court had to reconsider the claim pursuant to O.C.G.A. § 5-5-21. Rutland v. State, 296 Ga. App. 471, 675 S.E.2d 506 (2009).

Jury's fact finding not final until verdict approved when motion for new trial is made. — No finding of fact by jury is final or conclusive when motion for new trial is presented, unless and until that verdict is approved by trial judge. Mills v. State, 188 Ga. 616, 4 S.E.2d 453 (1939).

Trial court's written order granting a new trial on the general grounds was in compliance with the requirements of O.C.G.A. § 5-5-51. Jackson Nat'l Life Ins. Co. v. Snead, 231 Ga. App. 406, 499 S.E.2d 173 (1998).

Denial of new trial becomes law of case. — Absent specific appeal from ruling on motion for new trial or enumerating the ruling as error, denial of motion becomes law of case as to all grounds contained therein. Burnet v. Bazemore, 122 Ga. App. 73, 176 S.E.2d 184 (1970).

No double jeopardy bar. — Grant of new trial under former Code 1933, § 70-202 (see O.C.G.A. § 5-5-20) or former Code 1933, § 70-206 (see O.C.G.A. § 5-5-21) did not result in statutory double jeopardy bar under Ga. L. 1968, p. 1249, § 1 (see O.C.G.A. § 16-1-8(d)(2)). Ricketts v. Williams, 240 Ga. 148, 240 S.E.2d 41 (1977), vacated on other grounds, 438 U.S. 902, 98 S. Ct. 3119, 57 L. Ed. 2d 1145 (1978).

Successful motion for new trial at trial level, precludes later plea of former jeopardy. — Motion for new trial, if granted at trial level, is a forfeiture of any right to plead former jeopardy because of grant of new trial. Ricketts v. Williams, 240 Ga. 148, 240 S.E.2d 41 (1977), vacated on other grounds, 438 U.S. 902, 98 S. Ct. 3119, 57 L. Ed. 2d 1145 (1978).

Grant of new trial under section not same as finding evidence legally insufficient. — Grant of new trial by trial court on ground that verdict is against the weight of evidence under this section, does not amount to a finding that evidence is legally insufficient, and does not thereby bar a second trial under the double jeopardy clause of the U.S. Constitution. Ricketts v. Williams, 242 Ga. 303, 248 S.E.2d 673 (1978), cert. denied, 439 U.S. 1135, 99 S. Ct. 1059, 59 L. Ed. 2d 97 (1979).

Distinction between legally insufficient evidence and verdict against weight of evidence. — There is a distinction at law between a decision holding the evidence legally insufficient and a discretionary decision of the trial court that the verdict is against the weight of the evidence. Ricketts v. Williams, 242 Ga. 303, 248 S.E.2d 673 (1978), cert. denied, 439 U.S. 1135, 99 S. Ct. 1059, 59 L. Ed. 2d 97 (1979).

When some evidence supports verdict. — When trial judge has exercised discretion vested in the judge by law, and there is some evidence to support the verdict, the judgment overruling general grounds of motion for new trial is not

Application (Cont'd)

error. Kendrick v. Kendrick, 218 Ga. 460, 128 S.E.2d 496 (1962).

Because the state proved venue through testimony that the address of the crime scene was in a specific county and because counsel's actions were within the bounds of reasonable professional conduct, the trial court properly denied the defendant's motion for a new trial. Henry v. State, 279 Ga. 615, 619 S.E.2d 609 (2005).

Expert evidence. — Driver's motion for a new trial was properly denied when an expert witness in the field of accident reconstruction opined that the second driver's collision was unavoidable since the driver changed lanes immediately in front of the second driver's vehicle. Flynn v. Mack, 259 Ga. App. 882, 578 S.E.2d 488 (2003).

In a suit when plaintiff mulch seller sought money owed for plastic mulch, and defendants, two individuals doing business as a company, counterclaimed regarding crop damage due to the mulch deteriorating prematurely, the trial court did not abuse the court's discretion in denying the company's motion for a new trial after the jury returned a verdict in the seller's favor because, despite the company's claim on appeal that the evidence supported a finding of breach of express warranty, the testimony of the seller's vice-president that the seller advised customers on the order form that it could not provide a warranty, provided some evidence to support the verdict. McLeod v. Robbins Ass'n, 260 Ga. App. 347, 579 S.E.2d 748 (2003).

Inadequacy of damages for pain and suffering. — Amount of damages returned by jury in verdict, for pain and suffering, sustained because of alleged negligence, being governed by no other standard than enlightened conscience of impartial jurors, the question of inadequacy of verdict is not one which can be raised by general grounds in motion for new trial. Trammell v. Atlanta Coach Co., 51 Ga. App. 705, 181 S.E. 315 (1935); Brown v. Garcia, 154 Ga. App. 837, 270 S.E.2d 63 (1980).

Improper award of damages. — Trial court erred in denying defendants' motion for a new trial pursuant to O.C.G.A. § 5-5-21 in an action by a produce company and a storage company for damages which arose from an alleged joint venture to grow onions, and the packing, grading, and storage of onions thereafter; the trial court erred in awarding the produce company the total amount of lost profits for onions which the defendant did not account for, as the agreement provided that the defendants and the company would split the profits or losses evenly, and because the storage company failed to provide any evidence of the company's anticipated expenses, and therefore the company's proof of lost profits was insufficient as a matter of law. Williamson v. Strickland & Smith, Inc., 263 Ga. App. 431, 587 S.E.2d 876 (2003).

Fact that verdict is generous is not basis for setting verdict aside. — Trial judge may exercise sound discretion in refusing new trial in case where verdict may be decidedly and strongly against weight of evidence, but a generous verdict will not be set aside merely for that reason. Evans v. Caldwell, 52 Ga. App. 475, 184 S.E. 440 (1936), aff'd, 184 Ga. 203, 190 S.E. 582 (1937).

Fact that verdict is large will not prevent approval if any evidence supports the verdict. Southern Ry. v. Brock, 132 Ga. 858, 64 S.E. 1083 (1909).

Although plaintiff introduced more witnesses than defendant, judge's refusal of new trial is not error. McGriff v. McGriff, 154 Ga. 560, 115 S.E. 21 (1922).

Verdict in favor of party whose evidence does not correspond with pleadings justifies new trial. Western & Atl. R.R. v. Hunt, 116 Ga. 448, 42 S.E. 785 (1902).

Court refusal to accept verdict not abuse of discretion. — In action concerning a stock sales agreement, trial court did not abuse the court's discretion in declining to accept a jury verdict that required the defendant specifically to perform the agreement, but also recommended that bank balance and surplus stock in a warehouse be turned over to the defendant. Brown v. Reeves, 168 Ga. App. 403, 309 S.E.2d 654 (1983).

Court abuses discretion by refusing to set aside excessive award. — Trial

judge fails to exercise the discretion vested in the judge by law when the judge agrees that the amounts awarded to the plaintiff by the jury are excessive but refuses to set the amount aside or order a new trial on the basis that the judge does not want to impose the judge's opinion upon the jury. Story v. Monteith, 176 Ga. App. 853, 338 S.E.2d 32 (1985), rev'd on other grounds, 255 Ga. 528, 341 S.E.2d 1 (1986).

Newly discovered evidence and alleged perjury insufficient for new trial. — Trial court did not err in denying a defendant's motion for a new trial pursuant to O.C.G.A. §§ 5-5-20 and 5-5-21 based on newly discovered evidence because the "new" evidence—that the defendant's girlfriend got "five hundred" from the defendant in connection with the incident—did not come to the defendant's knowledge since the prior trial, and the girlfriend's alleged perjury would not in itself constitute grounds for a new trial. Jackson v. State, 294 Ga. App. 555, 669 S.E.2d 514 (2008).

As a deed grantor's motion for a new trial based on the weight of the evidence pursuant to O.C.G.A. §§ 5-5-20 and 5-5-21 was premature, the motion was void and a trial court's denial thereof was not error; further, there could be no review thereof on appeal as an independent error. Dae v. Patterson, 295 Ga. App. 818, 673 S.E.2d 306 (2009).

Motion for judgment notwithstanding verdict as motion for new trial in DUI case. — Assuming that the defendant's post-verdict motion for judgment notwithstanding the verdict was a motion for new trial, it was, nevertheless, wholly without merit because the evidence was sufficient to convict the defendant of driving under the influence (to the extent that the defendant was a less-safe driver, O.C.G.A. § 40-6-391(a)(1)) because a police officer administered two field-sobriety tests, and defendant exhibited clues of impairment on each. Masood v. State, 313 Ga. App. 549, 722 S.E.2d 149 (2012).

Appeal or Certiorari From Denial of New Trial

Appellate court does not have same discretion as trial judge who approved verdict. Southern Ry. v. Brock, 132 Ga. 858, 64 S.E. 1083 (1909).

Supreme Court does not have discretion to grant new trial on grounds enumerated in section; it can only review evidence to determine if there is any evidence to support verdict. Drake v. State, 241 Ga. 583, 247 S.E.2d 57 (1978), cert. denied, 440 U.S. 928, 99 S. Ct. 1265, 59 L. Ed. 2d 485 (1979).

Function of appellate court is to review sufficiency of evidence, not to determine the weight of the evidence. Though evidence might have authorized a different verdict or verdict is supported by only slight evidence or evidence is conflicting or preponderates against the verdict, when no material error of law appears, the appellate court will not disturb the trial judge's judgment in overruling the motion for new trial. McBowman v. Merry, 104 Ga. App. 454, 122 S.E.2d 136 (1961).

Discretion of superior court, on certiorari, to grant new trial in lower court. — Deaton v. Taliaferro, 80 Ga. App. 685, 57 S.E.2d 215 (1950).

First grant of new trial is not normally reviewable by appellate courts. — First grant of new trial to either party will never be reversed by appellate courts, unless verdict set aside by trial judge was absolutely demanded. Gledhill v. Brown, 44 Ga. App. 670, 162 S.E. 824 (1932).

Ruling on a motion for new trial under Code 1933, § 70-206 (see O.C.G.A. § 5-5-21) or former Code 1933, § 70-202 (see O.C.G.A. § 5-5-20) did not amount to any ruling on evidence as a matter of law, and as a result, first grant of new trial is not normally reviewable by appellate courts. Ricketts v. Williams, 240 Ga. 148, 240 S.E.2d 41 (1977), vacated on other grounds, 438 U.S. 902, 98 S. Ct. 3119, 57 L. Ed. 2d 1145 (1978).

Sole question on appeal from denial on general grounds. — Appellate court will not disturb trial court's refusal to grant new trial if there is any evidence at all to support the verdict, however slight, and regardless of what may be character of witnesses. McBowman v. Merry, 104 Ga. App. 454, 122 S.E.2d 136 (1961).

On appeal of denial of motion for new trial based on general grounds, sole question for appellate court is whether there is

Appeal or Certiorari From Denial of New Trial (Cont'd)

any evidence to support the verdict. Burnet v. Bazemore, 122 Ga. App. 73, 176 S.E.2d 184 (1970).

Trial judge's denial of a motion for new trial on evidentiary grounds will be reversed on appeal only if there is no evidence to support the verdict. Ricketson v. Fox, 247 Ga. 162, 274 S.E.2d 556 (1981).

Even though the trial court did not explicitly cite O.C.G.A. §§ 5-5-20 and 5-5-21, the language used by the trial court in the court's discretionary determinations that the evidence at trial was not "sufficiently close" to warrant the grant of a new trial as to either the guilt/innocence or the sentencing verdicts indicated that the trial court did in fact exercise the court's discretion under the relevant statutory provisions. Brockman v. State, 739 S.E.2d 332, No. S12P1490, 2013 Ga. LEXIS 201 (2013).

Appellate court cannot set aside verdict on general grounds trial judge could have relied upon. — In considering case in which verdict of jury has approval of trial judge, appellate court is without power to set verdict aside on general grounds upon which the trial judge, in exercise of the discretion vested in the judge, might have set the verdict aside. Gledhill v. Brown, 44 Ga. App. 670, 162 S.E. 824 (1932).

Appellate court cannot grant new trial if any evidence supports verdict. — While appellate division of Municipal Court of Atlanta may grant new trial when no evidence supports the verdict, when there is some evidence on which the verdict could be based, and such verdict has the approval of the trial judge, the appellate division of Municipal Court of Atlanta erred in granting a new trial. Turner v. Masonic Relief Ass'n, 52 Ga. App. 374, 183 S.E. 350 (1936).

Defendant could challenge the sufficiency of the evidence by appealing the denial of the defendant's motion for new trial, even though the defendant did not invoke such a ruling from the court at trial. Jones v. State, 219 Ga. App. 780, 466 S.E.2d 667 (1996).

New trial motion denied in criminal case. — Evidence was sufficient to support the convictions of murder, aggravated assault, and firearm possession in connection with the shooting death of the victim because the evidence showed that: (1) the defendant's teenage children made a cell phone call to the children's parents' home to tell the parents that the children were being followed by a motorcycle rider; (2) as the children arrived home, the defendant exited from the house with a handgun; (3) the defendant fired two warning shots at the rider when the rider rode past; (4) the rider turned the motorcycle around and when the rider rode past the house again, the defendant fired again as the defendant claimed that the rider swerved toward the defendant; and (5) this shot struck the victim, resulting in the victim's death. Gear v. State, 288 Ga. 500, 705 S.E.2d 632 (2011).

Illustrative cases. — Trial court properly denied defendant's motion for a new trial despite defendant's claim that there was insufficient evidence to prove the identity and value of the items which defendant shoplifted, as there was sufficient evidence to prove the identity and value of the items given that: (1) a store manager saw defendant place items from the manager's store into the trunk of defendant's car and identified defendant in a showup identification less than 30 minutes later, after the defendant was stopped for shoplifting at a second store; (2) the manager from the first store identified a number of items that were found in the defendant's trunk as coming from the first store based on the store code markings on the items; and (3) the packages contained pricing labels. Horne v. State, 260 Ga. App. 640, 580 S.E.2d 644 (2003).

Because a condemnee did not claim lost profits or business losses, the trial court properly limited the condemnee's evidence to the value of the property taken and consequential damages to the remainder; because the jury's valuation was within the range of the evidence, the trial court properly denied the condemnee's motion for a new trial. Thornton v. DOT, 275 Ga. App. 401, 620 S.E.2d 621 (2005).

In a suit on a guaranty, the trial court did not err in denying a guarantor's motion for a new trial on general grounds, as

the jury's award fell within the range of damages established by the evidence, the guarantor consented to the bank's modification of the terms of one of the loans, and the guarantor failed to demonstrate prejudice by the court's instructions. Beasley v. Wachovia Bank, 277 Ga. App. 698, 627 S.E.2d 417 (2006).

Although defendant received effective assistance from trial counsel, because defendant did not waive or abandon defendant's claims under O.C.G.A. §§ 5-5-20 and 5-5-21, the trial court erred in denying defendant's motion for new trial. Hartley v. State, 299 Ga. App. 534, 683 S.E.2d 109 (2009).

Trial court did not err in refusing to grant the defendant's motion for a new trial under O.C.G.A. § 5-5-21 because the evidence establishing that the defendant and the victims had engaged in a heated argument, which escalated to preparations for a physical altercation, was sufficient to sustain the defendant's voluntary manslaughter conviction, O.C.G.A. § 16-5-2(a); given the heated exchange and the defendant's belief that the defendant was in serious danger, there was sufficient provocation to excite the passion necessary for voluntary manslaughter, and the jury was authorized to reject the defendant's claim of self-defense under O.C.G.A. § 16-3-21(a) and conclude that the defendant was so influenced and excited that the defendant reacted passionately, rather than simply in self defense, when the defendant shot an unarmed victim. White v. State, 312 Ga. App. 421, 718 S.E.2d 335 (2011).

RESEARCH REFERENCES

C.J.S. — 23 C.J.S., Criminal Law, § 1973. 66 C.J.S., New Trial, §§ 117, 125, 237 et seq., 283.

ALR. — Power of court to reduce or increase verdict without giving party affected the option to submit to a new trial, 53 ALR 779; 95 ALR 1163.

Power of trial court to dismiss defendant in criminal case for insufficiency of evidence after submitting case to jury or after verdict of guilty, 131 ALR 187.

Court's power to grant new trial as to both defendants, over their objection, because of verdict holding employer and absolving employee for latter's negligence, 16 ALR2d 969.

5-5-22. Illegal admission or exclusion of evidence.

The courts may grant new trials in all cases when any material evidence may be illegally admitted to or illegally withheld from the jury over the objection of the movant. (Ga. L. 1853-54, p. 46, § 1; Code 1863, § 3638; Code 1868, § 3663; Code 1873, § 3714; Code 1882, § 3714; Civil Code 1895, § 5478; Penal Code 1895, § 1059; Civil Code 1910, § 6083; Penal Code 1910, § 1086; Code 1933, § 70-203.)

Cross references. — Evidence generally, T. 24.

Law reviews. — For article, "A Discussion of the 1957 Amendments to Rules of Practice and Procedure in Georgia," see 19 Ga. B.J. 395 (1957).

JUDICIAL DECISIONS

Analysis

General Consideration
Admission Over Objection
1. In General
2. Application
Erroneous Exclusion of Evidence

General Consideration

If evidence is admissible for any purpose, the admission of that evidence will not cause a new trial. West v. West, 199 Ga. 378, 34 S.E.2d 545 (1945).

Test as to whether illegal evidence warrants new trial. — Error of admitting illegal evidence must be such as induced or largely contributed to erroneous finding, and such error that if new trial is granted, result should in all probability be different on another trial. Daughtry v. Savannah & S. Ry., 1 Ga. App. 393, 58 S.E. 230 (1907).

When evidence of guilt is overwhelming. — When evidence is overwhelming that the defendant is guilty, even errors in admission or rejection of testimony will not operate so as to require new trial. Brannon v. State, 21 Ga. App. 328, 94 S.E. 259 (1917), cert. denied, 21 Ga. App. 825 (1918). But see Thigpen v. Batts, 199 Ga. 161, 33 S.E.2d 424 (1945).

When evidence rejected relates to matter collateral to main transaction, and evidence touching main transaction makes a clear case of guilt, rejection of such evidence does not in all cases require grant of new trial. Green v. State, 154 Ga. 117, 113 S.E. 536 (1922).

Ruling upon admissibility of testimony may be reversed by motion for new trial. Eaves v. Field & Son, 8 Ga. App. 69, 68 S.E. 556 (1910).

Admission of illegal testimony on one side will not justify illegal rebutting testimony on other. Two wrongs do not make a right. Housing Auth. v. Kolokuris, 110 Ga. App. 869, 140 S.E.2d 239 (1965).

Evidence not conforming to pleadings, admitted without objection. — Although pleadings may not present whole issue, if it is fully made by evidence without objection, it is too late, after verdict, for losing party, to make that the ground of a motion for new trial. Metropolitan Life Ins. Co. v. Hale, 47 Ga. App. 674, 171 S.E. 306 (1933).

Sufficiency of the evidence. — Because an accomplice's testimony was corroborated by defendant's recent possession of a stolen boat as well as defendant's flight from the scene of the crime, the evidence was sufficient to convict the defendant of theft by taking; consequently, the trial court properly denied the defendant's motion for a new trial. Johnson v. State, 275 Ga. App. 161, 620 S.E.2d 433 (2005).

There was sufficient evidence to support a defendant's conviction for felony murder of the love interest of the defendant's spouse, and the trial court did not err by denying the defendant's motions for a directed verdict or for a new trial; the trial court properly concluded that the defendant failed to prove by a preponderance of the evidence that the defendant was incompetent to stand trial based on the testimony of a state psychiatrist who determined that the defendant had some intellectual limitations and a problem with literacy, but found the defendant capable of rational and logical discussion about the circumstances of the incident to be tried, was capable of assisting in the defense, and understood the nature and object of the legal proceedings. The trial court also did not err by refusing the defendant's requested jury charges as the charges either did not relate to the evidence or the charge given was all that was necessary. Velazquez v. State, 282 Ga. 871, 655 S.E.2d 806 (2008).

Inadmissible testimony given on cross examination that is unresponsive to the question. — While answer that is responsive to question on cross-examination will not be ruled out although it would otherwise have been inadmissible as evidence, testimony that is inadmissible, which is given on cross-examination but is not responsive to question, should be ruled out; and it is error to overrule the motion to exclude it. Mickle v. Moore, 188 Ga. 444, 4 S.E.2d 217 (1939).

Admission of character evidence. — Because evidence of defendant's gang membership was admissible both as part of the res gestae of the crime and to show motive, the trial court properly denied the

defendant's motions in limine and for a new trial, even though the evidence implicated defendant's character. Garibay v. State, 275 Ga. App. 170, 620 S.E.2d 424 (2005).

Trial court did not err in denying the defendant's motion for a mistrial after an investigating officer testified on cross-examination that the defendant gave the officer a statement right after the defendant had talked with the defendant's parole officer because the testimony followed defense counsel's question regarding the content, not the timing, of the defendant's statement; a passing reference to a defendant's record does not place his or her character in evidence, and a nonresponsive answer that impacts negatively on a defendant's character does not improperly place his or her character in issue. Lanier v. State, 288 Ga. 109, 702 S.E.2d 141 (2010).

Similar transaction evidence. — Trial court properly denied defendant's motion for a new trial, challenging the admission of similar transaction evidence, because the similar transaction evidence properly corroborated the identity, intent, and course of conduct defendant engaged in with regard to two other home invasions with several other perpetrators that also included the rape of a victim. Grier v. State, 290 Ga. App. 59, 658 S.E.2d 827 (2008).

Admission of telephone conversation between defendant and mother. — Trial court did not abuse the court's discretion in denying the defendant's motion for mistrial, which was based on the admission of a recorded telephone conversation between the defendant and defendant's mother, who stated "because it's on your record," in response to why the defendant could not be disappointed if the defendant was denied bond; the comment was fleeting and was not a direct comment about the defendant's criminal history, and the mother did not comment on the content of the defendant's criminal record or even say, with certainty, that one did or did not exist. Hamrick v. State, 304 Ga. App. 378, 696 S.E.2d 403 (2010).

Alleged prosecutorial misconduct. — Because a prosecutor's comments were directed at defense counsel's failure to rebut or explain the state's evidence and the prosecutor made a permissible analogy, there was no prosecutorial misconduct; consequently, the trial court did not err in denying defendant's motion for a new trial. Duffy v. State, 271 Ga. App. 668, 610 S.E.2d 620 (2005).

Disposition of case on diminished record. — Trial court may not on motion for judgment notwithstanding the verdict eliminate evidence on the ground that the evidence was improperly received at the trial and then dispose of the case on the basis of the diminished record. Mays v. Daniels, 179 Ga. App. 677, 347 S.E.2d 642 (1986).

Coindictee's statement on polygraph examination. — Trial court did not abuse the court's discretion by declining to declare a mistrial when a coindictee testified that the coindictee had taken a polygraph examination because the trial court's prompt curative instructions to the jury to disregard the coindictee's statement was sufficient to prevent the testimony from having any prejudicial impact; it was highly improbable that the coindictee's remarks influenced the outcome of the case, in view of the strong weight of the evidence against the defendant. Gandy v. State, 290 Ga. 166, 718 S.E.2d 287 (2011).

Admission of statement given after waiver of right to counsel. — Trial court did not err by admitting the defendant's custodial statement to a police detective because after the defendant invoked the right to counsel, the detective ceased the interrogation and was returning the defendant to jail when the defendant told the detective that the defendant would tell the detective what the detective wanted to know and then gave an incriminating statement upon returning to the room where the interrogation was conducted. Anthony v. State, 315 Ga. App. 701, 727 S.E.2d 528 (2012).

Unredacted recording of phone conversation should have been admitted. — Trial court erred in denying the defendant's motion for new trial because the court committed harmful error when the court prevented the defendant from playing to the jury an unredacted recording of a phone conversation be-

General Consideration (Cont'd)

tween a witness and a friend; the witness was essentially acting as an informant, or at least an agent of police investigators, at the time of the phone conversation, and thus, the witness's recorded statements were admissible as original evidence pursuant to former O.C.G.A. § 24-3-2 (see now O.C.G.A. § 24-8-801). Redinburg v. State, 315 Ga. App. 413, 727 S.E.2d 201 (2012).

Motion for new trial properly denied. — Because the police officers saw a vehicle matching a dispatcher's description shortly after receiving the dispatch, and the vehicle attempted to elude the officers, in violation of O.C.G.A. § 40-6-395(a), the officers had a specific and articulable reason to stop the vehicle; consequently, the trial court properly denied the defendant's motions to suppress, in limine, and for a new trial. Francis v. State, 275 Ga. App. 164, 620 S.E.2d 431 (2005).

Trial court did not err by denying the defendant's motion for a mistrial after the jurors watched a portion of the defendant's videotaped statement, which the jurors were not supposed to view, because the jurors clearly indicated that the jurors could and would follow the trial court's curative instruction. Alatise v. State, 291 Ga. 428, 728 S.E.2d 592 (2012).

Cited in Campbell v. State, 155 Ga. 127, 116 S.E. 807 (1923); Evans v. Caldwell, 52 Ga. App. 475, 184 S.E. 440 (1936), aff'd, 184 Ga. 203, 190 S.E. 582 (1937); Harper v. Perry, 190 Ga. 233, 9 S.E.2d 160 (1940); Miller v. State, 69 Ga. App. 847, 26 S.E.2d 851 (1943); Edmonds v. State, 201 Ga. 108, 39 S.E.2d 24 (1946); Ludwig v. J.J. Newberry Co., 78 Ga. App. 871, 52 S.E.2d 485 (1949); Hamel v. Elliott, 79 Ga. App. 633, 54 S.E.2d 688 (1949); McBerry v. Ivie, 116 Ga. App. 808, 159 S.E.2d 108 (1967); Fendley v. Weaver, 121 Ga. App. 526, 174 S.E.2d 369 (1970); Rowell v. State, 122 Ga. App. 568, 177 S.E.2d 812 (1970); Johnson v. Ervin, 236 Ga. 605, 225 S.E.2d 21 (1976); Stillman v. Tempo Carpets, Inc., 174 Ga. App. 66, 329 S.E.2d 197 (1985); Odom v. Dekle, 178 Ga. App. 788, 344 S.E.2d 675 (1986); Joe N. Guy Co. v. Valiant Steel & Equip., Inc., 196 Ga. App. 20, 395 S.E.2d 310 (1990); Payne v. Joyner, 197 Ga. App. 527, 399 S.E.2d 83 (1990).

Admission Over Objection

1. In General

When material and illegal evidence is improperly admitted, a new trial will be granted. Cherry v. McCutchen, 68 Ga. App. 682, 23 S.E.2d 587 (1942).

When erroneously admitted evidence is harmful, the admission is ground for a new trial. Owens v. State, 118 Ga. 753, 45 S.E. 598 (1903).

Harmless error in admission of evidence not ground for new trial. — Objection may not be waived as to introduction of evidence on same subject matter through cross-examination or otherwise; nevertheless, a new trial will not be granted for harmless error in the admission of evidence. Eiberger v. Martel Elec. Sales, Inc., 125 Ga. App. 253, 187 S.E.2d 327 (1972).

While it was error for a trial court to rule that a prior inconsistent statement needed to be authenticated before statement could be used for impeachment, that error was harmless due to the overwhelming evidence of defendant's guilt; defendant was properly denied a new trial on defendant's conviction for aggravated child molestation. Also, while it was error to exclude a prior inconsistent statement by another witness, the fact that the defendant was able to vigorously examine the witness on the statement and the fact that the contents of the statement were made known to the jury rendered that error harmless. Robinson v. State, 265 Ga. App. 481, 594 S.E.2d 696 (2004).

While the trial court erred by denying the defendant's motion in limine, by overruling defendant's objection on hearsay grounds, and by overruling defense counsel's objections to the prosecution's improper character evidence, it was highly probable that the errors did not contribute to the judgment convicting the defendant of trafficking in cocaine; therefore, the defendant was not entitled to a new trial. Williams v. State, 312 Ga. App. 693, 719 S.E.2d 501 (2011).

Trial court did not err in refusing to

grant a mistrial on the ground that an eyewitness's testimony was based on hearsay because to the extent the testimony exposed prior difficulties between the codefendants and the victim, it was cumulative of other testimony that the defendant and the codefendant threatened the victim the day before the shooting; the other evidence implicating the defendant in the shooting made it highly probable that the hearsay testimony did not contribute to the verdict. Mathis v. State, 291 Ga. 268, 728 S.E.2d 661 (2012).

Admission of immaterial evidence not reversible error. — It is not reversible error to admit evidence that is merely irrelevant and immaterial. Mickle v. Moore, 188 Ga. 444, 4 S.E.2d 217 (1939); McDaniel v. State, 197 Ga. 757, 30 S.E.2d 612 (1944).

Admission of irrelevant testimony will not furnish ground for new trial unless the admission injuriously affected the party making the complaint. Turbaville v. State, 58 Ga. 545 (1877).

Admission of immaterial evidence without harmful effect is not a good ground for new trial. Cherry v. McCutchen, 68 Ga. App. 682, 23 S.E.2d 587 (1942).

Rejection of testimony, admissible or inadmissible, which has no probative value whatever, or admitting legal testimony which is wholly immaterial, is not sufficient cause for granting a new trial. Because testimony has been inadvertently admitted, which is wholly immaterial, and which it is apparent could have helped neither party, a new trial will hardly be awarded in an important case. Weeks v. State, 79 Ga. 36, 3 S.E. 323 (1887).

Admission of irrelevant testimony, not affecting verdict, will not require new trial. Purser v. McNair, 153 Ga. 405, 112 S.E. 648 (1922).

Corrective instructions to rule out illegal testimony. — Ordinarily, when illegal testimony is placed in evidence, it is not an abuse of discretion to refuse to grant a mistrial if sufficient corrective instructions are given in ruling out the testimony. This is true even if the illegal testimony has the effect of placing the defendant's character in issue, especially when the testimony is volunteered by the witness and not directly elicited by the solicitor. Witt v. State, 157 Ga. App. 564, 278 S.E.2d 145 (1981); Glenridge Unit Owners Ass'n v. Felton, 183 Ga. App. 858, 360 S.E.2d 418 (1987).

Erroneous admission of evidence over objection not reversible error. — When certain evidence is admitted over objection, but similar evidence to the same effect is admitted without objection, admission of evidence objected to will not constitute reversible error, even if admission of evidence was erroneous. Louisville & N.R.R. v. McCamy, 72 Ga. App. 769, 35 S.E.2d 206 (1945).

Erroneous admission of evidence over objection not reversible error when similar evidence is admitted without objection. Davis v. Fulton Nat'l Bank, 77 Ga. App. 400, 48 S.E.2d 773 (1948).

Testimony, even though illegally admitted over proper objection, will not constitute reversible error when substantially the same testimony is later introduced without objection. Johnson v. State, 84 Ga. App. 745, 67 S.E.2d 246 (1951).

When jury considers evidence on same subject matter, admitted without objection, it is not harmful error to allow the same evidence again admitted, over objections, since the admission would probably not change the result. Eiberger v. Martel Elec. Sales, Inc., 125 Ga. App. 253, 187 S.E.2d 327 (1972).

Effect of ruling out illegally admitted evidence. — As a general rule, error in admitting illegal evidence is cured by subsequently ruling the evidence out. This rule, however, is subject to exception; for when illegal evidence may have worked such harm or injury to accused as to render it probable that the subsequent withdrawal of the evidence will not heal the injury inflicted by the improper admission, error is sufficient ground for grant of a new trial. Thompson v. State, 12 Ga. App. 201, 76 S.E. 1072 (1913), see McDonald v. State, 72 Ga. 55 (1883).

2. Application

Erroneously admitted evidence, calculated to harm defendant. — When it cannot be said that erroneously admitted evidence was not calculated to harm the defendant and prejudice the

Admission Over Objection (Cont'd)
2. Application (Cont'd)

defendant's cause, the admission is ground for new trial. Brown v. State, 119 Ga. 572, 46 S.E. 833 (1904); Johnson v. State, 128 Ga. 71, 57 S.E. 84 (1907).

When illegal evidence impeaching credibility of party was admitted, a new trial was justified. Jenkins v. Lane, 154 Ga. 454, 115 S.E. 126 (1922).

When opinion of plaintiff that the plaintiff was damaged was admitted, new trial was justified. Central R.R. & Banking Co. v. Kelly, 58 Ga. 107 (1877).

Admission of expressions tending to mitigate rather than establish guilt, not ground for new trial. Pines v. State, 21 Ga. 227 (1857).

Admission of record of divorce between accused and deceased was not ground for new trial. Lucas v. State, 146 Ga. 315, 91 S.E. 72 (1916).

Admission of evidence in chief after state and defendant have closed is within court's discretion. Cooper v. State, 103 Ga. 63, 29 S.E. 439 (1897).

Admission of some hearsay or opinion evidence at interlocutory hearing. — Rules of evidence are not in all respects as rigidly enforced on interlocutory hearings as on final trials and admission of some hearsay or opinion evidence, will not necessarily require reversal. Griffith v. City of Hapeville, 182 Ga. 333, 185 S.E. 522 (1936).

Inadvertent reference to insurance in personal injury action did not warrant new trial. — Because the trial judge took the appropriate curative steps in denying an opposing driver's motions for both a mistrial and a new trial after the suing driver made an inadvertent reference to insurance, including rebuking the suing driver and issuing a curative instruction, the court did not abuse the court's discretion in denying the opposing driver's motions; moreover, the appeals court could not conclude that the opposing driver suffered any wrong or oppression as a result of the trial court's orders. Defusco v. Free, 287 Ga. App. 313, 651 S.E.2d 458 (2007).

Previously withheld exculpatory information. — If exculpatory information is withheld from a defendant prior to trial (after a proper motion to release all such evidence), but is later introduced at trial by the state, the defendant is not entitled to a mistrial unless the defendant shows that the defendant's defense was thereby prejudiced and that the defendant was denied a fair trial. Edwards v. State, 176 Ga. App. 369, 337 S.E.2d 27 (1985).

False evidence allegation did not warrant new trial. — Although the defendant contended that along with the revocation of defendant's codefendant's plea deal after the codefendant made statements in contradiction of the plea hearing testimony and defendant's assertion that the defendant refused to give false testimony to the prosecutor in exchange for a plea deal, proved that the prosecutor knowingly allowed false evidence to be presented to the jury in violation of due process, the trial court did not err when the court did not credit the motion for new trial testimony; since the defendant's codefendant was not privy to what occurred in the house after the codefendant ran out and the defendant did not present any evidence at trial that the defendant's codefendant's testimony was false, the revocation of the codefendant's plea deal was inapposite as was defendant's rejection of the plea deal offer. Therefore, the trial court did not err in finding there was no misconduct warranting a new trial pursuant to O.C.G.A. § 5-5-22. Cooper v. State, 287 Ga. 861, 700 S.E.2d 593 (2010), overruled on other grounds, Smith v. State, 290 Ga. 768, 723 S.E.2d 915 (2012).

Expert testimony. — Trial court erred in admitting, over objection, the testimony of the parents' expert witness about the standard of care in the day-care industry regarding the handling of infants in a case when the infant of the parents died at a hospital after being found pale at the infant's day-care center; the correct standard was that of the average parent, the jury did not need expert testimony to understand or apply that standard of care, and the expert's testimony confused the jury. Accordingly, the child-day care center was granted a new trial because the error in admitting the expert testimony was not harmless. Applebrook Country Dayschool,

Inc. v. Thurman, 264 Ga. App. 591, 591 S.E.2d 406 (2003).

Trial court did not abuse the court's discretion in denying the defendant's motion for mistrial after one of the state's expert witnesses testified about a medical examination the expert made of the victim that was not reflected in the records the state produced before trial because the doctors who examined the victim shortly after the victim had been injured testified to finding cell death in portions of the victim's brain, resulting in irreversible brain damage; the expert's testimony that the later examination also indicated a permanent brain injury was cumulative of the other medical evidence. Eskew v. State, 309 Ga. App. 44, 709 S.E.2d 893 (2011).

Testimony regarding codefendant's statement. — Trial court did not err in denying the defendant's motion for mistrial because the defendant did not show any harm resulting from the investigating police officers' testimony regarding the codefendant's statement, which referenced an "individual" with the codefendant on the night of the robbery who could be considered references to a person whom the jury could infer to be the defendant; the evidence against the defendant was overwhelming. Anderson v. State, 311 Ga. App. 732, 716 S.E.2d 813 (2011).

Interview notes not produced. — Assuming that notes of an interview that was suppressed by the state were evidence favorable to the defendant, the defendant failed to show either that the notes were not available to the defendant through reasonable diligence, or that the course of the defendant's trial would have been any different had the notes been produced. Thus, there was no error in the trial court's denial of the defendant's motion for a new trial based upon a Brady violation. Freeman v. State, 284 Ga. 830, 672 S.E.2d 644 (2009).

Evidence of arrest on another charge admissible. — Defendant was not denied a fair trial when the jury was allowed to hear evidence of an unrelated arrest because the circumstances of the defendant's arrest for obstruction of, and giving false information to, an officer were admissible as evidence of flight. Durham v. State, 309 Ga. App. 444, 710 S.E.2d 644 (2011).

Remedial charge sufficient to remedy error. — Trial court did not err in denying the defendant's motion for mistrial because a remedial charge, which repeatedly admonished the jury that an accomplice's guilty plea was not to be considered in any way with respect to the defendant's guilt, was sufficient to remedy the error of the admission of the plea and render a mistrial unnecessary. Robinson v. State, 312 Ga. App. 110, 717 S.E.2d 694 (2011).

Trial court did not abuse the court's discretion in refusing to grant a mistrial after the state elicited hearsay testimony because the trial court took sufficient precautions to exclude the inadmissible evidence from the jury's consideration as evidence. Sanders v. State, 290 Ga. 445, 721 S.E.2d 834 (2012).

Harmful Brady violation. — Trial court erred in denying the defendant's motion for new trial because the state committed a harmful Brady violation when the state failed to turn over to the defense a written statement that the victim gave to police; the victim's impeachable omission was not known to the defense before or during trial, and the victim's statement was material to the defense since had the statement been disclosed, the outcome of the case could have been different. Jackson v. State, 309 Ga. App. 796, 714 S.E.2d 584 (2011).

Erroneous Exclusion of Evidence

Necessary showing for exclusion of testimony to be considered ground for new trial. — For exclusion of oral testimony to be considered as ground for new trial, it must appear that pertinent question was asked, and that court ruled out answer and that a statement was made to court at time showing what answer would be; and that such testimony was material, and would have benefited complaining party. Ellison v. State, 21 Ga. App. 259, 94 S.E. 253 (1917).

Rejecting evidence tending to sustain defense. — When rejected evidence relates to main transaction and tends to sustain defense set up by the defendant, rejection of such evidence requires grant

Erroneous Exclusion of Evidence (Cont'd)

of a new trial. Green v. State, 154 Ga. 117, 113 S.E. 536 (1922).

Rejection of evidence partly admissible and partly inadmissible. — When evidence, some of which is admissible, and some of which is not admissible, is offered as a whole, a new trial will not be granted because of the evidence's rejection. Arnold v. State, 131 Ga. 494, 62 S.E. 806 (1908).

Erroneous exclusion when record contains similar evidence establishing same fact. — When certain evidence is excluded over objection, but record contains similar evidence establishing fact which it is sought to establish by evidence which has been excluded, such exclusion will not constitute reversible error, even if exclusion was erroneous. Louisville & N.R.R. v. McCamy, 72 Ga. App. 769, 35 S.E.2d 206 (1945).

No bad faith in failing to turn over videotaped statements. — Defendant's new trial motion under O.C.G.A. § 5-5-22 was properly denied, as the fact that the state failed to turn over two videotaped statements from defendant's sons, arising from criminal charges due to a domestic dispute, was based on inadvertance rather than bad faith, there was unimpeached eyewitness testimony from other witnesses that was sufficient to support defendant's convictions pursuant to former O.C.G.A. § 24-4-8 (see now O.C.G.A. § 24-14-8), and there was no showing that the defendant suffered the kind of prejudice that undermined confidence in the outcome of the trial; accordingly, defendant's Brady rights were not violated and there was no violation of O.C.G.A. §§ 17-16-6 and 17-16-7. Ely v. State, 275 Ga. App. 708, 621 S.E.2d 811 (2005).

Objection

Admission of illegal evidence without objection. — It is not ground for new trial that illegal evidence was admitted when no objection was made to the introduction when offered, nor at any time anterior to rendition of the verdict. Licett v. State, 23 Ga. 57 (1857); Evans v. State, 33 Ga. 1 (1861).

When counsel for defendant expressly consents to admission of evidence, the admission will not thereafter serve as ground for new trial. Williams v. State, 119 Ga. 425, 46 S.E. 626 (1904).

When no objection is made to illegal evidence on trial of case the admission is not ground for a new trial. Weldon v. State, 78 Ga. App. 530, 51 S.E.2d 605 (1949).

When evidence is illegally admitted, a new trial may be granted, yet the general rule is that a specific ground of objection must be made at the time the evidence is offered. Boggs v. Griffeth Bros. Tire Co., 125 Ga. App. 304, 187 S.E.2d 915 (1972).

Failure to make objection to admission of illegal evidence will be treated as a waiver and will prevent court, on motion for new trial from inquiring as to competency of such evidence. Andrews v. State, 118 Ga. 1, 43 S.E. 852 (1903); Richardson v. State, 141 Ga. 782, 82 S.E. 134 (1914); Boggs v. Griffeth Bros. Tire Co., 125 Ga. App. 304, 187 S.E.2d 915 (1972).

Defendant's claim that defendant's character was improperly placed into evidence when an officer testified that the officer found defendant's prison identification card in defendant's pocket was waived as defendant failed to make a further objection or renew defendant's motion for a mistrial after a curative instruction was given. McCullough v. State, 268 Ga. App. 445, 602 S.E.2d 181 (2004).

Objection to evidence must specify ground upon which objection is based. — When objection to evidence does not state ground upon which the objection is based, error cannot be assigned upon overruling thereof; the ground must be specific, and must point out wherein and how admission of evidence would violate some recognized rule of the law of evidence. Cooksey v. State, 149 Ga. App. 572, 254 S.E.2d 892 (1979).

In order to raise on appeal contentions concerning admissibility of evidence the specific ground of objection must be made at the time the evidence is offered, and a failure to do so will be considered as a waiver. All evidence is admitted as a matter of course unless a valid ground of objection is interposed. Eiberger v. West, 165 Ga. App. 559, 301 S.E.2d 914 (1983).

Objection merely that evidence is inadmissible is equivalent to no objection. — Objection to admission of evidence upon ground merely that the evidence is inadmissible is equivalent to assigning no reason at all for the evidence's exclusion. McDonald v. State, 21 Ga. App. 125, 94 S.E. 262 (1917).

Objection necessary although judge previously promises to exclude testimony if connection with crime not established. — When trial judge promises that certain testimony which counsel for accused moves to exclude, on ground that the testimony does not connect the accused with the crime for which the accused is being tried, will be excluded unless such connection is shown, failure to make any subsequent motion to exclude the testimony can be treated by the court as a waiver of the objection, and failure to exclude the testimony is not cause for a new trial. Quinn v. State, 22 Ga. App. 632, 97 S.E. 84 (1918).

One cannot urge admission of evidence over objection of opposite party as ground for new trial. — After verdict it is too late for party who upon trial made no objection to testimony which was inadmissible or of no probative value, to urge for first time, as reason why new trial should be granted that party, failure of the judge to exclude such testimony upon motion of opposite party. That party's failure to object upon the party's own part, or to join in objection of the party's opponent will be construed as a waiver of all objection to it, and as a tacit admission that the party considered the testimony beneficial to that party's cause. Wright v. State, 6 Ga. App. 770, 65 S.E. 806 (1909).

When part of evidence is admissible, objection to that part as a whole may be overruled. Dye v. State, 77 Ga. App. 517, 48 S.E.2d 742 (1948).

Obligation to point out objectionable portion of evidence. — While superior courts may grant new trials when objection is made to specified evidence as a whole, part of which is admissible and part inadmissible, and objection does not point out objectionable portion, there is no error in admitting entire evidence. Jones v. Blackburn, 75 Ga. App. 791, 44 S.E.2d 555 (1947).

Content of Motion

Motion for new trial must state nature of objection or objections made to admission of illegal evidence. Licett v. State, 23 Ga. 57 (1857); Evans v. State, 33 Ga. 1 (1861); Reilly v. State, 82 Ga. 568, 9 S.E. 332 (1889); Brown v. State, 105 Ga. 640, 31 S.E. 557 (1898); Sable v. State, 14 Ga. App. 816, 82 S.E. 379 (1914).

Ground of motion for new trial should be complete within itself. Williamson v. Prather, 188 Ga. 545, 4 S.E.2d 140 (1939).

When motion does not clearly show admission of illegal evidence, new trial will be denied. Anderson v. State, 122 Ga. 161, 50 S.E. 46 (1905).

Must show that objection was made at time of exclusion complained of. — Ground of motion for new trial, not indicating that evidence was illegally withheld from jury against demand of applicant, does not contain a sufficient assignment of error. Ponder v. Walker, 107 Ga. 753, 33 S.E. 690 (1899).

Ground of motion for new trial based upon admission of evidence should state objection made to evidence, and that such objection was urged at time evidence was offered; otherwise no question is raised for determination. Adkins v. State, 137 Ga. 81, 72 S.E. 897 (1911); McDonald v. State, 21 Ga. App. 125, 94 S.E. 262 (1917).

Supreme Court will not pass upon question of admissibility of evidence when ground in motion for new trial fails to show that objections for exclusion of evidence were urged before trial judge when evidence was offered. Davis v. Buie, 197 Ga. 835, 30 S.E.2d 861 (1944).

It is insufficient to show that ground of objection existed at time of making of motion. Andrews v. State, 118 Ga. 1, 43 S.E. 852 (1903); Richardson v. State, 141 Ga. 782, 82 S.E. 134 (1914).

Objection urged in motion for new trial must be same as objection made during trial. Cooner v. State, 16 Ga. App. 539, 85 S.E. 688 (1915).

Materiality of excluded evidence and object for which the evidence was offered must appear in motion for new trial. Weeks v. State, 79 Ga. 36, 3 S.E. 323 (1887).

Content of Motion (Cont'd)

Plaintiff in error must show that the plaintiff was harmed and prejudiced by ruling complained of. — In order for court to grant new trial because of alleged error in introduction of evidence, upon direct exception to this court, it is incumbent upon plaintiff in error to show affirmatively in bill of exceptions, that the plaintiff was harmed and prejudiced by such ruling; and when there is no brief of evidence before this court, and it is not made to appear from bill of exceptions but that there was other evidence before the jury upon same subject, the plaintiff in error fails to show error requiring grant of a new trial in erroneous introduction of such evidence. McRae v. Boykin, 50 Ga. App. 866, 179 S.E. 535 (1935), rev'd on other grounds, 182 Ga. 252, 185 S.E. 246 (1936).

Evidentiary basis for motion under section must be set out. — When evidence is not literally or in substance set out in motion for new trial, nor is the evidence attached as an exhibit, the motion is insufficient. Jackson v. State, 93 Ga. 190, 18 S.E. 401 (1893); Norred v. State, 127 Ga. 347, 56 S.E. 464 (1907); Garvin v. State, 76 Ga. App. 684, 47 S.E.2d 192 (1948).

Assignment of error upon admission of evidence will not be considered when evidence alleged to have been illegally admitted is not set forth literally, or the substance clearly stated, in motion for new trial and objection thereto. Pearson v. Brown, 105 Ga. 802, 31 S.E. 746 (1898); Hicks v. Mather, 107 Ga. 77, 32 S.E. 901 (1899); Georgia N. Ry. v. Hutchins & Jenkins, 119 Ga. 504, 46 S.E. 659 (1904); Hicks v. Webb, 127 Ga. 170, 56 S.E. 307 (1906); Smith v. Savannah Elec. Co., 25 Ga. App. 59, 102 S.E. 548 (1924).

Complaint in ground of motion for new trial of ruling admitting or excluding as evidence a paper, which does not set forth the paper literally or in substance in the ground itself or as an exhibit thereto properly identified, is insufficient to present any question for decision by the Supreme Court on a bill of exceptions assigning error on a judgment refusing a new trial. Williamson v. Prather, 188 Ga. 545, 4 S.E.2d 140 (1939).

Motion must state name of witness whose testimony is complained of. — Ground of motion for new trial which complains of admission of specified testimony must state name of witness whose testimony is complained of. Adams v. State, 22 Ga. App. 252, 95 S.E. 877 (1918).

Motion must show court was advised what answer of witness, whose testimony was excluded, would be. — Ground of motion for new trial, which assigns error because court excluded certain testimony of a witness, will not be considered, when movant has failed to show that court was advised as to what answer of witness would be. Herndon v. State, 178 Ga. 832, 174 S.E. 597 (1934), appeal dismissed, 295 U.S. 441, 55 S. Ct. 794, 79 L. Ed. 1530 (1935).

Motion claiming testimony lacked proper foundation, which fails to disclose preliminary testimony. — Ground for motion for new trial which complains of admission of testimony as to contradictory statements made by witness without sufficient foundation being laid therefor, but which does not disclose what preliminary testimony, in way of laying foundation, was produced, is incomplete. Miliken v. State, 8 Ga. App. 478, 69 S.E. 915 (1910).

RESEARCH REFERENCES

Am. Jur. 2d. — 58 Am. Jur. 2d, New Trial, §§ 234, 235, 345.

C.J.S. — 23 C.J.S., Criminal Law, §§ 1948, 1949. 66 C.J.S., New Trial, § 63 et seq.

ALR. — Statement by prosecuting attorney in presence of jury implying that defendant had made incriminating statements to him not in evidence, as ground of reversal or new trial, 52 ALR 1022.

Instruction or evidence as to conspiracy where there is no charge of conspiracy in indictment or information, 66 ALR 1311.

Reception of incompetent evidence in criminal case tried to court without jury as ground of reversal, 116 ALR 558.

Statements, comments, or conduct of court or counsel regarding perjury, as ground for new trial or reversal in civil action or criminal prosecution other than for perjury, 127 ALR 1385.

Statements by a witness after criminal trial tending to show that his testimony was perjured, as ground for new trial, 158 ALR 1062.

Reference by counsel for prosecution in opening statement to matters which he does not later attempt to prove as ground for new trial, reversal, or modification, 28 ALR2d 972.

Prejudicial effect of argument or remark that adversary was attempting to suppress facts, 29 ALR2d 996.

Prejudicial effect of admission, in personal injury action, of evidence as to financial or domestic circumstances of plaintiff, 59 ALR2d 371.

Admissibility, in prosecution for assault or similar offense involving physical violence, of extent or effect of victim's injuries, 87 ALR2d 926.

Propriety and prejudicial effect of prosecutor's remarks as to victim's age, family circumstances, or the like, 50 ALR3d 8.

Prosecutor's reference in opening statement to matters not provable or which he does not attempt to prove as ground for relief, 16 ALR4th 810.

Search conducted by school official or teacher as violation of fourth amendment or equivalent state constitutional provision, 31 ALR5th 229.

5-5-23. Newly discovered evidence.

A new trial may be granted in any case where any material evidence, not merely cumulative or impeaching in its character but relating to new and material facts, is discovered by the applicant after the rendition of a verdict against him and is brought to the notice of the court within the time allowed by law for entertaining a motion for a new trial. (Ga. L. 1853-54, p. 46, § 1; Code 1863, § 3640; Code 1868, § 3665; Code 1873, § 3716; Code 1882, § 3716; Civil Code 1895, §§ 5480, 5481; Penal Code 1895, § 1061; Civil Code 1910, §§ 6085, 6086; Penal Code 1910, § 1088; Code 1933, § 70-204.)

Cross references. — Extraordinary motions for new trial, § 5-5-41.

JUDICIAL DECISIONS

Analysis

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General Consideration

Former Civil Code 1910, § 6086 (see O.C.G.A. § 5-5-23) permitted new trial as to evidence brought in within time specified by former Civil Code 1910, § 6089 (see O.C.G.A. § 5-5-40). Jackson v. Williams, 149 Ga. 505, 101 S.E. 116 (1919).

New trial granted based on error in jury charge. — In a condemnation action, the lessee was entitled to a new trial because the trial court erred in the court's

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charge to the jury regarding lost profits; the jury instructions misstated the law and, when considered in the context of the charge as a whole, rendered the charge confusing, contradictory, and unreconcilable. Action Sound, Inc. v. DOT, 265 Ga. App. 616, 594 S.E.2d 773 (2004).

Trial court erred in denying new trial. — Trial court erred in not granting beauty pageant operators' motions for judgment notwithstanding the verdict, directed verdict, or a new trial, pursuant to O.C.G.A. §§ 5-5-23 and 9-11-56, in an action by a beauty pageant contestant who was banned from the contest after it was rumored that the contestant was "stuffing" the ballot boxes, as the contestant failed to establish the contestant's claim for tortious interference with business relations because the contestant did not offer direct evidence of the operators' actions to the contestant's alleged loss of work and earnings following the pageant, nor could the operators be held liable for tortious interference with the contestant's relationships with others, as the contestants were not strangers to those relationships; it was similarly error to deny the motions with respect to the contestant's slander claim, as the contestant failed to show that an employee was directly ordered to make the statements by the employer, there was no respondeat superior liability in slander cases, and the statements between the contest's joint venturers were privileged as intra-corporate communications and accordingly, publication was also not shown. Galardi v. Steele-Inman, 266 Ga. App. 515, 597 S.E.2d 571 (2004).

Policy of law to end litigation must yield to supreme object of achieving full justice. — Despite often-stated policy of law to end litigation, for which reason courts ordinarily look with disfavor upon grants of new trial upon newly discovered evidence, this policy of law must and does yield to higher and supreme object of law which is to do full justice in all cases. Matthews v. Grace, 199 Ga. 400, 34 S.E.2d 454 (1945).

Requirements for grant of new trial based on newly discovered evidence. — To obtain a new trial on the basis of newly discovered evidence, a movant must satisfy the court: (1) that the evidence has come to the movant's knowledge since the trial; (2) that it was not owing to the want of due diligence that the movant did not acquire the evidence sooner; (3) that the evidence is so material that it would probably produce a different verdict; (4) that the evidence is not cumulative only; (5) that the affidavit of the witness is attached to the motion or the affidavit's absence accounted for; and (6) that the new evidence does not operate solely to impeach the credibility of a witness. All six requirements must be satisfied before a new trial will be granted. Young v. State, 194 Ga. App. 335, 390 S.E.2d 305 (1990); Eliopulos v. State, 203 Ga. App. 262, 416 S.E.2d 745, cert. denied, 203 Ga. App. 906, 416 S.E.2d 745 (1992).

Requirements for grant of new trial based on newly discovered evidence are: (1) that evidence has come to knowledge of moving party since trial; (2) that it was not owing to want of due diligence that moving party did not acquire the evidence sooner; (3) that the evidence was so material that it would probably produce a different verdict; and (4) that it is not cumulative only. Turner v. State, 139 Ga. App. 503, 229 S.E.2d 23 (1976); Jefferson v. State, 157 Ga. App. 324, 277 S.E.2d 317 (1981); Blankenship v. State, 162 Ga. App. 538, 292 S.E.2d 123 (1982).

It is incumbent on party who asks for new trial on ground of newly discovered evidence to satisfy court: (1) that evidence has come to the party's knowledge since trial; (2) that it was not owing to want of due diligence that the party did not acquire it sooner; (3) that the evidence is so material that it would probably produce a different verdict; (4) that the evidence is not cumulative only; (5) that affidavit of witness should be procured or the affidavit's absence accounted for; and (6) that new trial will not be granted if only effect of evidence will be to impeach credit of witness. Benefield v. State, 140 Ga. App.

727, 232 S.E.2d 89 (1976); Timberlake v. State, 246 Ga. 488, 271 S.E.2d 792 (1980); Allanson v. State, 158 Ga. App. 77, 279 S.E.2d 316 (1981); Alexander v. State, 186 Ga. App. 787, 368 S.E.2d 550 (1988); Lawrence v. State, 227 Ga. App. 70, 487 S.E.2d 608 (1997).

In motion for new trial made upon alleged newly discovered evidence, when it appears that latter is purely cumulative, and it does not appear that with additional evidence a verdict different from that already rendered would probably result, and when it further appears that the defendant and defense counsel could, by exercise of slightest diligence, have discovered such evidence before or at time of trial, this court will not hold that trial judge abused the judge's discretion in overruling motion. Stargel v. State, 52 Ga. App. 74, 182 S.E. 406 (1935).

To obtain a new trial on the basis of newly discovered evidence, the evidence supporting the motion must be admissible, and must also satisfy six criteria: (1) it must have been discovered after the trial or hearing; (2) its late discovery was not due to lack of diligence; (3) it is so material that its introduction in evidence would probably produce a different result; (4) it is not cumulative only; (5) the affidavit of the witness must be attached to the motion (or its absence accounted for); and (6) it does not operate only to impeach a witness. Collins v. Kiah, 218 Ga. App. 484, 462 S.E.2d 158 (1995).

Post-trial declaration. — Law is settled that a post-trial declaration by a state's witness that the witness's former testimony was false is not a ground for a new trial. Brown v. State, 209 Ga. App. 314, 433 S.E.2d 321 (1993).

Movant bears burden of showing meeting of standards for granting new trial. James v. State, 115 Ga. App. 822, 156 S.E.2d 183 (1967).

Although a codefendant who testified against the defendant at defendant's criminal trial indicated that a certain sentence was recommended by the prosecutor's office, and thereafter, a much more lenient sentence was actually imposed on that codefendant, the defendant failed to show that the state committed a Brady violation by not disclosing the more favorable deal that the state made with the testifying codefendant as the prosecutor testified that the codefendant had testified accurately as to the sentence recommendation, but that the sheriff's office had sought a more lenient sentence for the defendant, which was in fact imposed; accordingly, the defendant's new trial motion was properly denied and the convictions were properly affirmed. Ford v. State, 273 Ga. App. 290, 614 S.E.2d 907 (2005).

When all requirements are met, grant of new trial is mandatory. — While section states that new trial may be granted, in proper case, when all rules of law have been met, new trial must be granted. Matthews v. Grace, 199 Ga. 400, 34 S.E.2d 454 (1945).

Failure to show one requirement is sufficient to deny motion for new trial. Timberlake v. State, 246 Ga. 488, 271 S.E.2d 792 (1980).

All six requirements must be complied with to secure a new trial. Westbrook v. State, 186 Ga. App. 493, 368 S.E.2d 131, cert. denied, 186 Ga. App. 919, 368 S.E.2d 131 (1988).

Effect of noncompliance with section's requirements. — When requirements of section are not complied with, it is not error to overrule ground of motion for new trial based upon evidence alleged to be newly discovered, which might produce a different result should a new trial be granted. Blackwell v. Houston County, 168 Ga. 248, 147 S.E. 574 (1929).

Grants of new trials on ground of newly discovered evidence are not favored by courts. McDuffie v. State, 2 Ga. App. 401, 58 S.E. 544 (1907); Staton v. State, 174 Ga. 719, 163 S.E. 901 (1932); Herrin v. State, 71 Ga. App. 384, 31 S.E.2d 124 (1944); Grant v. State, 74 Ga. App. 493, 40 S.E.2d 406 (1946); Gates v. State, 84 Ga. App. 367, 66 S.E.2d 342 (1951); Fields v. State, 212 Ga. 652, 94 S.E.2d 694 (1956); Lord v. State, 156 Ga. App. 492, 274 S.E.2d 641 (1980).

Motions for new trials based upon newly discovered evidence are not favored. Norman v. Goode, 121 Ga. 449, 49 S.E. 268 (1904); Harris v. State, 149 Ga. 724, 102 S.E. 159 (1920); Reed Oil Co. v. Harrison, 26 Ga. App. 37, 105 S.E. 496 (1920); Hart v. State, 207 Ga. 599, 63

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S.E.2d 390 (1951); James v. State, 115 Ga. App. 822, 156 S.E.2d 183 (1967).

Great caution should be exercised in granting new trial on ground of newly discovered evidence. Gates v. State, 84 Ga. App. 367, 66 S.E.2d 342 (1951).

When severance not mandatory, denial of new trial not error. — When defendant's trial counsel did not move to sever defendant's two aggravated assault charges, which were similar in fact pattern and would have presumably been admitted in the trial of the other, it was found that severance was not mandatory and the defendant did not show prejudice as a result of the decision to not so move. The trial court did not err in denying the defendant's motion for new trial on the ground that the defendant's trial attorney rendered ineffective assistance by failing to seek severance of the charges. Collier v. State, 266 Ga. App. 345, 596 S.E.2d 795 (2004).

Reasons that new trials under section are not favored. — Generally, granting of new trials on newly discovered evidence is not favored, because it tends to discourage diligence and encourage lack of diligence by litigants and their counsel on the first trial, causes delay in administering of justice, and loss of time, labor, and expense of another trial. Turner v. State, 44 Ga. App. 348, 161 S.E. 626 (1931).

Motions for new trial are not intended to serve purpose of cross-examination. Greer & Co. v. Raney, 120 Ga. 290, 47 S.E. 939 (1904); Bullington v. Chandler, 110 Ga. App. 803, 140 S.E.2d 59 (1964).

Discretion of judge. — Motion must be addressed to the sound legal discretion of court, and the court alone must be trier of weight and credibility of testimony. Morgan v. State, 16 Ga. App. 559, 85 S.E. 827 (1915).

Motions for new trial under section are addressed to the sound discretion of the judge. Aycock v. State, 188 Ga. 550, 4 S.E.2d 221 (1939); Herrin v. State, 71 Ga. App. 384, 31 S.E.2d 124 (1944); Matthews v. Grace, 199 Ga. 400, 34 S.E.2d 454 (1945); Grant v. State, 74 Ga. App. 493, 40 S.E.2d 406 (1946); Lord v. State, 156 Ga. App. 492, 274 S.E.2d 641 (1980); Jefferson v. State, 157 Ga. App. 324, 277 S.E.2d 317 (1981).

Grant or denial of motion for new trial based on newly discovered evidence is largely discretionary with trial judge. James v. State, 115 Ga. App. 822, 156 S.E.2d 183 (1967).

Applications for new trial are in large part addressed to the sound discretion of the trial judge. Allanson v. State, 158 Ga. App. 77, 279 S.E.2d 316 (1981).

Motions for new trial on the ground of newly discovered evidence are addressed to the sole discretion of the trial judge, which will not be controlled unless abused. Blankenship v. State, 162 Ga. App. 538, 292 S.E.2d 123 (1982).

Grant or denial of a new trial based on newly discovered evidence is a decision within the sound discretion of the trial court. The court's ruling will not be disturbed absent an abuse of that discretion. Wilson v. State, 193 Ga. App. 374, 387 S.E.2d 642 (1989).

In a situation in which a juror did not admit during voir dire that the juror knew the victim, but during trial, the juror indicated that the juror was unaware of the victim's name but that the juror knew the victim, but in fact, the victim had worked in the juror's shop years earlier, the trial court did not err in denying the defendant's motion for a new trial, as the juror indicated that the juror would be fair and impartial, the juror had not been dishonest, but merely mistaken, during voir dire, and the trial court was within the court's discretion because a corrected response by the juror during voir dire would not have provided a valid basis for a challenge for cause. Todd v. State, 275 Ga. App. 459, 620 S.E.2d 666 (2005).

New trial should not be granted unless it appears different verdict will result. — To warrant granting of new trial under section, it must be shown that different result may obtain at second trial. Morris Storage & Transf. Co. v. Wilkes, 1 Ga. App. 751, 58 S.E. 232 (1907); Mayor of Athens v. Peeler, 6 Ga. App. 379, 65 S.E. 45 (1909); Wright v. Wright, 25 Ga. App. 721, 104 S.E. 456 (1920); Oglesbee v. State, 25 Ga. App. 750, 105 S.E. 51 (1920); Republic Truck Sales Corp. v. Padgett, 30

Ga. App. 474, 118 S.E. 435 (1923); Alexander v. Allen, 101 Ga. App. 706, 115 S.E.2d 258 (1960).

Courts are not obliged to grant a new trial for newly discovered evidence unless the court's are reasonably convinced that on another trial there will probably be a different verdict. Oglesby v. Cason, 65 Ga. App. 813, 16 S.E.2d 493 (1941); Baumbach v. Dickens, 213 Ga. 745, 101 S.E.2d 702 (1958).

Unless newly discovered evidence is of such character as upon another trial would likely produce a different result, the judge does not err in overruling the motion for new trial. Cannon v. State, 194 Ga. 277, 21 S.E.2d 689 (1942).

When newly discovered evidence offered in support of motion for new trial was of such character as probably would, if credited by jury, produce a different result upon another investigation, the trial judge erred in overruling the motion. McDaniel v. State, 74 Ga. App. 5, 38 S.E.2d 697 (1946).

On hearing extraordinary motion for new trial, if it is not reasonably apparent to judicial mind that new facts would probably produce a different verdict, new trial should not be ordered. Fields v. State, 212 Ga. 652, 94 S.E.2d 694 (1956); Stevens v. State, 119 Ga. App. 102, 166 S.E.2d 413 (1969).

If it is not reasonably apparent to judicial mind that new facts would probably produce different verdict, new trial should not be ordered. Hamilton v. State, 119 Ga. App. 196, 166 S.E.2d 735 (1969).

Unless it is reasonably apparent from the record that alleged newly discovered evidence will likely produce a different verdict upon another trial, a motion for new trial based upon that ground should not be granted. Lord v. State, 156 Ga. App. 492, 274 S.E.2d 641 (1980); Blankenship v. State, 162 Ga. App. 538, 292 S.E.2d 123 (1982).

When it has not been shown that the newly discovered evidence was so material that it would probably produce a different verdict, or that it could not have been discovered during trial by the exercise of reasonable diligence there is no abuse of discretion by the trial court in overruling the defendant's motion for a new trial. Covington v. State, 157 Ga. App. 371, 277 S.E.2d 744 (1981).

Because defense counsel went over the voluntary manslaughter statute with defendant and explained intent to the defendant, the defendant failed to show that counsel was ineffective; because the defendant's plea was freely and voluntarily made, the trial court did not err in denying the defendant's motion for new trial. Howard v. State, 274 Ga. App. 861, 619 S.E.2d 363 (2005).

Standard of review. — Trial judge's grant of new trial under section will not be disturbed unless it is made to appear that the judge abused the judge's discretion. Exchange Bank v. Cone, 18 Ga. App. 432, 89 S.E. 489 (1916).

Trial judge's ruling on motion under section will not be disturbed absent a manifest abuse of discretion. Aycock v. State, 188 Ga. 550, 4 S.E.2d 221 (1939); Herrin v. State, 71 Ga. App. 384, 31 S.E.2d 124 (1944); Matthews v. Grace, 199 Ga. 400, 34 S.E.2d 454 (1945); Grant v. State, 74 Ga. App. 493, 40 S.E.2d 406 (1946); James v. State, 115 Ga. App. 822, 156 S.E.2d 183 (1967); Lord v. State, 156 Ga. App. 492, 274 S.E.2d 641 (1980).

Order of trial judge in refusing to grant new trial on ground of newly discovered evidence will not be disturbed unless it is shown that the judge has abused the judge's discretion. Baumbach v. Dickens, 213 Ga. 745, 101 S.E.2d 702 (1958).

Refusal to grant the motion will not be reversed unless the trial judge's discretion is abused. Jefferson v. State, 157 Ga. App. 324, 277 S.E.2d 317 (1981).

Refusal of new trial not disturbed unless it appears new evidence would change result. — Discretion of trial judge in refusing to grant new trial on ground of newly discovered evidence will not be controlled, unless it plainly appears that evidence alleged to have been newly discovered would probably change result. This rule is peculiarly applicable when alleged newly discovered testimony in criminal case relates to facts which are not vitally material to the issue of defendant's guilt or innocence. Taylor v. State, 13 Ga. App. 689, 79 S.E. 862 (1913).

Ineffective assistance of appellate counsel not shown. — Defendant failed

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to meet the defendant's burden in order to show that defendant's counsel rendered ineffective assistance at trial, pursuant to the Strickland standard under U.S. Const., amend. VI, as the failure to request instructions was shown to be a trial strategy, for which no prejudice was shown, and there was no need to object to an instruction which was a correct statement of the law and was supported by the evidence; further, appellate counsel was not shown to be ineffective because no prejudice was shown and certain issues which were not raised in defendant's new trial motion, pursuant to O.C.G.A. § 5-5-23, were procedurally barred from review on appeal. Godfrey v. State, 274 Ga. App. 237, 617 S.E.2d 213 (2005).

Trial court properly denied defendant's motion for a new trial. — Trial court did not abuse the court's discretion in denying the defendant's motion for a new trial based on what was alleged to be newly discovered evidence; the appeals court classified the evidence, at best, as newly available, not newly discovered. Kilby v. State, 289 Ga. App. 457, 657 S.E.2d 567 (2008).

Motion properly denied. — Motion for new trial was properly denied as the trial court did not err in concluding that the defendant failed to carry the defendant's burden of showing ineffective assistance; trial counsel's decision to pursue the coercion defense, O.C.G.A. § 16-3-26, for armed robbery rather than a mistaken identity defense, was clearly a strategic decision based upon the evidence. Lewis v. State, 270 Ga. App. 48, 606 S.E.2d 77 (2004).

Trial court properly denied an injured party's motion for a new trial pursuant to O.C.G.A. § 5-5-23 in a personal injury action; a driver's statements in the answer and pre-trial order were not inconsistent, as both averred that the driver had a green light at the time of the accident, and thus the trial court properly declined to allow cross-examination of the driver as to the pleadings. Lott v. Hatcher, 275 Ga. App. 424, 620 S.E.2d 651 (2005).

Evidence sufficient to support denial of motion. — Defendant's convictions for robbery, burglary, and false imprisonment, in violation of O.C.G.A. §§ 16-8-40(a), 16-7-1(a), and 16-5-41(a), respectively, were supported by sufficient evidence because the victim and a codefendant both positively identified the defendant as a participant in a criminal event, wherein three individuals burst into the victim's apartment, robbed the victim at gunpoint, and tied the victim up; the lack of physical evidence did not alter the sufficiency, as the identification testimony from a photographic line-up and at trial was within the trier of fact's credibility determination, and denial of the defendant's new trial motion under O.C.G.A. § 5-5-23 was proper. Tucker v. State, 275 Ga. App. 611, 621 S.E.2d 562 (2005).

Cited in Atlanta Rapid Transit Co. v. Young, 117 Ga. 349, 43 S.E. 861 (1903); Trammell v. Shirley, 38 Ga. App. 710, 145 S.E. 486 (1928); Smith v. State, 170 Ga. 234, 152 S.E. 482 (1930); Booth v. Rickerson, 45 Ga. App. 733, 165 S.E. 893 (1932); Capps v. Toccoa Falls Light & Power Co., 46 Ga. App. 268, 167 S.E. 530 (1933); McDow v. State, 176 Ga. 764, 168 S.E. 869 (1933); Thompson v. Growers' Fin. Corp., 49 Ga. App. 119, 174 S.E. 192 (1934); Gibson v. State, 178 Ga. 707, 174 S.E. 354 (1934); Terry v. State, 49 Ga. App. 343, 175 S.E. 403 (1934); Goodson v. State, 50 Ga. App. 91, 176 S.E. 916 (1934); Booker v. State, 50 Ga. App. 66, 176 S.E. 917 (1934); Jackson Disct. Co. v. Merck, 50 Ga. App. 381, 178 S.E. 208 (1935); Le Counte v. State, 51 Ga. App. 421, 180 S.E. 657 (1935); Wright v. State, 184 Ga. 62, 190 S.E. 663 (1937); Whatley v. Henry, 65 Ga. App. 668, 16 S.E.2d 214 (1941); Mills v. State, 193 Ga. 139, 17 S.E.2d 719 (1941); Parsons v. Georgia Power Co., 67 Ga. App. 517, 21 S.E.2d 257 (1942); Jones v. State, 68 Ga. App. 210, 22 S.E.2d 671 (1942); Landers v. State, 68 Ga. App. 804, 24 S.E.2d 139 (1943); Johnson v. State, 196 Ga. 806, 27 S.E.2d 749 (1943); Buttersworth v. State, 200 Ga. 13, 36 S.E.2d 301 (1945); Brown v. State, 73 Ga. App. 420, 37 S.E.2d 163 (1946); Luce v. Evans, 202 Ga. 48, 41 S.E.2d 878 (1947); Mooney v. Shelfer, 205 Ga. 766, 55 S.E.2d 212 (1949); McCowen v. Aldred, 85 Ga. App. 373, 69 S.E.2d 660 (1952); Randall v. Whitman, 88 Ga. App. 803, 78 S.E.2d 78

(1953); Gibson v. State, 210 Ga. 440, 80 S.E.2d 681 (1954); Fields v. Balkcom, 211 Ga. 797, 89 S.E.2d 189 (1955); Lightfoot v. Applewhite, 212 Ga. 136, 91 S.E.2d 37 (1956); Fortner v. State, 96 Ga. App. 855, 101 S.E.2d 908 (1958); Austin v. State, 121 Ga. App. 244, 173 S.E.2d 452 (1970); Bickford v. Bickford, 228 Ga. 353, 185 S.E.2d 756 (1971); Vinson v. State, 127 Ga. App. 607, 194 S.E.2d 583 (1972); Blair v. State, 230 Ga. 409, 197 S.E.2d 362 (1973); Shepherd v. Shepherd, 233 Ga. 228, 210 S.E.2d 731 (1974); Downs v. State, 141 Ga. App. 173, 233 S.E.2d 32 (1977); Maddox v. Thomas, 151 Ga. App. 477, 260 S.E.2d 355 (1979); Cartin v. Boles, 155 Ga. App. 248, 270 S.E.2d 799 (1980); Curry v. State, 155 Ga. App. 829, 273 S.E.2d 411 (1980); Austin v. McNeese, 156 Ga. App. 533, 275 S.E.2d 79 (1980); Transport Ins. Co. v. Ferguson, 156 Ga. App. 715, 275 S.E.2d 354 (1980); Fields v. Fields, 247 Ga. 437, 276 S.E.2d 614 (1981); Cody v. State, 160 Ga. App. 86, 286 S.E.2d 321 (1981); Powell v. State, 160 Ga. App. 210, 286 S.E.2d 513 (1981); Drake v. State, 248 Ga. 891, 287 S.E.2d 180 (1982); Willis v. State, 249 Ga. 261, 290 S.E.2d 87 (1982); Payne v. State, 161 Ga. App. 233, 291 S.E.2d 236 (1982); Collier v. State, 169 Ga. App. 69, 311 S.E.2d 242 (1983); Llewellyn v. State, 252 Ga. 426, 314 S.E.2d 227 (1984); Ansell v. State, 172 Ga. App. 89, 321 S.E.2d 819 (1984); Mason v. State, 177 Ga. App. 184, 338 S.E.2d 706 (1985); Joe N. Guy Co. v. Valiant Steel & Equip., Inc., 196 Ga. App. 20, 395 S.E.2d 310 (1990); McIntyre v. State, 207 Ga. App. 129, 427 S.E.2d 99 (1993); Betha v. State, 208 Ga. App. 802, 432 S.E.2d 242 (1993); Gardner v. State, 261 Ga. App. 188, 582 S.E.2d 167 (2003); Crossley v. State, 261 Ga. App. 250, 582 S.E.2d 204 (2003); Dorsey v. State, 261 Ga. App. 181, 582 S.E.2d 158 (2003); Floor Pro Packaging, Inc. v. AICCO, Inc., 308 Ga. App. 586, 708 S.E.2d 547 (2011).

Extraordinary Motions Under Section

Extraordinary motions or cases contemplated by section are such as do not ordinarily occur in transaction of human affairs, as when a man has been convicted of murder, and it afterwards appears that supposed deceased is still alive, or when one is convicted on testimony of witness who is subsequently found guilty of perjury in giving that testimony, or when there has been some providential cause, and cases of like character. Manchester v. State, 175 Ga. 906, 166 S.E. 651 (1932).

Stricter rule is applied to extraordinary motions under section than to ordinary motions. Kryder v. State, 76 Ga. App. 546, 46 S.E.2d 526 (1948).

Strict rules. — Extraordinary motions for new trials, based solely upon ground of newly discovered evidence, are viewed by courts with even less favor than original motions based on such ground, a stricter rule being applied to the former. Norman v. Goode, 121 Ga. 449, 49 S.E. 268 (1904); Jackson v. State, 50 Ga. App. 243, 177 S.E. 819 (1934).

Extraordinary motions for new trial based on newly discovered evidence are not favored by law. Fields v. State, 212 Ga. 652, 94 S.E.2d 694 (1956); Stevens v. State, 119 Ga. App. 102, 166 S.E.2d 413 (1969); Hamilton v. State, 119 Ga. App. 196, 166 S.E.2d 735 (1969).

Extraordinary motion for new trial under section is addressed to sound discretion of trial judge. Fields v. State, 212 Ga. 652, 94 S.E.2d 694 (1956); Stevens v. State, 119 Ga. App. 102, 166 S.E.2d 413 (1969); Hamilton v. State, 119 Ga. App. 196, 166 S.E.2d 735 (1969).

Refusal to grant extraordinary motion under section will not be reversed absent abuse of discretion. Fields v. State, 212 Ga. 652, 94 S.E.2d 694 (1956); Stevens v. State, 119 Ga. App. 102, 166 S.E.2d 413 (1969); Hamilton v. State, 119 Ga. App. 196, 166 S.E.2d 735 (1969).

Cannot be based on evidence known or discoverable in permissible time. — Extraordinary motion for new trial cannot be based upon evidence which was known to the movant or which could have been discovered in time by proper diligence. Hamilton v. State, 119 Ga. App. 196, 166 S.E.2d 735 (1969).

Denial of defendant's extraordinary motion for a new trial based on newly discovered evidence was upheld after the defendant failed to show, inter alia, that the allegedly new evidence came to the defendant's knowledge after trial or that the

Extraordinary Motions Under Section (Cont'd)

delay in acquiring the evidence was not the result of lack of due diligence. Alexander v. State, 264 Ga. App. 34, 589 S.E.2d 857 (2003).

Denial of defendant's motion for a new trial after the defendant's conviction for burglary and theft by receiving was not error, as defendant's alleged newly-discovered evidence would have been known prior to trial; the defendant knew of a witness' immediate presence during a conversation regarding stolen goods and, therefore, would have known prior to trial that the witness could have testified to the conversation. Fetter v. State, 271 Ga. App. 652, 610 S.E.2d 615 (2005).

Must contain certified copy of evidence adduced upon trial. — When accused has been convicted, a new trial denied the accused, and that judgment affirmed, in order for extraordinary motion for new trial on ground of newly discovered evidence to be a valid motion, it must appear that newly discovered evidence is not merely cumulative or impeaching, and that newly discovered evidence would likely produce a different result. As none of these requirements can be determined without an examination of evidence adduced upon original trial of case, an extraordinary motion for new trial that does not contain a certified copy of evidence adduced upon original trial is not a good motion and can be denied upon this ground alone. Fields v. State, 212 Ga. 652, 94 S.E.2d 694 (1956).

Court may allow oral or parol testimony. — On hearing of extraordinary motion for new trial, it is not error for court to allow, over objection, oral or parol testimony. Herrin v. State, 71 Ga. App. 384, 31 S.E.2d 124 (1944).

Judge may hear affidavits, though witnesses are present unless objection is made. — In hearing on extraordinary motion for new trial, when witnesses are present, and do not object, the presiding judge has discretion as to whether the judge will hear affidavits or oral testimony. Herrin v. State, 71 Ga. App. 384, 31 S.E.2d 124 (1944).

Claim of innocence in habeas petition was not a constitutional claim. — Petitioner, a death row inmate, argued in the petitioner's federal habeas petition as a separate claim for relief that the petitioner was actually innocent, but that claim failed because actual innocence was not itself a constitutional claim, and was instead a gateway through which a habeas petitioner had to pass to have an otherwise barred constitutional claim considered on the merits; further, the claim was not properly before the federal court, as the petitioner could pursue a claim of actual innocence in state court by filing an extraordinary motion for new trial under O.C.G.A. §§ 5-5-23, 5-5-40, and 5-5-41. Jefferson v. Terry, 490 F. Supp. 2d 1261 (N.D. Ga. 2007), aff'd in part and rev'd in part, 570 F.3d 1283 (11th Cir. Ga. 2009).

On hearing of extraordinary motion for new trial, pertinent parts of trial record are admissible. — It is not error on hearing of extraordinary motion for new trial to admit, over objection, record of evidence taken at main trial bearing upon question to be decided. Herrin v. State, 71 Ga. App. 384, 31 S.E.2d 124 (1944).

Filing of extraordinary motion not affected by notice of appeal. — While it is elementary that after notice of appeal has been filed to judgment of trial court, judge no longer has jurisdiction to reconsider and change it, this has no bearing on extraordinary motions filed under this section. Brooks v. Williams, 127 Ga. App. 311, 193 S.E.2d 231 (1972).

Exercise of Ordinary Diligence

When record shows that no diligence was exercised, motion under section is not meritorious. Williams v. State, 199 Ga. 504, 34 S.E.2d 854 (1945).

When a defendant was knowledgeable as to the identity of an eyewitness, yet did not exercise due diligence to locate the witness, no subpoena was issued for this witness to appear at the trial, and there was no attempt made to obtain a continuance of the case so that this witness could be located, the trial court did not err in denying the motion for new trial. Curtiss v. State, 165 Ga. App. 464, 302 S.E.2d 1 (1983).

When movant knew or should have known of evidence, motion is without merit. — Ground of the motion for new trial based on alleged newly discovered evidence is without merit when it appears from the ground that such evidence must have been, or should have been known to the defendant before trial. Bissell v. State, 157 Ga. App. 711, 278 S.E.2d 415 (1981).

No new trial as to evidence that could have been secured earlier through ordinary diligence. — Motion for new trial on this ground should not be granted unless it appears that applicant's ignorance of alleged newly discovered evidence at time of trial was not the result of negligence. Williams v. State, 67 Ga. 260 (1881).

New trials based on newly discovered evidence should not be granted unless it appears that testimony alleged to be newly discovered could not have been secured at trial by exercise of ordinary diligence. Copelan v. State, 7 Ga. App. 690, 67 S.E. 833 (1910).

When evidence could have been discovered before trial by exercise of diligence, trial judge does not abuse the judge's discretion in refusing a new trial. Cadwalader v. Fendig, 137 Ga. 140, 72 S.E. 903 (1911); Rothschild & Co. v. Arenson & Co., 22 Ga. App. 337, 96 S.E. 14 (1918); Sovereign Camp of Woodmen of the World v. Winn, 23 Ga. App. 760, 99 S.E. 319 (1919).

Judge is trier of whether or not sufficient diligence has been shown. Matthews v. Grace, 199 Ga. 400, 34 S.E.2d 454 (1945).

Determination of whether diligence exercised was ordinary. — Whether diligence used was ordinary or less than ordinary must be determined in each case by comparing conduct under consideration with that of ordinary man under similar circumstances. Orr v. State, 5 Ga. App. 76, 62 S.E. 676 (1908).

It is not incumbent upon state to show lack of diligence. Timberlake v. State, 246 Ga. 488, 271 S.E.2d 792 (1980).

Mere statement that evidence could not have been discovered through ordinary diligence is insufficient. — Mere general statements by defendant and counsel that they did not know of evidence and could not have discovered the evidence by the exercise of ordinary diligence are insufficient to sustain a motion for new trial on the ground of newly discovered evidence. James v. State, 115 Ga. App. 822, 156 S.E.2d 183 (1967).

Mere assertion that evidence could not have been discovered by ordinary diligence is insufficient. Timberlake v. State, 246 Ga. 488, 271 S.E.2d 792 (1980).

Mere allegation that the evidence could not have been discovered by ordinary diligence is insufficient to show that the evidence could not have been discovered prior to trial. Jefferson v. State, 157 Ga. App. 324, 277 S.E.2d 317 (1981).

Diligence before trial will not be inferred from diligence after conviction. Timberlake v. State, 246 Ga. 488, 271 S.E.2d 792 (1980).

Ordinary diligence requires pretrial inspection of place where accident occurred. Cadwalader v. Fendig, 137 Ga. 140, 72 S.E. 903 (1911); Realty Bond & Mtg. Co. v. Harley, 19 Ga. App. 186, 91 S.E. 254 (1917).

Avoidance of juror disqualification by ordinary diligence. — When a bank deposed a customer, who had filed a slip and fall action against the bank, four years before trial and when asked whether the customer had any relatives who might become jurors, the customer indicated that a spouse had some but the customer did not know their names, it was held that the bank was on notice that further investigation was required in order to avoid the issue of juror disqualification pursuant to O.C.G.A. § 15-12-135(a); accordingly, the denial of the bank's motion for a new trial pursuant to O.C.G.A. § 5-5-23, after the verdict was entered in favor of the customer, was properly denied because the bank could have avoided the issue of juror disqualification by use of ordinary diligence. Furthermore, the damages awarded in favor of the customer were not so flagrantly excessive or inadequate, in light of the evidence, as to create a clear implication of bias, prejudice, or gross mistake by the jurors. Patterson Bank v. Gunter, 263 Ga. App. 424, 588 S.E.2d 270 (2003).

Newly Discovered Evidence

1. In General

Newly discovered evidence must be admissible as evidence to provide basis for new trial. Timberlake v. State, 246 Ga. 488, 271 S.E.2d 792 (1980).

When ground of motion for new trial, based on newly discovered evidence, is predicated on certified copies of various documents, and contains much that would not be admissible in event of another trial, it is proper for the trial judge and for the reviewing court, in passing upon the ground, to consider only such portions of alleged newly discovered evidence as would be admissible in the event of a new trial. Williams v. State, 199 Ga. 504, 34 S.E.2d 854 (1945).

To entitle one convicted of a crime to a new trial on the ground of newly discovered evidence, such evidence must be admissible and must not be merely cumulative. Hornbuckle v. State, 76 Ga. App. 111, 45 S.E.2d 98 (1947).

Evidence itself, rather than witnesses, must be newly discovered. — Alleged newly discovered evidence is no cause for new trial, unless it shall appear that evidence itself is newly discovered, not merely that certain named witnesses by whom facts can be proved were unknown until after the trial. Watkins v. State, 18 Ga. App. 60, 88 S.E. 1000 (1916); Bass v. State, 154 Ga. 112, 113 S.E. 524 (1922); Manchester v. State, 175 Ga. 906, 166 S.E. 651 (1932).

Newly discovered evidence must be material to issue involved in trial. Oppenheim v. State, 12 Ga. App. 480, 77 S.E. 652 (1913).

Evidence should relate to new material facts, likely to produce different result on second trial. — It is essential that evidence should be material, relating to new and material facts, and such as will be likely to produce different result on second trial. Goldberg v. State, 16 Ga. App. 691, 85 S.E. 972 (1915).

Defendant's motion for a new trial based on newly discovered evidence was properly denied since the defendant claimed that one of the other people riding in a car with the defendant asked a testifying witness for bullets for a gun, and thereafter, defendant was convicted for various crimes resulting from the shooting, wounding, and deaths of three individuals; this new information was not material and not likely to produce a different result. Ingram v. State, 276 Ga. 223, 576 S.E.2d 855 (2003).

Must relate to new material facts discovered after verdict. — Newly discovered evidence must also be material in relating to new and material facts discovered by applicant after rendition of verdict against the applicant. Alexander v. Allen, 101 Ga. App. 706, 115 S.E.2d 258 (1960).

Evidence which must have been known before trial ended. — Motion for new trial on this ground should not be granted unless it appears that evidence was discovered by the applicant after a verdict against the applicant. Collins v. State, 21 Ga. App. 128, 94 S.E. 77 (1917).

Evidence which, in the nature of things, must have been known to the accused before the trial ended cannot after verdict be treated as newly discovered. Oglesby v. Cason, 65 Ga. App. 813, 16 S.E.2d 493 (1941).

Trial court did not abuse the court's discretion by denying the defendant's motion for new trial based upon newly discovered evidence, as the defendant had possession of the claimed new evidence, surveillance photos taken at the scene of an armed robbery, at trial, and counsel used these photos in presenting a defense; further, testimony from a newly discovered witness, whom the defendant claimed would extrapolate meaning from the evidence, was not newly discovered evidence for purposes of granting a new trial. Claritt v. State, 280 Ga. App. 384, 634 S.E.2d 81 (2006).

Evidence which could have been discovered and presented at trial. — If evidence subsequently relied upon is such that the evidence could have been discovered with ordinary diligence and presented at trial, a motion for new trial should be denied. Dyal v. State, 121 Ga. App. 50, 172 S.E.2d 326 (1970).

Trial court did not err by denying an insurance company's motion for a new trial to consider newly-discovered evidence, pursuant to O.C.G.A. § 5-5-23, be-

cause the bankruptcy records which the insurance company wanted the court to consider were available as public records and could have been obtained and introduced during the trial. VFH Captive Ins. Co. v. Cielinski, 260 Ga. App. 807, 581 S.E.2d 335 (2003).

In an action by a builder to recover for breach of contract, the buyers were not entitled to a new trial since the buyers failed to point to authority stating that the perjured testimony was grounds for a new trial in a civil case and failed to show that late discovery was not due to lack of diligence. Hopper v. M & B Builders, Inc., 261 Ga. App. 702, 583 S.E.2d 533 (2003).

Claim that there was newly discovered evidence lacked merit because the evidence was available before trial; the evidence that the defendant's son was allegedly molested by the victim of the defendant's offenses was known to the defendant prior to trial. Lester v. State, 278 Ga. App. 247, 628 S.E.2d 674 (2006).

Affidavit submitted by litigant's counsel purporting to show newly discovered evidence is insufficient to serve as grounds for a new trial. Among other requirements, the affidavit of the witness should be procured or the absence accounted for. Head v. State, 160 Ga. App. 4, 285 S.E.2d 735 (1981).

When appellant did not obtain the witness's affidavit as to newly discovered evidence, nor account for the affidavit's absence, there was no concrete indication as to what the newly discovered evidence would be, if a new trial were had. Thus, the trial court did not err in overruling the motion for new trial. Kuchenmeister v. State, 199 Ga. App. 64, 403 S.E.2d 847, cert. denied, 199 Ga. App. 906, 403 S.E.2d 847 (1991).

No abuse of discretion found. — Because the "newly discovered evidence" upon which the defendant relied merely tended to impeach the codefendant's trial testimony, the trial court did not abuse the court's discretion in denying the defendant's motion for a new trial; there was no evidence that the codefendant who recanted had been convicted of perjury. Anderson v. State, 276 Ga. App. 216, 622 S.E.2d 898 (2005).

2. Cumulative and Impeaching Evidence

Newly discovered evidence will not authorize new trial when merely cumulative or impeaching in character. See Brantley v. State, 16 Ga. App. 6, 84 S.E. 131 (1915); Aycock v. State, 188 Ga. 550, 4 S.E.2d 221 (1939); Hart v. State, 207 Ga. 599, 63 S.E.2d 390 (1951); Fields v. State, 212 Ga. 652, 94 S.E.2d 694 (1956); Hamilton v. State, 119 Ga. App. 196, 166 S.E.2d 735 (1969); O'Neal v. State, 238 Ga. App. 446, 519 S.E.2d 244 (1999), cert. denied, 529 U.S. 1039, 120 S. Ct. 1535, 146 L. Ed. 2d 349 (2000).

Newly discovered evidence that is merely impeaching in nature will not authorize a new trial, even though such evidence may relate to only testimony on some vital point. Johnson v. State, 196 Ga. 806, 27 S.E.2d 749 (1943).

Even when all the requirements of O.C.G.A. § 5-5-23 are met, a new trial is not demanded when the newly discovered evidence is no more than impeaching in character. Cole v. Shoffner, 205 Ga. App. 65, 421 S.E.2d 322 (1992).

Newly discovered evidence which is impeaching only is not basis for granting of new trial. Drane v. State, 130 Ga. 349, 60 S.E. 863 (1908); Bass v. State, 154 Ga. 112, 113 S.E. 524 (1922); Jones v. Knightstown Body Co., 52 Ga. App. 667, 184 S.E. 427 (1936); Williams v. State, 199 Ga. 504, 34 S.E.2d 854 (1945); Stembridge v. Georgia, 343 U.S. 541, 72 S. Ct. 834, 96 L. Ed. 1130 (1952); Williams v. State, 98 Ga. App. 346, 105 S.E.2d 771 (1958).

Newly discovered evidence which merely impeaches testimony of witnesses for state, and which would not likely produce different result on another trial if admitted, is not sufficient to authorize grant of new trial. Spell v. State, 225 Ga. 705, 171 S.E.2d 285 (1969).

Newly discovered evidence merely cumulative in nature is not a sufficient ground for grant of new trial. Walker v. State, 126 Ga. 588, 55 S.E. 483 (1906); Lawhorn v. State, 155 Ga. 373, 116 S.E. 822 (1923); Baumbach v. Dickens, 213 Ga. 745, 101 S.E.2d 702 (1958); Benefield v. State, 140 Ga. App. 727, 232 S.E.2d 89 (1976).

Newly Discovered Evidence (Cont'd)
2. Cumulative and Impeaching Evidence (Cont'd)

When newly discovered evidence is strictly cumulative and merely increases weight of evidence, leaving still in doubt a material question at issue, new trial will not be granted. Bragg v. State, 15 Ga. App. 368, 83 S.E. 274 (1914).

New trial will not be granted if the only effect of the newly discovered evidence will be to impeach the credit of a witness. Hutto v. State, 158 Ga. App. 3, 279 S.E.2d 278 (1981).

In a motion for a new trial based on newly discovered evidence, when a newly discovered witness only offered impeaching testimony, it did not constitute newly discovered evidence. Allain v. State, 202 Ga. App. 706, 415 S.E.2d 315 (1992).

After the trial court denied defendant's motion for a new trial under O.C.G.A. § 5-5-23 that was premised upon newly discovered evidence in the form of the testimony of two witnesses that the victim told that the victim had lied at trial, this was insufficient to grant a new trial, as the testimony would have merely impeached the victim's testimony, which was not a sufficient basis to grant a new trial. Slack v. State, 265 Ga. App. 306, 593 S.E.2d 664 (2004).

Coconspirator's testimony was not newly discovered evidence which warranted a new trial, as such, in addition to lacking credibility, was cumulative of the exculpatory evidence which was presented at trial, and impeached the inculpatory testimony of the coconspirator who was a witness for the prosecution. Silvers v. State, 278 Ga. 45, 597 S.E.2d 373 (2004).

Defendant's motion for a new trial based on newly discovered evidence that the victim and similar transaction witness fabricated their allegations was properly denied as: (1) the evidence failed to show that a material witness's trial testimony was physically impossible; and (2) the evidence merely served to impeach the victim's and the similar transaction witness's trial testimony. Cowan v. State, 279 Ga. App. 532, 631 S.E.2d 760 (2006).

Trial court did not err by denying defendant's motion for a new trial based on newly discovered evidence with regard to defendant's conviction for making an untrue material statement of fact and omitting other material facts in selling stock to a victim as the four affidavits in support of the defendant's motion set forth that, contrary to the victim's testimony on direct examination, the defendant had disclosed various legal difficulties to the victim, including the defendant's disbarment from the practice of law; the affidavits served only the purpose of impeachment, thus failing to satisfy the final requirement of case law that a new trial will not be granted if the only effect of the evidence will be to impeach the credit of a witness. Haupt v. State, 290 Ga. App. 616, 660 S.E.2d 383 (2008).

Defendant was not entitled to a new trial on the ground of newly discovered evidence in the form of testimony that was not available to defense counsel before trial because the witness's testimony regarding an agent's post-trial statement was merely impeaching the agent's testimony and did not establish as fact that the agent's testimony was knowingly and wilfully false. Chance v. State, 291 Ga. 241, 728 S.E.2d 635 (2012).

Ultimate criterion is probability of different result. — Although newly discovered evidence may be somewhat cumulative of testimony previously introduced, and impeaching in the evidence's character, the ultimate criterion is the probability of a different result. Paden v. State, 17 Ga. App. 112, 86 S.E. 287 (1915); McDaniel v. State, 74 Ga. App. 5, 38 S.E.2d 697 (1946).

When cumulative or impeaching evidence might justify new trial. — Cumulative evidence might justify a new trial, if it has effect of rendering clear and positive that which was before equivocal and uncertain. Dougherty v. State, 7 Ga. App. 91, 66 S.E. 276 (1909).

Evidence of new, independent fact, indicating accused's innocence, suffices. — Evidence of new and independent fact, indicating innocence of accused, even though impeaching and cumulative in a sense, if other requirements have been fulfilled, requires new trial. Mosley v. State, 17 Ga. App. 740, 88 S.E. 415 (1916).

What is cumulative evidence. — Cumulative evidence is evidence tending to establish a fact in relation to which there was evidence upon trial. Walker v. State, 126 Ga. 588, 55 S.E. 483 (1906); Lawhorn v. State, 155 Ga. 373, 116 S.E. 822 (1923); Baumbach v. Dickens, 213 Ga. 745, 101 S.E.2d 702 (1958).

Evidence is cumulative when the evidence goes to the fact principally controverted upon trial, and respecting which the party asking for a new trial produced testimony. Greenway v. Sloan, 211 Ga. 775, 88 S.E.2d 366 (1955); Fields v. State, 212 Ga. 652, 94 S.E.2d 694 (1956); Baumbach v. Dickens, 213 Ga. 745, 101 S.E.2d 702 (1958).

Evidence which covers same point is cumulative. McKinnon v. Henderson, 145 Ga. 373, 89 S.E. 415 (1916).

To be noncumulative, evidence must concern new issue or be of higher grade. — It is only when newly discovered evidence either relates to particular material issue concerning which no witness has previously testified, or is of a higher and different grade from that previously had on same material point, that it will ordinarily be taken outside definition of cumulative evidence, and afford a basis for a new trial. Johnson v. State, 196 Ga. 806, 27 S.E.2d 749 (1943).

That newly discovered evidence incidentally strengthens defense used in trial does not make the evidence cumulative, when the evidence is comprised of new, distinct, and material facts about which no witness testified at trial, thereby supplying a link or gap missing in previous testimony. Bell v. State, 227 Ga. 800, 183 S.E.2d 357 (1971).

Evidence not rendered noncumulative merely because furnished by stranger to litigation. — Evidence is not rendered noncumulative so as to afford a basis for demanding new trial on the ground of newly discovered evidence, merely because it is to be furnished by a stranger to the litigation upon a matter otherwise covered only by the testimony of the parties. Baumbach v. Dickens, 213 Ga. 745, 101 S.E.2d 702 (1958).

New evidence which is immaterial, incompetent, or merely impeaching is not ground for new trial. Ponder v. Walker, 107 Ga. 753, 33 S.E. 690 (1899); Fort v. State, 3 Ga. App. 448, 60 S.E. 282 (1908); Graham v. Owens, 18 Ga. App. 284, 89 S.E. 304 (1916); Jenkins v. Jenkins, 150 Ga. 77, 102 S.E. 425 (1920); Hill v. Overstreet, 28 Ga. App. 786, 113 S.E. 41 (1922); Fairburn & A. Ry. & Elec. Co. v. Hale, 32 Ga. App. 412, 123 S.E. 724 (1924).

Newly discovered evidence which is no more than impeaching in character, falls under inhibition of section, although in every other respect it meets requirements of this section dealing with circumstances under which new trial may be granted on ground of newly discovered evidence. Stembridge v. State, 84 Ga. App. 413, 65 S.E.2d 819 (1951), cert. dismissed, 343 U.S. 541, 72 S. Ct. 834, 96 L. Ed. 1130 (1952).

Evidence of perjury by witness insufficient. — Affidavit indicating that the defendant's cousin allegedly committed perjury on the stand at the defendant's trial was not newly discovered evidence under O.C.G.A. § 5-5-23, and would have served only to impeach the cousin's trial testimony; therefore, such evidence was not a basis for a new trial. Morrison v. State, 256 Ga. App. 23, 567 S.E.2d 360 (2002).

Trial court did not abuse the court's discretion in denying the defendant's motion for a new trial as the hearsay evidence of alleged post-trial statements that the victim and the victim's mother made to the relatives of the defendant, who had been convicted of two counts of child molestation regarding the victim, that the victim and the mother had admitted that they lied at trial about the molestation, only had the effect of impeaching the trial testimony of prosecution witnesses and a new trial would not be granted under such circumstances. Dowd v. State, 261 Ga. App. 306, 582 S.E.2d 235 (2003).

Failure by the defendant to comply with former Ga. Ct. App. R. 27(c)(2) because there was no citation of authority or reasoned argument to support an asserted error constituted an abandonment of a claim on appeal that the trial court erred in failing to order a lie detector test for the victim of the defendant's crime; however, even if there was no abandonment of the

Newly Discovered Evidence (Cont'd)
2. Cumulative and Impeaching Evidence (Cont'd)

assertion of error, a new trial would not have been granted pursuant to O.C.G.A. § 5-5-23 because the results of any polygraph test given to the victim would not have done more than impeach the victim's credibility and there was no showing by the defendant that the evidence would not have merely been cumulative. Hammond v. State, 282 Ga. App. 478, 638 S.E.2d 893 (2006).

Extrajudicial admissions of party are not merely impeaching, and when such admissions show a new and distinct right to recover, or a different theory of recovery, from that relied upon at trial, or when similar extrajudicial admissions of the same party were not proved upon the trial of the case, such evidence may be grounds for a new trial. Wiggins v. Lord, 87 Ga. App. 486, 74 S.E.2d 389 (1953).

Trial court properly denied the second defendant's motion for new trial on the basis of newly discovered evidence that a codefendant lied under oath to obtain a favorable deal because the codefendant was not convicted of perjury, the second defendant failed to establish that the codefendant's testimony was the purest fabrication, and there was other evidence that supported second defendant's guilt. Lopez v. State, 267 Ga. App. 532, 601 S.E.2d 116 (2004).

3. Application

Post-trial admissions or declarations of successful party as ground for new trial. — New trial may be granted for newly discovered evidence of material admissions of successful party, which is not cumulative to other evidence offered at trial. Evidence of admissions made by successful party after trial, or subsequent declarations inconsistent with that party's testimony on trial, may be ground for setting aside verdict, at least in interest of justice. Perry v. Hammock, 75 Ga. App. 171, 42 S.E.2d 651 (1947).

Evidence that conviction was procured by perjured testimony, with prosecutor's knowledge. — When it is shown and not denied that conviction was procured by perjured testimony, which testimony state's prosecuting attorney knew to be perjured at time the testimony was introduced, due process as guaranteed by the Fourteenth Amendment is denied, and such testimony is not merely impeaching in character but has probative force. Burke v. State, 205 Ga. 656, 54 S.E.2d 350 (1949).

Section does not preclude evidence showing witness's error in former certificate as to transcript of record. — Section does not prevent introduction of evidence which goes to show that error was made by witness in the witness's former certificate as to transcript of record. Such evidence does not impeach former testimony or transcript, although the evidence may be contradictory. It is explanatory, as showing way and manner in which such alleged error may have occurred. Sheffield v. Hawkins, 47 Ga. App. 162, 170 S.E. 100 (1933).

Discovered attempt of prosecutor to bribe individual to swear falsely. — It is no cause for new trial that accused has discovered that certain person will swear that prosecutor sought to bribe the person to swear falsely. Duggan v. State, 124 Ga. 438, 52 S.E. 748 (1905).

Effect of showing that efforts were made to get certain persons to testify falsely against the defendant, which persons did not testify at all, could only be material as a circumstance to show that same effort was made to get those who did testify against the defendant to likewise swear falsely. It therefore follows that such newly discovered evidence is merely impeaching in character and is therefore not a good ground for new trial. Loomis v. State, 78 Ga. App. 153, 51 S.E.2d 13 (1948).

Newly discovered evidence tending to impeach state's witness. Jenkins v. State, 19 Ga. App. 626, 91 S.E. 944 (1917).

Officers' opinion testimony not evidence. — Defendant was not entitled to a new trial based upon the prosecution having failed to disclose evidence favorable to the defense because two police officers' opinions as to the defendant's guilt were not evidence and would not have been admissible at trial. Smith v. State, 309 Ga. App. 241, 709 S.E.2d 823 (2011), cert.

denied, No. S11C1266, 2011 Ga. LEXIS 954 (Ga. 2011).

Extrajudicial declarations by witness not ground for new trial. — That witness, after trial, made certain declarations at variance with the witness's sworn testimony, will not work new trial. Lasseter v. Simpson, 78 Ga. 61, 3 S.E. 243 (1886); Smarr v. Kerlin, 21 Ga. App. 813, 95 S.E. 306 (1918); Adams v. Ginn, 27 Ga. App. 222, 107 S.E. 608 (1921).

Declarations of witness at variance with testimony. — Declarations of witness at variance with what the witness testified to upon trial do not constitute reasons for grant of new trial. Gates v. State, 84 Ga. App. 367, 66 S.E.2d 342 (1951).

Individual's statement to another that the individual, rather than accused, perpetrated offense. — Declarations to third persons against declarant's penal interest, to effect that declarant, and not accused, was actual perpetrator of offense, are not admissible in favor of an accused at the accused's trial, or to procure a new trial on the basis of newly discovered evidence. Timberlake v. State, 246 Ga. 488, 271 S.E.2d 792 (1980).

No new trial when movant's counsel knew of existence of certain papers before trial. Hearn v. Roberts, 27 Ga. App. 411, 108 S.E. 622, cert. denied, 27 Ga. App. 835 (1921).

Recent photo of another suspect not ground for new trial when other recent photo was available. — Defendant's motion for new trial on basis of newly discovered, recent photo of another suspect and of district attorney's failure to bring such photo to attention of defendant or trial court was properly denied when the defendant had access to a different photo, which was less than two years old, and used the photo to examine the witness but did not seek to examine the state's eyewitnesses by use of the photo; and when the defendant failed to tender post trial evidence that any of the state's eyewitnesses would identify other suspect from newly discovered photo, leading trial court to conclude that photo was not so material that it would probably produce a different verdict. Timberlake v. State, 246 Ga. 488, 271 S.E.2d 792 (1980).

Improved condition of victim not new evidence. — Although the defendant was convicted under O.C.G.A. § 40-6-394, the defendant was not entitled to a new trial under O.C.G.A. § 5-5-23, as the newly-discovered evidence that the victim was seen walking would not have produced a different result; evidence of this was produced at trial, and permanent uselessness of a limb was not required for a conviction under O.C.G.A. § 40-6-394. Adams v. State, 259 Ga. App. 570, 578 S.E.2d 207 (2003).

Evidence offered to establish alibi, contradicted at trial. — When evidence presented at hearing on motion to reopen case involving operation of automobile during period driver's license was suspended attempted only to establish alibi and there was positive evidence to the contrary presented at the original hearing, it was not newly discovered evidence as contemplated. Whitley v. State, 79 Ga. App. 600, 54 S.E.2d 486 (1949).

Evidence which would do no more than make case of oath against oath. — When alleged newly discovered evidence would do no more than make case of oath against oath i.e., new witness swearing prosecutrix was lying and vice versa, on issues already covered at trial, presumption in favor of verdict is sufficient to turn scale or at least to sustain exercise of discretion by presiding judge upholding verdict. Jackson v. State, 56 Ga. App. 250, 192 S.E. 454 (1937).

Existing rulings of Interstate Commerce Commission court cannot be set up as newly discovered evidence. Macon D. & S.R.R. v. Robinson, 19 Ga. App. 370, 91 S.E. 492 (1917).

No new trial as to facts known to summoned witness who did not testify. — When witnesses summoned by the defendant are present at trial but are not examined, a new trial will not be granted on the ground that since the verdict the defendant has for first time learned that the witnesses could have testified to facts material to the defendant's defense. Hall v. State, 117 Ga. 263, 43 S.E. 718 (1903); Rounsaville v. State, 163 Ga. 391, 136 S.E. 276 (1926).

Fact that trial witness would have testified differently had the witness

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not been ill is insufficient. — It is no ground for new trial that witness who testified upon trial would have testified to other facts in contradiction of other testimony, had the witness not, at time of rendition of the witness's testimony, been ill and under influence of drugs. Duren v. Clark, 47 Ga. App. 429, 170 S.E. 693 (1933).

Forgetfulness by party of material fact on trial. Oglesby v. Cason, 65 Ga. App. 813, 16 S.E.2d 493 (1941).

Inadequate pre-trial investigation merits new trial. — Defendant's motion for suppression of identification evidence in defendant's trial for armed robbery, in violation of O.C.G.A. § 16-8-41, was properly denied because the photographic line-up presented to the victim was not impermissibly suggestive, as four of the six men were within defendant's age range and had the same color and characteristics about their faces. However, it was error to deny the defendant's motion for a new trial pursuant to O.C.G.A. § 5-5-23, since defense counsel rendered ineffective assistance in that counsel failed to conduct a proper pre-trial investigation based on the defendant's claim of an alibi for which the defendant provided names of witnesses, as there was a reasonable probability that the outcome might have changed if the proper investigation was conducted. Tenorio v. State, 261 Ga. App. 609, 583 S.E.2d 269 (2003).

Testimony constituting expert opinions did not present "new and material facts" and such opinion evidence failed to constitute newly discovered evidence within O.C.G.A. § 5-5-23. Wesleyan College v. Weber, 238 Ga. App. 90, 517 S.E.2d 813 (1999).

New and material evidence found in civil case. — Discovery of the fact that the former wife had remarried the day before a trial on issues of alimony, child support, and property disposition is new and material evidence warranting a new trial. Hegedus v. Hegedus, 255 Ga. 44, 335 S.E.2d 284 (1985).

Denial of a motion for new trial not abuse of discretion. Pendergrass v. State, 168 Ga. App. 190, 308 S.E.2d 585 (1983).

When the plaintiff in a malpractice action moved for a new trial claiming the discovery of new evidence in that a 1981 x-ray defendant introduced at trial as depicting the plaintiff's shoulder was, in fact, an x-ray of someone else's shoulder because a prosthesis was not depicted therein, but the record reveals that the plaintiff did not exercise due diligence in determining that fact before the end of trial, having fallen short of meeting the requirements for the grant of a new trial, plaintiff had no basis for asserting that the trial court had abused the court's discretion by denying the plaintiff's motion. Boatwright v. Eddings, 180 Ga. App. 742, 350 S.E.2d 291 (1986).

Sufficient evidence supported the defendant's conviction for malice murder, and there was no merit in the defendant's ineffective assistance of counsel claim; therefore, the defendant's motion for a new trial was properly denied. Jackson v. State, 277 Ga. 592, 592 S.E.2d 834 (2004).

Trial court properly denied the defendant's motion for a new trial based on newly discovered evidence challenging the victim's testimony that the victim knew the defendant but had never "partied" or smoked marijuana with the defendant as: (1) the defendant knew of the dispute as to how well the defendant knew the victim; (2) the defendant did not show any reason why the defendant could not in due diligence have obtained the affidavits at some earlier time; (3) the only issues raised in the affidavits were how well the defendant and the victim were acquainted and how they spent their time; and (4) the proffered testimony only went to impeach the witness. Joyner v. State, 267 Ga. App. 309, 599 S.E.2d 286 (2004).

Defendant's acts, including telephoning a known drug dealer about purchasing cocaine, and driving to an agreed location to make the transaction, sufficiently constituted a substantial step to convict the defendant of attempting to possess cocaine; thus, denial of defendant's motion for a new trial was not an abuse of discretion. Massey v. State, 267 Ga. App. 482, 600 S.E.2d 437 (2004).

In a prosecution for serial rape, the trial

court did not abuse the court's discretion by denying a motion for a new trial after the defendant failed to establish the existence or the relevance of new evidence of the nonoccurrence of a prior incident not originally in the record. Jefferson v. State, 206 Ga. App. 544, 425 S.E.2d 915 (1992).

When the copies were not submitted until after entry of a directed verdict, copies of a prior declaratory judgment introduced by parties to that proceeding did not constitute newly discovered evidence for purposes of a motion for a new trial. McMillian v. Rogers, 223 Ga. App. 699, 479 S.E.2d 7 (1996).

Not only did counsel's testimony support the trial court's ruling denying the defendant a new trial, but the defendant did not produce evidence as to what the defendant should have known at the time of the defendant's decision not to testify that the defendant did not know, nor how that information would have altered the defendant's decision; in any event, the defendant failed to show that there was any likelihood that the outcome of the trial would have been different. Sims v. State, 278 Ga. 587, 604 S.E.2d 799 (2004).

Trial court did not err in denying a husband's motion for new trial as the wife presented sufficient evidence for which an equitable division of the value of two properties at issue could have been determined at the time the property's value began to include an element of marital property. Maddox v. Maddox, 278 Ga. 606, 604 S.E.2d 784 (2004).

Defendant was not entitled to a new trial based on newly discovered evidence that the defendant suffered from pigmentary dispersion syndrome because, even with vision impairment the defendant qualified for a Georgia driver's license; further, the argument at trial was that the defendant was not looking at the road and was sleep-impaired at the time of the accident, and there was evidence that the defendant had been drinking and swerved back and forth across the road making it unlikely that evidence of visual impairment would produce a different outcome. Harris v. State, 272 Ga. App. 366, 612 S.E.2d 557 (2005).

There was no manifest abuse of discretion in a trial court's denial of defendant's new trial motion, pursuant to O.C.G.A. § 5-5-23, with respect to the claim that one juror was not impartial because the juror had failed to answer a juror question regarding the juror's relationship to anyone who was convicted of, or a victim of, a child molestation crime, for which defendant was on trial, and it later was discovered that the juror's nephew had been convicted of such a crime six years earlier, as defendant never sought to exclude the juror during the trial, the juror indicated that the juror did not consider the nephew a close relative, and there was no bias or lack of impartiality shown. Allen v. State, 275 Ga. App. 826, 622 S.E.2d 54 (2005).

Upon convictions of possessing cocaine with intent to distribute and obstructing a law enforcement officer, the trial court properly denied the defendant's motion for a new trial, as: (1) a challenged juror affirmed the guilty verdict; (2) details about a government witness's plea deal would not have changed the trial outcome; and (3) lab results confirming the purity of the contraband seized was sufficient to show that the substance defendant possessed was cocaine. Tate v. State, 278 Ga. App. 324, 628 S.E.2d 730 (2006).

Defendant's aggravated assault with a deadly weapon conviction was upheld, and an amended motion for a new trial was properly denied, as the defendant was not entitled to a jury instruction on a claimed defense of "mere presence" as such was not a recognized defense, and the charge given to the jury covered all legal principles relevant to the determination of guilt; any confusion was cleared up by the court's further instruction that in order for the jury to convict the defendant of aggravated assault under a party to a crime theory, it would have to find that the defendant directly committed or intentionally helped in the commission of aggravated assault with a deadly weapon. Kelley v. State, 279 Ga. App. 187, 630 S.E.2d 783 (2006).

Trial court did not abuse the court's discretion in denying the defendant's extraordinary motion for new trial without a hearing as: (1) the alleged newly-discovered evidence was not so material that it would likely result in a different verdict; (2) the affidavits pre-

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sented lacked the type of materiality required to support a new trial as they did not show the witnesses's trial testimony to have been the purest fabrication; (3) the defendant failed to act diligently in presenting the affidavits alleged to have supported the motion; (4) the trial court favored the original testimony, and as such, could not disregard the jury's verdict; and (5) the defendant failed to present the facts necessary to warrant a hearing on the motion. Davis v. State, 283 Ga. 438, 660 S.E.2d 354 (2008), cert.denied, mot. granted, 129 S. Ct. 397, 172 L.Ed.2d 323 (2008).

Trial court did not abuse the court's discretion in denying a temporary staffing agency's motion for a new trial based on the failure of a widow and a hospital to spontaneously disclose their litigation agreement because there was nothing in the record to show that the agency's ignorance of the litigation agreement rendered the trial fundamentally unfair; because the agency's contractual obligation to indemnify the hospital for any damages the hospital had to pay on account of a nurse's negligence, the hospital had an obvious incentive from the outset to try to show that the widow's damages were entirely the nurse's fault, rather than solely or partly the fault of the hospital's own employee. Med. Staffing Network, Inc. v. Connors, 313 Ga. App. 645, 722 S.E.2d 370 (2012), cert. denied, No. S12C0940, 2012 Ga. LEXIS 533 (Ga. 2012).

Trial court did not err in denying the defendant's extraordinary motion for a new trial under O.C.G.A. § 5-5-41 because the codefendant's testimony at the hearing probably would not have produced a different result in the guilt/innocence phase if the testimony had been presented at the defendant's trial; the defendant did not demonstrate that the defendant took diligent steps to ascertain what testimony the codefendant could have been willing to give during the more than 17 years since the codefendant's trial. Drane v. State, 291 Ga. 298, 728 S.E.2d 679 (2012), cert. denied, U.S. , 133 S. Ct. 663, 184 L. Ed. 2d 472 (2012).

Trial court did not abuse it's discretion by denying a mother's motion for a new trial with regard to an order changing custody of the parties' one minor child to the father because the mother failed to produce newly discovered evidence, repeatedly interfered with the father's visitation, and the record established that the mother obtained a modification in another county under false pretenses. Thus, the mother's credibility had been completely impeached. Fifadara v. Goyal, 318 Ga. App. 196, 733 S.E.2d 478 (2012).

Evidence defendant cited not newly discovered evidence for new trial. — Defendant presented nothing that would serve as a basis for providing relief based on a theory of newly discovered evidence because the alleged evidence the defendant cited was not "newly discovered evidence" that would justify the grant of a new trial but merely a new expert asserting an alternative theory about the case based on the same DNA evidence that had always been available to the defendant for review. Wheeler v. State, 290 Ga. 817, 725 S.E.2d 580 (2012).

Authentication of evidence. — Trial court did not err in denying the defendant's motion for a new trial, pursuant to O.C.G.A. § 5-5-23, since defense counsel's actions constituted trial strategy, were not shown to be ineffective, nor was there any showing that defense counsel's conduct caused the defendant any harm, which was a necessary element of showing ineffectiveness; the motion was also denied with respect to the defendant's claim that the defendant had been coerced into helping commit the crimes as a letter purportedly written by a codefendant which corroborated the coercion defense was not authenticated, despite a request by the state for authentication, and there was no other evidence to support the defendant's claim. Menefield v. State, 264 Ga. App. 171, 590 S.E.2d 180 (2003).

Denial of motion proper. — Under O.C.G.A. § 5-5-23, denial of a motion for new trial was proper when the evidence was consistent with the defendant's pre-trial statement that was introduced at trial. Mack v. State, 263 Ga. App. 186, 587 S.E.2d 132 (2003).

Trial court did not abuse the court's

discretion in denying the defendant's motion for a new trial based on a newly discovered confession from the victim, which had been lost before trial; the victim testified that the confession had been signed under duress while the victim was chained and hanging by the victim's feet, and it was improbable that the confession would have produced a different verdict as, pretermitting whether the victim stole from the defendant, the defendant was not justified in binding the victim, hanging the victim from the victim's feet, and striking the victim. McPetrie v. State, 263 Ga. App. 85, 587 S.E.2d 233 (2003).

Corporate defendant, in a negligence and product liability action, was not entitled to a new trial or judgment notwithstanding the verdict because the jury was properly charged that each individual tortfeasor's conduct did not have to constitute a substantial contributing factor in the plaintiff's injury in order to be considered a proximate cause thereof. John Crane, Inc. v. Jones, 278 Ga. 747, 604 S.E.2d 822 (2004).

Defendant's claim that a trial court improperly denied a motion for new trial and for extraordinary new trial, based on Brady violations by the state in failing to apprise defendant that a lab technician who had run tests on defendant's blood for the presence of alcohol had switched other test samples on two prior occasions, lacked merit; even if most of the elements of a Brady violation were shown, defendant was not deprived of a fair trial because there was no reasonable possibility that the outcome of the trial would have been different because blood taken by hospital personnel also indicated that alcohol was present. Verlangieri v. State, 273 Ga. App. 585, 615 S.E.2d 633 (2005).

Defendant's aggravated stalking conviction was upheld on appeal, and a new trial was properly denied, as sufficient evidence of the defendant's contact with the victim, in violation of a protective order, and acts of harassment and intimidation supported the conviction; moreover, the failure to object to the state's of similar transaction evidence waived any consideration of the evidence on appeal. Kennedy v. State, 279 Ga. App. 415, 631 S.E.2d 462 (2006).

Trial court properly denied a defendant's motion for a new trial based on newly discovered evidence with regard to the defendant's conviction for the murder of the defendant's mother as the purported newly discovered evidence that another man with whom the defendant had used cocaine with on the day of the murder killed the defendant's mother after learning that the mother had a large sum of cash in the home in preparation for a trip, was part of the defendant's defense, and was vigorously advanced at trial; the reviewing court found no error after concluding that the newly discovered evidence would not have reasonably produced a different result. Hester v. State, 282 Ga. 239, 647 S.E.2d 60 (2007).

Trial court properly denied defendants' motions to suppress and for new trial with regard to the defendants' convictions for drug possession and trafficking based on obtaining allegedly new evidence that a stopping officer failed to run a computer check of one defendant's driver's license, as that officer had indicated, because there was no showing that defendants exercised due diligence in obtaining the additional evidence. In fact, the reason defense counsel provided for not obtaining the evidence sooner was a failure to believe that the computer check of the license was going to be a key issue. Woodard v. State, 289 Ga. App. 643, 658 S.E.2d 129 (2008), cert. denied, No. S08C1061, 2008 Ga. LEXIS 475 (Ga. 2008).

Trial court did not err in denying the defendant's motion for new trial based on newly discovered evidence where bystander's existence was known by defense prior to trial; moreover, as the bystander's claim that defendant had no gun was contradicted by three bystanders and a victim, it did not appear that evidence would have produced a different verdict. Banks v. State, 290 Ga. App. 887, 660 S.E.2d 873 (2008).

Trial court did not err in denying the defendant's motion for new trial based on newly discovered evidence because the defendant failed to establish that the new evidence attacked the creditability of a witness; credibility is attacked by showing that the pending charges and their dismissal reveal a possible bias, prejudice, or

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ulterior motive on behalf of the witness to give untruthful or shaded testimony in an effort to please the state and not merely to testify in accordance with the state's theory of the case. Delgiudice v. State, 308 Ga. App. 397, 707 S.E.2d 603 (2011).

Decision denying the defendant's motion for a new trial was proper, in light of the strength of the evidence that the defendant committed the charged offenses, including fingerprint evidence; it could not be concluded that new DNA evidence excluding the defendant as the donor of a semen sample recovered from a victim was so material that the DNA evidence warranted a new trial. Wright v. State, 310 Ga. App. 80, 712 S.E.2d 105 (2011).

Hearing of Motions Under Section

Each case of newly discovered evidence must be judged on the case's own facts. Tanner v. State, 247 Ga. 438, 276 S.E.2d 627 (1981).

In motion for new trial, trial judge becomes trier of that issue. Herrin v. State, 71 Ga. App. 384, 31 S.E.2d 124 (1944).

Judge shall determine credibility of conflicting facts and contradictory witnesses. — Upon hearing of motion for new trial, based upon newly discovered evidence, when affidavits are introduced supporting and disputing ground of motion, the trial judge is trier of facts, and it is the judge's province to determine credibility of conflicting facts and contradictory witnesses. Herrin v. State, 71 Ga. App. 384, 31 S.E.2d 124 (1944).

Court must consider alleged newly discovered evidence in comparison with evidence adduced at trial. — Under motion for new trial based upon newly discovered evidence, trial court and appellate court are necessarily required to consider alleged newly discovered evidence in light of and in comparison with evidence adduced at trial, and on which conviction is based, in order that court may determine whether alleged newly discovered evidence is merely cumulative or impeaching. Accordingly, injury is done to the defendant in appeal to allow introduction of evidence adduced at trial. Herrin v. State, 71 Ga. App. 384, 31 S.E.2d 124 (1944).

Fact that evidence authorized verdict does not preclude different result on new trial. — Fact that verdict was authorized by evidence adduced at trial in no way precludes probability of different verdict on another trial with newly discovered evidence, when evidence merely authorized, but did not demand, verdict, and such verdict was before vital, newly discovered evidence supplying missing link was before jury. Bell v. State, 227 Ga. 800, 183 S.E.2d 357 (1971).

Appellate court will not control trial judge's discretion regarding credibility of witnesses. — Appellate court will not in appeal of motion for new trial control discretion of trial judge as to comparative credibility of witnesses who testified in support of motion and those who swore to contrary. Herrin v. State, 71 Ga. App. 384, 31 S.E.2d 124 (1944).

Presumption in favor of verdict sustains judge's discretion in upholding verdict when evidence conflicts. — Under motion for new trial based upon newly discovered evidence, when evidence consists of conflicting oaths, presumption in favor of verdict is sufficient to sustain exercise of discretion by judge in upholding verdict. Herrin v. State, 71 Ga. App. 384, 31 S.E.2d 124 (1944).

When countershowing is made on application under section, trial judge becomes trier of issue thus formed and the judge's discretion is final and cannot be controlled by the appellate court unless there is a manifest abuse of the discretion. Herrin v. State, 71 Ga. App. 384, 31 S.E.2d 124 (1944).

In a motion for a new trial based upon newly discovered evidence in a criminal trial, when there is a countershowing by the state, the judge is the trier of facts, and it is the judge's province to determine credibility of facts and contradictory witnesses, and the judge's discretion in refusing a new trial on alleged newly discovered evidence will not be controlled unless manifestly abused. Bailey v. State, 47 Ga. App. 856, 171 S.E. 874 (1933).

When motion for new trial is based on ground of newly discovered evidence, and

there is a countershowing, with conflicting evidence as to truth of alleged newly discovered facts, the Supreme Court will not interfere with grant or refusal of new trial on that ground, unless there has been a manifest abuse of discretion which law has vested in the trial judge, but not conferred on the Supreme Court. Southwell v. State, 188 Ga. 310, 4 S.E.2d 26 (1939).

Trial judge does not abuse the judge's discretion in refusing new trial when alleged newly discovered evidence is contradicted in countershowing. Atlanta Consol. S. Ry. v. McIntire, 103 Ga. 568, 29 S.E. 766 (1898); Crumley v. State, 23 Ga. App. 312, 98 S.E. 230 (1919); Edenfield v. Brinson, 149 Ga. 377, 100 S.E. 373 (1919); Fackler v. Lifsey, 28 Ga. App. 544, 112 S.E. 167 (1922).

When conflict arises as to material facts upon which motion for new trial based on newly discovered evidence was based and as to credibility of witnesses, the reviewing court will not hold that the court erred in overruling the motion. Harper v. State, 60 Ga. App. 684, 4 S.E.2d 734 (1939).

When countershowing rendered it doubtful as to what witness would testify. — In motion for new trial upon ground of newly discovered evidence, when state made countershowing with a later affidavit of witness who proposed to testify in behalf of the defendant, which showed that the proposed witness largely repudiated the witness's first affidavit, rendering it doubtful or equivocal as to what the witness would testify, the judge did not err in overruling motion. Cannon v. State, 194 Ga. 277, 21 S.E.2d 689 (1942).

No error in denying defendant's motion for new trial. — Trial court did not err in denying the defendant's motion for new trial when the state did not stipulate during the sentencing phase of trial that the shotgun found in the defendant's possession was improperly measured. The state simply did not object to the defendant's introduction into evidence of a document giving instructions for measuring the length of the barrel of a rifle or shotgun. Wiley v. State, 204 Ga. App. 881, 420 S.E.2d 783, cert. denied, 204 Ga. App. 922, 420 S.E.2d 783 (1992).

Time for amendments. — Phrase "within the time allowed by law for entertaining a motion for new trial," indicates that the amendments should be allowed until the trial court's final disposition of a motion for a new trial timely filed and should not be limited by the 30-day period specified in O.C.G.A. § 5-5-40(a). Hegedus v. Hegedus, 255 Ga. 44, 335 S.E.2d 284 (1985).

Failure to request an evidentiary hearing in support of a claim of ineffectiveness of trial counsel raised in a motion for new trial results only in a waiver of the right to such a hearing, but not in a waiver of appellate consideration of the claim. Wilson v. State, 277 Ga. 195, 586 S.E.2d 669 (2003).

Juror's alleged presence while codefendant pleaded guilty. — Trial court properly denied the defendant's motion for a new trial as the trial court's finding that defendant's jurors were not present when the codefendant pleaded guilty was not clearly erroneous since the victims testified that: (1) the victims were present in the courtroom during the codefendant's guilty plea; (2) the victims were familiar with and would have recognized the jurors selected to hear the defendant's case; and (3) no jurors selected to hear the defendant's case were present in the courtroom during the codefendant's guilty plea. Alwin v. State, 267 Ga. App. 236, 599 S.E.2d 216 (2004).

Defendant's competency no basis to conduct hearing or issue ruling on new trial motion. — Trial court erred by refusing to conduct a hearing or to rule on the defendant's motion for a new trial based upon the court's finding that the defendant was, at that time, mentally incompetent and unable to assist the counsel in challenging the conviction, as defendant's current mental incompetence provided no logical basis to delay a post-conviction proceeding to address whether the defendant was incompetent at trial, whether the trial court should have been on notice of the defendant's incompetency and conducted a hearing during trial, or whether the trial counsel was ineffective for failing to timely raise the competency issue. Florescu v. State, 276 Ga. App. 264, 623 S.E.2d 147 (2005).

Hearing of Motions Under Section (Cont'd)

Without a record of trial, the Court of Appeals was forced to be in accord with the presumption in favor of regularity of the trial court's denial of the motion, and assume that the court's findings were supported by sufficient competent evidence; thus, the findings made against the intervenor regarding the legitimation of a child he claimed to be the biological father of were upheld. King v. Lusk, 280 Ga. App. 40, 633 S.E.2d 350 (2006).

RESEARCH REFERENCES

Am. Jur. 2d. — 58 Am. Jur. 2d, New Trial, § 284 et seq.

C.J.S. — 66 C.J.S., New Trial, § 163 et seq.

ALR. — Coram nobis on ground of newly discovered evidence, 33 ALR 84.

Statements by witness after criminal trial tending to show that his testimony was perjured, as ground for new trial, 33 ALR 550; 74 ALR 757; 158 ALR 1062.

Newly discovered evidence, corroborating testimony given only by a party or other interested witness, as ground for new trial, 158 ALR 1253.

Statements of witness in civil action secured after trial, inconsistent with his testimony, as basis for new trial on ground of newly discovered evidence, 10 ALR2d 381.

Evidence as to physical condition after trial as affecting right to new trial, 31 ALR2d 1236.

New trial in criminal case because of newly discovered evidence as to sanity of prosecution witness, 49 ALR2d 1247.

Facts or evidence forgotten at trial as newly discovered evidence which will warrant grant of new trial in civil case, 50 ALR2d 994.

Disclosure in criminal case of juror's political, racial, religious, or national origin prejudice against accused or witnesses as ground for new trial or reversal, 91 ALR2d 1120.

Facts or evidence forgotten at trial as newly discovered evidence which will warrant grant of new trial in criminal case, 92 ALR2d 992.

Perjury or wilfully false testimony of expert witness as basis for new trial on ground of newly discovered evidence, 38 ALR3d 812.

New trial on ground of newly discovered evidence going to amount of recovery, 55 ALR3d 696.

Recantation of testimony of witness as grounds for new trial—federal criminal cases, 94 ALR Fed. 60.

5-5-24. Error in instructions; objection required in civil cases; requested instructions; review of charges involving substantial error.

(a) Except as otherwise provided in this Code section, in all civil cases, no party may complain of the giving or the failure to give an instruction to the jury unless he objects thereto before the jury returns its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury. Objection need not be made with the particularity formerly required of assignments of error and need only be as reasonably definite as the circumstances will permit. This subsection shall not apply in criminal cases.

(b) In all cases, at the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may present to the court written requests that it instruct the jury on the law as set

forth therein. Copies of requests shall be given to opposing counsel for their consideration prior to the charge of the court. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury but shall instruct the jury after the arguments are completed. The trial judge shall file with the clerk all requests submitted to him, whether given in charge or not.

(c) Notwithstanding any other provision of this Code section, the appellate courts shall consider and review erroneous charges where there has been a substantial error in the charge which was harmful as a matter of law, regardless of whether objection was made hereunder or not. (Ga. L. 1853-54, p. 46, § 1; Code 1863, § 3639; Code 1868, § 3664; Code 1873, § 3715; Ga. L. 1878-79, p. 150, § 1; Code 1882, § 3715; Civil Code 1895, § 5479; Penal Code 1895, § 1060; Civil Code 1910, § 6084; Penal Code 1910, § 1087; Code 1933, § 70-207; Ga. L. 1965, p. 18, § 17; Ga. L. 1966, p. 493, § 6; Ga. L. 1968, p. 1072, § 9.)

Cross references. — Granting of new trials in instances where judge expresses opinion as to what has or has not been proved or, in criminal actions, expresses the judge's opinion as to guilt of accused, §§ 9-10-7 and 17-8-55.

Law reviews. — For article arguing for and against adoption of Rule 51 of the Federal Rules of Civil Procedure, so as to require objections to charges before verdict, see 1 Ga. St. B.J. 177 (1964). For article, "The Appellate Procedure Act of 1965," see 1 Ga. St. B.J. 451 (1965). For article, "1966 Amendments to the Appellate Procedure Act of 1965," see 2 Ga. St. B.J. 433 (1966). For article comparing sections of Ch. 11, T. 5 with preexisting provisions of the Georgia Code, see 3 Ga. St. B.J. 295 (1967). For article, "Synopses of 1968 Amendments Appellate Procedure Act and Georgia Civil Practice Act," see 4 Ga. St. B.J. 503 (1968). For article, "Trial Practice and Procedure," see 53 Mercer L. Rev. 475 (2001). For annual survey of trial practice and procedure, see 58 Mercer L. Rev. 405 (2006). For survey article on appellate practice and procedure, see 59 Mercer L. Rev. 21 (2007). For survey article on trial practice and procedure, see 59 Mercer L. Rev. 423 (2007).

For comment on Bibb Transit Co. v. Johnson, 107 Ga. App. 804, 131 S.E.2d 631 (1963), see 16 Mercer L. Rev. 347 (1964).

JUDICIAL DECISIONS

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General Consideration

Editor's notes. — In light of the similarity of the issues dealt with in the provisions, decisions under former Civil Code 1910, § 6084, former Penal Code 1910, § 1087, and former Code 1933, § 70-207, as it read prior to its repeal and reenactment by Ga. L. 1965, p. 18, § 17, are included in the annotations for this Code section.

Use of federal cases for interpretation. — Subsection (b) is an adoption of Fed. R. Civ. P. 51, and thus federal cases provide guidance for resolving issues presented in the statute's interpretation. Daniels v. State, 137 Ga. App. 371, 224 S.E.2d 60 (1976). But see Continental Cas. Co. v. Union Camp Corp., 230 Ga. 8, 195 S.E.2d 417 (1973).

Subsection (b) of this section is an adoption of Fed. R. Civ. P. 51 and decisions of federal courts are authoritative though not binding on the question of the statute's construction. Seaney & Co. v. Katz, 132 Ga. App. 456, 208 S.E.2d 333 (1974). But see Continental Cas. Co. v. Union Camp Corp., 230 Ga. 8, 195 S.E.2d 417 (1973).

As subsection (b) is similar to Fed. R. Civ. P. 51, federal courts' application has persuasive influence. Smith v. Poteet, 127 Ga. App. 735, 195 S.E.2d 213 (1972). But see Continental Cas. Co. v. Union Camp Corp., 230 Ga. 8, 195 S.E.2d 417 (1973).

Interpretations of Fed. R. Civ. P. 51 are not authority for construction of section. — Federal cases interpreting Fed. R. Civ. P. 51 are based upon substantially different law than this section and are not authority for construction of this section. Continental Cas. Co. v. Union Camp Corp., 230 Ga. 8, 195 S.E.2d 417 (1973).

Intended departure of section from Fed. R. Civ. P. 51 as to requests to charge. — Substance of paragraphs (a) and (b) of § 17 of Appellate Practice Act (Ga. L. 1965, p. 18) is embodied in a single paragraph in Fed. R. Civ. P. 51. It is thus manifest that the legislature in enacting § 17 of the Appellate Practice Act intended to depart from the federal rule in the matter of requests to charge. Continental Cas. Co. v. Union Camp Corp., 230 Ga. 8, 195 S.E.2d 417 (1973).

Distinction between failure to request charge and object to its omission, and failure to object to charge. — Thomas v. State, 234 Ga. 615, 216 S.E.2d 859, answer conformed to, 136 Ga. App. 165, 220 S.E.2d 736 (1975).

Last clause of subsection (a) applies to charge, not to statements to accused in jury's presence. — Negative command of subsection (a) that the statute's provisions shall not apply in criminal cases, is applicable to charge of court but is not applicable to statements made by court to accused in jury's presence but not a part of the charge to the jury. Thomas v. State, 234 Ga. 615, 216 S.E.2d 859, answer conformed to, 136 Ga. App. 165, 220 S.E.2d 736 (1975).

Objection or request to charge to restrict admission of evidence to special purpose. — Effect of admission of evidence should usually be made the subject of objection or of a request to charge when it is desired that it be restricted to a special purpose. Deshazier v. State, 155 Ga. App. 526, 271 S.E.2d 664 (1980).

Discretion of trial judge in declaring mistrial. — Trial judge in passing on motions for mistrial has a broad discretion, dependent on the circumstances of each case, which will not be disturbed unless manifestly abused. Furthermore, unless it is apparent that a mistrial is essential to preservation of the right of fair trial, the discretion of the trial judge will not be interfered with. Marriott Corp. v. American Academy of Psychotherapists, Inc., 157 Ga. App. 497, 277 S.E.2d 785 (1981).

Citing law in closing argument. — Enactment of O.C.G.A. § 5-5-24 renders "reading the law" both unnecessary and

incorrect, though it is counsel's right to state counsel's legal position to the jury. Freels v. State, 195 Ga. App. 609, 394 S.E.2d 405 (1990).

Explanatory comments. — Explanatory comments to juror question are not the same as a recharge and subsection (c) of O.C.G.A. § 5-5-24 does not create an exception to a failure to object to such judicial comments. Brown v. State, 221 Ga. App. 454, 471 S.E.2d 527 (1996).

Statute is mandatory. — Provision in O.C.G.A. § 5-5-24(b) that the court shall instruct the jury after the arguments are completed is mandatory and requires a complete charge be given after closing arguments are completed. Williams v. State, 277 Ga. 853, 596 S.E.2d 597 (2004).

Cited in Cain v. State, 113 Ga. App. 477, 148 S.E.2d 508 (1966); Georgia Power Co. v. Maddox, 113 Ga. App. 642, 149 S.E.2d 393 (1966); King v. Adams, 113 Ga. App. 708, 149 S.E.2d 548 (1966); Strong v. Palmour, 113 Ga. App. 750, 149 S.E.2d 745 (1966); Israel v. Wilson, 113 Ga. App. 846, 149 S.E.2d 839 (1966); Howington v. State, 114 Ga. App. 93, 150 S.E.2d 252 (1966); Matthews v. State Hwy. Dep't, 114 Ga. App. 163, 150 S.E.2d 464 (1966); Atkins v. Britt, 114 Ga. App. 258, 150 S.E.2d 841 (1966); Phillips v. State, 114 Ga. App. 417, 151 S.E.2d 474 (1966); Southwire Co. v. Franklin Aluminum Co., 114 Ga. App. 337, 151 S.E.2d 493 (1966); Westmoreland v. State, 114 Ga. App. 389, 151 S.E.2d 548 (1966); State Hwy. Dep't v. Calhoun, 114 Ga. App. 501, 151 S.E.2d 806 (1966); Saint v. Ryan, 114 Ga. App. 489, 151 S.E.2d 826 (1966); Clark v. Belleau, Inc., 114 Ga. App. 587, 151 S.E.2d 894 (1966); State Hwy. Dep't v. Edmunds, 115 Ga. App. 154, 154 S.E.2d 35 (1967); DeFee v. I.S. Berlin Press, Inc., 115 Ga. App. 206, 154 S.E.2d 452 (1967); Gunter v. State, 223 Ga. 290, 154 S.E.2d 608 (1967); Haskins v. Carson, 115 Ga. App. 336, 154 S.E.2d 626 (1967); Crider v. State, 115 Ga. App. 347, 154 S.E.2d 743 (1967); Sakobie v. State, 115 Ga. App. 460, 154 S.E.2d 830 (1967); Barnes v. State, 115 Ga. App. 431, 154 S.E.2d 878 (1967); McCurry v. McCurry, 223 Ga. 334, 155 S.E.2d 378 (1967); Millholland v. Oglesby, 115 Ga. App. 715, 155 S.E.2d 672 (1967); Childs v. Childs, 223 Ga. 435, 156 S.E.2d 21 (1967); Smith v. State, 116 Ga. App. 45, 156 S.E.2d 380 (1967); Crouch v. Nicholson, 116 Ga. App. 12, 156 S.E.2d 384 (1967); Gabriel v. Clary, 116 Ga. App. 151, 156 S.E.2d 465 (1967); City of Douglas v. Rigdon, 116 Ga. App. 306, 157 S.E.2d 66 (1967); Hawkins v. State, 116 Ga. App. 448, 157 S.E.2d 800 (1967); Colter v. Consolidated Credit Corp., 116 Ga. App. 520, 157 S.E.2d 812 (1967); Williams v. State, 223 Ga. 773, 158 S.E.2d 373 (1967); Bowens v. State, 116 Ga. App. 577, 158 S.E.2d 420 (1967); Smith v. Burtts, 116 Ga. App. 649, 158 S.E.2d 702 (1967); Partridge v. Lee, 116 Ga. App. 800, 159 S.E.2d 113 (1967); Stevens v. State, 117 Ga. App. 41, 159 S.E.2d 456 (1967); Douglas v. Herringdine, 117 Ga. App. 72, 159 S.E.2d 711 (1967); DuFour v. Martin, 117 Ga. App. 160, 159 S.E.2d 450 (1968); Coley v. State, 117 Ga. App. 149, 159 S.E.2d 452 (1968); Gunnells v. Cotton States Mut. Ins. Co., 117 Ga. App. 123, 159 S.E.2d 730 (1968); Barnes v. Barnes, 224 Ga. 92, 160 S.E.2d 391 (1968); Burgess v. State, 117 Ga. App. 284, 160 S.E.2d 411 (1968); Atlanta Americana Motor Hotel Corp. v. Sika Chem. Corp., 117 Ga. App. 707, 161 S.E.2d 342 (1968); Fett v. Alderman, 117 Ga. App. 677, 161 S.E.2d 350 (1968); Askew v. State, 117 Ga. App. 647, 161 S.E.2d 445 (1968); Buntin v. State, 117 Ga. App. 813, 162 S.E.2d 234 (1968); Callaway v. Miller, 118 Ga. App. 309, 163 S.E.2d 336 (1968); Caudell v. Sargent, 118 Ga. App. 405, 164 S.E.2d 148 (1968); O'Neil v. Moore, 118 Ga. App. 424, 164 S.E.2d 328 (1968); Turner v. State, 118 Ga. App. 650, 164 S.E.2d 924 (1968); Still v. Metropolitan Life Ins. Co., 118 Ga. App. 832, 165 S.E.2d 896 (1968); McGregor v. State, 119 Ga. App. 40, 165 S.E.2d 915 (1969); Harris v. State, 118 Ga. App. 848, 166 S.E.2d 94 (1969); Peek v. Miller, 119 Ga. App. 138, 166 S.E.2d 377 (1969); Colley v. Stump, 119 Ga. App. 220, 166 S.E.2d 616 (1969); Chalkley v. Ward, 119 Ga. App. 227, 166 S.E.2d 748 (1969); Ewing v. Whitehead, 119 Ga. App. 72, 166 S.E.2d 769 (1969); Griffin v. State, 225 Ga. 209, 166 S.E.2d 885 (1969); City of Atlanta v. Williams, 119 Ga. App. 353, 166 S.E.2d 896 (1969); Sancken Assoc. v. Stokes, 119 Ga. App. 282, 166 S.E.2d 924 (1969); Hatley v. State, 119 Ga. App. 371, 167

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S.E.2d 217 (1969); Tabor v. Fowler, 119 Ga. App. 259, 167 S.E.2d 220 (1969); Jones v. State, 119 Ga. App. 322, 167 S.E.2d 237 (1969); Pirkle v. Widener, 119 Ga. App. 401, 167 S.E.2d 407 (1969); Newcomb v. Pattillo, 119 Ga. App. 495, 167 S.E.2d 665 (1969); Jones v. Cloud, 119 Ga. App. 697, 168 S.E.2d 598 (1969); Roberts v. Halpern's Home Stores of Ga., Inc., 119 Ga. App. 826, 169 S.E.2d 177 (1969); Harnage v. Hall, 120 Ga. App. 12, 169 S.E.2d 345 (1969); Worsham v. Trimble, 120 Ga. App. 180, 169 S.E.2d 689 (1969); Knox v. Knox, 225 Ga. 481, 169 S.E.2d 805 (1969); Boone v. Boone, 225 Ga. 610, 170 S.E.2d 414 (1969); Jones v. Atkins, 120 Ga. App. 487, 171 S.E.2d 367 (1969); Brown v. Kelley, 120 Ga. App. 788, 172 S.E.2d 181 (1969); Berger v. Plantation Pipeline Co., 121 Ga. App. 362, 173 S.E.2d 741 (1970); Seagraves v. Kelley, 121 Ga. App. 412, 173 S.E.2d 885 (1970); Richmond County Hosp. Auth. v. Haynes, 121 Ga. App. 537, 174 S.E.2d 364 (1970); Shepard v. Morrison, 121 Ga. App. 762, 175 S.E.2d 407 (1970); Gaither v. Green, 122 Ga. App. 25, 176 S.E.2d 204 (1970); McChargue v. Black Grading Contractors, 122 Ga. App. 1, 176 S.E.2d 212 (1970); Colvin v. Truitt, 122 Ga. App. 233, 176 S.E.2d 502 (1970); Garmany v. Peavy, 122 Ga. App. 466, 177 S.E.2d 502 (1970); Seibers v. Morris, 226 Ga. 813, 177 S.E.2d 705 (1970); Shelton v. Housing Auth., 122 Ga. App. 535, 177 S.E.2d 832 (1970); Baxter v. Bryan, 122 Ga. App. 817, 178 S.E.2d 724 (1970); Reeves v. Morgan, 123 Ga. App. 64, 179 S.E.2d 648 (1970); Morehead v. Morehead, 227 Ga. 428, 181 S.E.2d 59 (1971); Denham v. Shellman Grain Elevator, Inc., 123 Ga. App. 569, 181 S.E.2d 894 (1971); Austin Lee Corp. v. Cascades Motel, Inc., 123 Ga. App. 642, 182 S.E.2d 173 (1971); Southern Home Ins. Co. v. Willoughby, 124 Ga. App. 162, 182 S.E.2d 910 (1971); Craft v. State, 124 Ga. App. 57, 183 S.E.2d 37 (1971); Lane v. Morrison, 124 Ga. App. 316, 183 S.E.2d 533 (1971); Harris v. Hub Motor Co., 124 Ga. App. 490, 184 S.E.2d 199 (1971); Brown v. Nutter, 125 Ga. App. 449, 188 S.E.2d 133 (1972); Security Dev. & Inv. Co. v. Ben O'Callaghan Co., 125 Ga. App. 526, 188 S.E.2d 238 (1972); Tanner v. State, 228 Ga. 829, 188 S.E.2d 512 (1972); Wells v. State, 126 Ga. App. 130, 190 S.E.2d 106 (1972); Whiteway Laundry & Dry Cleaners, Inc. v. Childs, 126 Ga. App. 617, 191 S.E.2d 454 (1972); G.E.C. Corp. v. Levy, 126 Ga. App. 604, 191 S.E.2d 461 (1972); Anchor Sign Co. v. LaBarge Pipe & Steel Co., 127 Ga. App. 86, 192 S.E.2d 714 (1972); Utzman v. Srochi, 127 Ga. App. 294, 193 S.E.2d 195 (1972); Hodges v. Carpenter, 127 Ga. App. 358, 193 S.E.2d 199 (1972); Hornbuckle v. Escambia Chem. Corp., 127 Ga. App. 522, 194 S.E.2d 344 (1972); Daugherty v. Vick, 127 Ga. App. 767, 195 S.E.2d 208 (1972); Newsrack Supply, Inc. v. Heinle, 127 Ga. App. 843, 195 S.E.2d 193 (1973); Daniels v. State, 230 Ga. 126, 195 S.E.2d 900 (1973); Averette v. Oliver, 128 Ga. App. 54, 195 S.E.2d 925 (1973); Gibson's Prods. Co. v. Mansfield, 128 Ga. App. 186, 196 S.E.2d 353 (1973); Johnson & Schultz Agents-Brokers, Inc. v. Overnite Transp. Co., 128 Ga. App. 392, 196 S.E.2d 681 (1973); Maynard v. Readdick, 128 Ga. App. 368, 196 S.E.2d 688 (1973); Bailey v. Perrin, 128 Ga. App. 476, 196 S.E.2d 899 (1973); Howard v. Gardner, 128 Ga. App. 545, 197 S.E.2d 386 (1973); Holzendorf v. Sheffield, 230 Ga. 497, 197 S.E.2d 701 (1973); Robertson v. Georgia Power Co., 128 Ga. App. 740, 197 S.E.2d 924 (1973); Locklear v. Morgan, 129 Ga. App. 763, 201 S.E.2d 163 (1973); Drake v. Shurbutt, 129 Ga. App. 754, 201 S.E.2d 184 (1973); Howington v. Puckett, 130 Ga. App. 584, 203 S.E.2d 916 (1974); Reynolds v. Huckeba, 231 Ga. 792, 204 S.E.2d 149 (1974); Jones v. Hutchins, 131 Ga. App. 808, 207 S.E.2d 224 (1974); Redman Dev. Corp. v. Pollard, 132 Ga. App. 98, 207 S.E.2d 588 (1974); Carter v. Harrell, 132 Ga. App. 148, 207 S.E.2d 648 (1974); Davenport v. Little, 132 Ga. App. 391, 208 S.E.2d 179 (1974); Davis v. Londeau, 132 Ga. App. 626, 208 S.E.2d 632 (1974); Thibadeau Co. v. McMillan, 132 Ga. App. 842, 209 S.E.2d 236 (1974); Harwell v. Harwell, 233 Ga. 89, 209 S.E.2d 625 (1974); Shepherd v. Shepherd, 233 Ga. 228, 210 S.E.2d 731 (1974); Haralson County Economic Dev. Corp. v. Hammock, 233 Ga. 381, 211 S.E.2d 278 (1974); DiMauro v. Barber, 133 Ga. App. 590, 211

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Indem. Corp., 166 Ga. App. 63, 303 S.E.2d 321 (1983); Smith v. Hiawassee Hdwe. Co., 167 Ga. App. 70, 305 S.E.2d 805 (1983); Hurst v. J.P. Colley Contractors, 167 Ga. App. 56, 306 S.E.2d 54 (1983); Hyles v. Cockrill, 169 Ga. App. 132, 312 S.E.2d 124 (1983); DOT v. Whitehead, 169 Ga. App. 226, 312 S.E.2d 344 (1983); Henley v. State, 169 Ga. App. 682, 314 S.E.2d 697 (1984); Crawford v. State, 252 Ga. 552, 314 S.E.2d 880 (1984); Davis v. Stewart, 169 Ga. App. 733, 315 S.E.2d 6 (1984); Taylor v. State, 169 Ga. App. 842, 315 S.E.2d 661 (1984); Johnson v. State, 253 Ga. 37, 315 S.E.2d 871 (1984); DOT v. Clower, 170 Ga. App. 750, 318 S.E.2d 161 (1984); Fair v. State, 172 Ga. App. 49, 321 S.E.2d 790 (1984); Kirkland v. Williams, 172 Ga. App. 595, 323 S.E.2d 891 (1984); Allen v. Hiwassee Land Co., 172 Ga. App. 814, 324 S.E.2d 742 (1984); Jackson v. Rodriquez, 173 Ga. App. 211, 325 S.E.2d 857 (1984); Howard v. State, 173 Ga. App. 585, 327 S.E.2d 554 (1985); Mr. Transmission, Inc. v. Thompson, 173 Ga. App. 773, 328 S.E.2d 397 (1985); Crawford v. State, 254 Ga. 435, 330 S.E.2d 567 (1985); Walker v. Mitchell, 174 Ga. App. 738, 331 S.E.2d 82 (1985); Baldwin v. Associates Fin. Servs. of Am., Inc., 174 Ga. App. 795, 332 S.E.2d 21 (1985); John H. Smith, Inc. v. Teveit, 175 Ga. App. 565, 333 S.E.2d 856 (1985); Wilkes v. DOT, 176 Ga. App. 739, 337 S.E.2d 404 (1985); Pritchett v. Anding, 177 Ga. App. 34, 338 S.E.2d 503 (1985); Associated Software Consultants Org., Inc. v. Wysocki, 177 Ga. App. 135, 338 S.E.2d 679 (1985); Georgia Farm Bureau Mut. Ins. Co. v. Bestawros, 177 Ga. App. 667, 340 S.E.2d 645 (1986); Rivers v. State, 178 Ga. App. 310, 342 S.E.2d 781 (1986); King v. State, 178 Ga. App. 343, 343 S.E.2d 401 (1986); Boring v. McPherson, 178 Ga. App. 623, 344 S.E.2d 459 (1986); American Game & Music Serv., Inc. v. Knighton, 178 Ga. App. 745, 344 S.E.2d 717 (1986); Rice v. State, 178 Ga. App. 748, 344 S.E.2d 720 (1986); Carswell v. State, 179 Ga. App. 56, 345 S.E.2d 66 (1986); DOT v. Poole, 179 Ga. App. 638, 347 S.E.2d 625 (1986); Nash v. State, 179 Ga. App. 702, 347 S.E.2d 651 (1986); Almond v. State, 180 Ga. App. 475, 349 S.E.2d 482 (1986); Alexander v. State, 180 Ga. App. 640, 350 S.E.2d 284 (1986); White v. Archer Daniels Midland Co., 180 Ga. App. 829, 350 S.E.2d 788 (1986); Exley v. State, 180 Ga. App. 821, 350 S.E.2d 829 (1986); Beck v. State, 181 Ga. App. 681, 353 S.E.2d 610 (1987); Cox v. Cantrell, 181 Ga. App. 722, 353 S.E.2d 582 (1987); General Warranty Corp. Ins. Agents & Adm'rs v. Cameron-Hogan, Inc., 182 Ga. App. 434, 356 S.E.2d 83 (1987); Morris v. DeLong, 183 Ga. App. 124, 358 S.E.2d 285 (1987); Phillips v. State, 183 Ga. App. 194, 358 S.E.2d 480 (1987); Evans v. Harvey, 183 Ga. App. 284, 358 S.E.2d 668 (1987); Davis v. Charter By-The-Sea, Inc., 183 Ga. App. 213, 358 S.E.2d 865 (1987); Jones v. Davis, 183 Ga. App. 401, 359 S.E.2d 187 (1987); Shaw v. W.M. Wrigley, Jr., Co., 183 Ga. App. 699, 359 S.E.2d 723 (1987); Sharp v. State, 183 Ga. App. 641, 360 S.E.2d 50 (1987); Glenridge Unit Owners Ass'n v. Felton, 183 Ga. App. 858, 360 S.E.2d 418 (1987); Billingsley v. State, 183 Ga. App. 850, 360 S.E.2d 451 (1987); Dubberly v. P.F. Moon & Co., 184 Ga. App. 221, 361 S.E.2d 223 (1987); Precision Label Indus., Inc. v. Jones, 185 Ga. App. 161, 363 S.E.2d 605 (1987); Martin v. State, 185 Ga. App. 145, 363 S.E.2d 765 (1987); Carpet Transp., Inc. v. Dixie Truck Tire Co., 185 Ga. App. 181, 363 S.E.2d 840 (1987); Martini v. Nixon, 185 Ga. App. 328, 364 S.E.2d 49 (1987); Foskey v. Foskey, 257 Ga. 736, 363 S.E.2d 547 (1988); Mathis v. DOT, 185 Ga. App. 658, 365 S.E.2d 504 (1988); Westfall v. State, 185 Ga. App. 687, 365 S.E.2d 527 (1988); Smith v. State, 186 Ga. App. 303, 367 S.E.2d 573 (1988); Booth v. State, 186 Ga. App. 342, 367 S.E.2d 77 (1988); Davis v. Metropolitan Atlanta Rapid Transit Auth., 186 Ga. App. 366, 367 S.E.2d 885 (1988); Georgia Am. Ins. Co. v. Mills, 187 Ga. App. 128, 369 S.E.2d 768 (1988); Lissmore v. Kincade, 188 Ga. App. 548, 373 S.E.2d 819 (1988); Pool Mkts. S., Inc. v. Moore, 189 Ga. App. 48, 374 S.E.2d 831 (1988); Kelly v. State, 189 Ga. App. 67, 375 S.E.2d 81 (1988); Little v. State, 189 Ga. App. 451, 376 S.E.2d 232 (1988); Martin v. State, 189 Ga. App. 483, 376 S.E.2d 888 (1988); Haun v. State, 189 Ga. App. 884, 377 S.E.2d 878 (1989); Martin v. State, 190 Ga. App. 486, 379 S.E.2d 170 (1989); Christopher v. State, 190 Ga. App. 393, 379 S.E.2d 205 (1989); Waters v. Spell, 190

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App. 348, 702 S.E.2d 669 (2010); Goody Prods. v. Dev. Auth. of Manchester, No. A12A1725, 2013 Ga. App. LEXIS 229 (Mar. 20, 2013).

Requested Instructions

1. In General

Purpose of the written request to charge as required by O.C.G.A. § 5-5-24 requires such desired requests to be in writing in order to inform the court as to the jury instructions to be given and the statute, as amended, refers to all cases both civil and criminal. Whatley v. State, 162 Ga. App. 106, 290 S.E.2d 316 (1982).

Absent request for specific charge, and objection to failure to charge, error not reversible. Herring v. McLemore, 248 Ga. 808, 286 S.E.2d 425 (1982).

When litigant need not request instructions. — O.C.G.A. § 5-5-24 does not relieve a litigant from the necessity of requesting instructions except in those circumstances where the omission is clearly harmful and erroneous as a matter of law in that the statute fails to provide the jury with the proper guidelines for determining guilt or innocence. Jackson v. State, 161 Ga. App. 650, 289 S.E.2d 525 (1982).

Requests to charge must be timely and properly submitted in writing. Slaughter v. Linder, 122 Ga. App. 144, 176 S.E.2d 450 (1970).

Changes to section have not made it unnecessary to file written requests to charge. Dixon v. State, 224 Ga. 636, 163 S.E.2d 737 (1968).

It is never error to deny oral request to charge. Slaughter v. Linder, 122 Ga. App. 144, 176 S.E.2d 450 (1970); Hudson v. Columbus, 139 Ga. App. 789, 229 S.E.2d 671 (1976).

Requests to charge must be made prior to arguments to jury. — On appeal a party may not complain about court's failure to charge when no written requests to charge were received prior to arguments to jury. Ledbetter Bros. v. Holmes, 122 Ga. App. 514, 177 S.E.2d 824 (1970).

Where request is not timely or is not warranted by evidence. — Even though written request to charge has been made by state or accused, trial court's failure to so charge is not error if (1) written request to charge has not been made at or before close of evidence, or (2) evidence does not warrant such requested charge. Bouttry v. State, 242 Ga. 60, 247 S.E.2d 859 (1978).

There was no abuse of discretion in the court's denial of the defendant's request that the state furnish proposed jury instructions 24 hours before trial. Pruitt v. State, 258 Ga. 583, 373 S.E.2d 192 (1988), cert. denied, 493 U.S. 1093, 110 S. Ct. 1170, 107 L. Ed. 2d 1072 (1990).

When a criminal defendant was tried on charges of kidnapping and murder, and after the court had recharged the jury three times on kidnapping, the defendant, for the first time, requested a charge on false imprisonment; the trial court did not err in failing to give the defendant's requested charge on false imprisonment; the request was not made at or before the close of the evidence, and the evidence did not authorize the charge. Peebles v. State, 260 Ga. 165, 391 S.E.2d 639 (1990).

Request must be correct, legal, apt, even perfect, and precisely adjusted to some principle involved in case. Slaughter v. Linder, 122 Ga. App. 144, 176 S.E.2d 450 (1970); Fowler v. Gorrell, 148 Ga. App. 573, 251 S.E.2d 819 (1978).

Requested charge should be given only when the charge embraces correct and complete principle of law which has not been included in general instructions given and when request is pertinent and adjusted to the facts of the case. Gates v. Southern Ry., 118 Ga. App. 201, 162 S.E.2d 893 (1968).

Unless request is all legal and pertinent, court need not give any part of it. Slaughter v. Linder, 122 Ga. App. 144, 176 S.E.2d 450 (1970).

Denial of request to charge is proper if any portion of it is inapt or incorrect. Fowler v. Gorrell, 148 Ga. App. 573, 251 S.E.2d 819 (1978).

Legal, pertinent, written requests to charge should generally be granted. — Some issues cannot be raised except by virtue of special pleading, but in general under this section, if request is legal, pertinent, and in writing it should

Requested Instructions (Cont'd)
1. In General (Cont'd)

be given. Atlanta Coca-Cola Bottling Co. v. Burke, 109 Ga. App. 53, 134 S.E.2d 909 (1964) (decided under former Code 1933, § 70-207, as it read prior to its repeal and reenactment by Ga. L. 1965, p. 18, § 17).

Request to charge must be in writing. Dumas v. Stafford & Son, 22 Ga. App. 365, 95 S.E. 1009 (1918); Howard v. State, 233 Ga. App. 724, 505 S.E.2d 768 (1998), overruled on other grounds, Wilson v. State, 277 Ga. 195, 586 S.E.2d 669 (2003).

Requested charge which does not accurately state a correct principle of law should be refused. Georgia & Fla. Ry. v. Newton, 140 Ga. 463, 79 S.E. 142 (1913) (decided under former Penal Code 1910).

Requested charge not applicable to facts should be refused. Smith v. Satilla Pecan Orchard & Stock Co., 152 Ga. 538, 110 S.E. 303 (1922) (decided under former Penal Code 1910).

If requested charge is not accurately adjusted to facts of case, request must be denied. Emory Univ. v. Lee, 97 Ga. App. 680, 104 S.E.2d 234 (1958) (decided under former Code 1933, § 70-207, as it read prior to its repeal and reenactment by Ga. L. 1965, p. 18, § 17).

Argumentative requests. — Request to charge, though correct, is properly refused if it is in the slightest degree argumentative. Emory Univ. v. Lee, 97 Ga. App. 680, 104 S.E.2d 234 (1958) (decided under former Code 1933, § 70-207, as it read prior to its repeal and reenactment by Ga. L. 1965, p. 18, § 17).

That requested charge is substantially correct is not enough; it must contain a perfect statement of law applicable to question dealt with, to render it erroneous for court to refuse to give it in charge to the jury. Turnipseed v. State, 53 Ga. App. 194, 185 S.E. 403 (1936) (decided under former Code 1933, § 70-207, as it read prior to its repeal and reenactment by Ga. L. 1965, p. 18, § 17).

Request to charge is not perfect when inference is required to make it correct, and there is no error in refusing to charge such request. Evans v. Caldwell, 52 Ga. App. 475, 184 S.E. 440 (1936) (decided under former Code 1933, § 70-207, as it read prior to its repeal and reenactment by Ga. L. 1965, p. 18, § 17), aff'd, 184 Ga. 203, 190 S.E. 582 (1937) (decided under former Code 1933, § 70-207, as it read prior to its repeal and reenactment by Ga. L. 1965, p. 18, § 17).

Purpose for requiring that copies of jury instruction requests be given to opposing counsel. — Requirement that copies of jury instruction requests be given to opposing counsel at the time the requests are submitted to court can serve no useful purpose other than to afford opposing counsel an opportunity to argue to the court, before granting or refusing of such request, counsel's contentions with respect to whether such requested charges should be given. Continental Cas. Co. v. Union Camp Corp., 230 Ga. 8, 195 S.E.2d 417 (1973).

Reason subsection (b) contains no provision relating to objections to refusals of requests to charge. — Unlike subsection (a), subsection (b) contains no provision relating to objections to refusals to grant requests to charge. This is because when party has presented to court written requests that it instruct jury on law as set forth therein, court normally affords such party at that time an opportunity to state grounds upon which he contends such submitted request to charge should be given. The court is thus at that time put on notice as to the grounds upon which it is urged such requests to charge should be given. Continental Cas. Co. v. Union Camp Corp., 230 Ga. 8, 195 S.E.2d 417 (1973).

Extent of exemption of criminal defendants as to requests for instructions. — While this section exempts defendant in criminal case from strict requirements imposed on litigants in civil cases to preserve issue on giving of or failure to give instructions to jury, it does not relieve him from necessity of requesting instructions, or making timely objection in trial court on failure to give instructions, except in those circumstances where omission is clearly harmful and erroneous as a matter of law in that it fails to provide jury with proper guidelines for determining guilt or innocence. Spear v. State, 230 Ga. 74, 195 S.E.2d 397 (1973); Sanders v. State, 138 Ga. App. 774, 227

S.E.2d 504 (1976); Lundy v. State, 139 Ga. App. 536, 228 S.E.2d 717 (1976); Weatherington v. State, 139 Ga. App. 795, 229 S.E.2d 676 (1976); Dorsey v. State, 141 Ga. App. 68, 232 S.E.2d 405 (1977); Mullins v. State, 144 Ga. App. 22, 240 S.E.2d 297 (1977); Richardson v. State, 144 Ga. App. 416, 240 S.E.2d 917 (1977); Key v. State, 147 Ga. App. 800, 250 S.E.2d 527 (1978); Byrd v. State, 156 Ga. App. 522, 275 S.E.2d 108 (1980); Brown v. State, 157 Ga. App. 473, 278 S.E.2d 31 (1981); Carr v. State, 183 Ga. App. 36, 357 S.E.2d 816, cert. denied, 183 Ga. App. 905, 357 S.E.2d 816 (1987).

While this section exempts the defendant in a criminal trial from the strict requirements imposed on litigants in civil cases to preserve issue on giving or failure to give instructions, this does not relieve the defendant from the necessity of requesting clarifying instructions or making clear the defendant's objection so that the trial court can exercise an opportunity to correct possible errors at most opportune point in proceedings and thus allow review by the appellate court. Bradham v. State, 148 Ga. App. 89, 250 S.E.2d 801 (1978), aff'd in part and rev'd in part on other grounds, 243 Ga. 638, 256 S.E.2d 331 (1979).

This section does not relieve the criminal defendant of the necessity of requesting instructions except in those circumstances where omission is clearly harmful and erroneous as a matter of law in that it fails to provide jury with proper guidelines for determining guilt or innocence. Key v. State, 147 Ga. App. 800, 250 S.E.2d 527 (1978).

Although a defendant in a criminal case is exempted from the requirements imposed on civil litigants to object to the giving of or failure to give jury instructions, the defendant is not relieved of the necessity of requesting instructions except when the omission is clearly harmful and erroneous as a matter of law in that the instruction fails to provide the jury with the proper guidelines for determining guilt or innocence. Sosebee v. State, 169 Ga. App. 370, 312 S.E.2d 853 (1983).

Supplemental instructions. — Trial court did not violate O.C.G.A. § 5-5-24(b) in giving a charge on concurrent negligence after the close of evidence, as a conflict on the issue of concurrent negligence arose after the charge conference. Swanson v. Hall, 275 Ga. App. 452, 620 S.E.2d 576 (2005).

Ineffective assistance of counsel for failure to object not found. — Trial counsel was not ineffective for failing to object to the trial court's inclusion of a simple assault charge after the charge conference at which the trial court stated that the charge would not be given, in violation of O.C.G.A. § 5-5-24(b), as the jury found the defendant guilty of simple assault on one of the aggravated assault charges so that the defendant failed to show how the failure to object prejudiced defendant's defense. Osterhout v. State, 266 Ga. App. 319, 596 S.E.2d 766 (2004).

2. Judge's Duty Regarding Proposed Action on Requested Charges

Court required to inform of proposed actions. — Subsection (b) of O.C.G.A. § 5-5-24 requires a trial court to inform counsel of the court's proposed actions on requested charges prior to argument to the jury. Jiles v. Peters, 216 Ga. App. 288, 454 S.E.2d 178 (1995).

Subsection (b) of O.C.G.A. § 5-5-24 does not require a judge to accede to a party's requested charges, but merely requires the judge to inform the parties as to the judge's action on the requests prior to closing arguments, so as to allow the parties to argue their cases intelligently to the jury. Wozniuk v. Kitchin, 229 Ga. App. 359, 494 S.E.2d 247 (1997).

Purpose of requirement. — Requirement of subsection (b) that judge inform parties prior to final argument of the judge's action on requested charges is designed to enable attorneys to argue their case to jury intelligently and on basis of guiding legal principles under which argument should be made. Daniels v. State, 137 Ga. App. 371, 224 S.E.2d 60 (1976).

Subsection (b) provides, in part, that the trial court "shall inform counsel of its proposed action upon the requests prior to their arguments to the jury ...." This is a mandatory rule, designed to permit counsel to argue the case intelligently before the jury. King v. State, 201 Ga. App. 391, 411 S.E.2d 278, cert. denied, 201 Ga. App.

Requested Instructions (Cont'd)
2. Judge's Duty Regarding Proposed Action on Requested Charges (Cont'd)

904, 411 S.E.2d 278 (1991).

Failure to so inform parties not reversible error when no harm done. — For reversal to be obtained for such inadvertent oversight of court failing to inform counsel as to court's proposed action on opposing party's requests to charge, it is necessary to show substantial prejudice to have resulted. Smith v. Poteet, 127 Ga. App. 735, 195 S.E.2d 213 (1972).

Trial judge's failure to inform counsel of the judge's intention regarding charges to the jury pursuant to subsection (b) is not reversible error when the record fails to show harm to the party involved. Braswell v. Owen of Ga., Inc., 128 Ga. App. 528, 197 S.E.2d 463 (1973); Brown v. State, 163 Ga. App. 661, 295 S.E.2d 581 (1982).

Mere failure to inform counsel of the court's intention to charge is not such an omission as will require the grant of a new trial in the absence of prejudice. Jackson v. Meadows, 157 Ga. App. 569, 278 S.E.2d 8 (1981).

Trial court's failure to adhere to the mandate of subsection (b) of O.C.G.A. § 5-5-24 was harmless error when counsel was not prevented from arguing the substance of any of the requests to charge and the court charged on all legal principles contained in the requests. King v. State, 201 Ga. App. 391, 411 S.E.2d 278, cert. denied, 201 Ga. App. 904, 411 S.E.2d 278 (1991).

When closing arguments were already completed at the time counsel called attention to the fact the trial court had not gone over requests to charge, no harmful error resulted from the court's admission. Latimore v. State, 170 Ga. App. 848, 318 S.E.2d 722 (1984); Roberts v. State, 223 Ga. App. 167, 477 S.E.2d 345 (1996).

Judge's noncompliance with subsection (b) not necessarily reversible error. — In absence of request by counsel to be informed of judge's proposed action on requested charges, noncompliance with subsection (b) is not, in and of itself, reversible error. Post-Tensioned Constr., Inc. v. VSL Corp., 143 Ga. App. 148, 237 S.E.2d 618 (1977).

In the absence of any request by counsel to be informed of the judge's proposed action on requested charges, noncompliance with O.C.G.A. § 5-5-24 is not, in and of itself, reversible error. Thus, when counsel embark upon their summation without any request for such information, the trial judge may usually infer that they envisage no need for such information and treat the requirement as waived. Jackson v. Meadows, 157 Ga. App. 569, 278 S.E.2d 8 (1981).

Prejudice must be shown to warrant reversal or new trial for noncompliance with subsection (b). — Even if proper request is made, in order to warrant reversal or new trial for failure to comply with subsection (b) of this section, prejudice must be shown. Post-Tensioned Constr., Inc. v. VSL Corp., 143 Ga. App. 148, 237 S.E.2d 618 (1977).

Failure to inform counsel of the court's proposed action on the refusal to charge is not reversible error per se. In order to warrant a reversal or new trial for failure to comply with this rule, prejudice must be shown. The burden is on the complaining party to show harm. Jackson v. Meadows, 157 Ga. App. 569, 278 S.E.2d 8 (1981).

There was no harmful error in the trial court's inclusion of a simple assault charge as a lesser included offense of aggravated assault after closing argument and after defendant's request for a simple assault charge was denied, in violation of O.C.G.A. § 5-5-24, as the defendant did not bring the matter to the trial court's attention nor did the defendant ask to reargue in light of the unexpectedly included charge. Osterhout v. State, 266 Ga. App. 319, 596 S.E.2d 766 (2004).

Judge's failure to file written requests with clerk not reversible error when no harm done. — Where trial court violated section in failing to file written requests to charge with clerk, if no harm has been shown trial court should not be reversed. Nelson v. Seaboard Coast Line R.R., 125 Ga. App. 764, 188 S.E.2d 887 (1972); Adams v. State, 231 Ga. App. 279, 499 S.E.2d 105 (1998).

When trial judge misleads counsel regarding intended charge. — When trial judge misleads counsel as to in-

tended charge, severe injustice may result and counsel should be given opportunity, if justice requires, to reargue facts in light of changed law of case. Daniels v. State, 137 Ga. App. 371, 224 S.E.2d 60 (1976).

When defense counsel had been misled as to intended charge, counsel's remedy is to request to reargue the facts in the light of the charge given. Hudson v. State, 150 Ga. App. 126, 257 S.E.2d 312 (1979).

Beginning summation without inquiry into intended action on proposed charges. — When counsel embark upon their summations without any request for information on court's proposed action on opposing party's requests to charge, trial judge may usually infer that they envisage no need for such information and treat requirement as waived. Smith v. Poteet, 127 Ga. App. 735, 195 S.E.2d 213 (1972).

Failure to inform counsel must be objected to. — Failure of the trial judge to inform counsel as to which of the requested charges would be included in the trial court's instructions to the jury is clearly error. However, to effect a reversal of the case because of the trial judge's failure to comply with the provisions of this section it is necessary that counsel make a proper objection and perfect the record so that the appellate court will have the issue properly before the court for determination. Jackson v. Meadows, 157 Ga. App. 569, 278 S.E.2d 8 (1981).

3. Application

Preliminary instructions. — Denial of defendant's request for the trial court to give suggested preliminary jury instructions at the commencement of trial was not an abuse of discretion. Honeycutt v. State, 245 Ga. App. 819, 538 S.E.2d 870 (2000).

Requirements for requests to charge extend to pertinent Code sections which party desires included in charge. Slaughter v. Linder, 122 Ga. App. 144, 176 S.E.2d 450 (1970).

Oral request that court charge excerpt from decision of appellate court is insufficient to meet requirement in subsection (b) of this section that requests to instruct be written. Norman v. State, 121 Ga. App. 753, 175 S.E.2d 119 (1970), cert. denied, 401 U.S. 956, 91 S. Ct. 981, 28 L. Ed. 2d 240 (1971).

Request to charge submitted after closing arguments. — When, at close of evidence, party made oral request to charge, which was denied, and written request to charge was filed by party after conclusion of closing arguments to jury, trial court did not err in refusing to give requested charge. Bouttry v. State, 242 Ga. 60, 247 S.E.2d 859 (1978).

Request submitted after commencement of opposing party's argument. — Section clearly contemplates that any requests for instructions be submitted before argument begins, and when requests of counsel for defendant were not submitted to court until after solicitor general (now district attorney) commenced the attorney's argument, such requests were not timely submitted and it was not error for the court to refuse to give the instructions. Curtis v. State, 224 Ga. 870, 165 S.E.2d 150 (1968).

If one of several requests presented en bloc is erroneous court not required to give any. — When series of propositions are presented en bloc in a single request to charge, the court is not required to give the instructions or any part of the instructions, if any one is erroneous or inapplicable to the case. Western Union Tel. Co. v. Owens, 23 Ga. App. 169, 98 S.E. 116 (1919) (decided under former Penal Code 1910); Port Wentworth Term. Corp. v. Leavitt, 28 Ga. App. 82, 110 S.E. 686 (1922).

It is not error to refuse request to charge when part thereof states principle of law inapplicable to case. Johns v. State, 79 Ga. App. 429, 54 S.E.2d 142 (1949) (decided under former Code 1933, § 70-207, as it read prior to its repeal and reenactment by Ga. L. 1965, p. 18, § 17).

Charge need not be in exact language requested. — Former rule that pertinent request to charge must be given in exact language requested notwithstanding that trial judge had already charged substantially on issue elsewhere has been removed by this section. Southern Ry. v. Grogan, 113 Ga. App. 451, 148 S.E.2d 439 (1966).

It is no longer essential that court give instruction in exact language of request;

Requested Instructions (Cont'd)
3. Application (Cont'd)

requirement of the law is satisfied when court instructs jury substantially upon principles embodied in request. Hardwick v. Price, 114 Ga. App. 817, 152 S.E.2d 905 (1966); Shelton v. Rose, 116 Ga. App. 37, 156 S.E.2d 659 (1967); Kendrick v. State, 123 Ga. App. 785, 182 S.E.2d 525 (1971); Jackson v. Miles, 126 Ga. App. 320, 190 S.E.2d 565 (1972); Bailey v. Todd, 126 Ga. App. 731, 191 S.E.2d 547 (1972), cert. denied, 409 U.S. 1113, 93 S. Ct. 927, 34 L. Ed. 2d 696 (1973); Continental Cas. Co. v. Union Camp Corp., 230 Ga. 8, 195 S.E.2d 417 (1973); Brookhaven Supply Co. v. DeKalb County, 134 Ga. App. 878, 216 S.E.2d 694 (1975).

Court is not bound to instruct in language of request, or in immediate response to the request, if in substance at any time the instruction desired is given. Carnes v. State, 115 Ga. App. 387, 154 S.E.2d 781, cert. denied, 389 U.S. 928, 88 S. Ct. 287, 19 L. Ed. 2d 279 (1967).

It is not error to refuse requested charge when general instructions cover substance of request. Gates v. Southern Ry., 118 Ga. App. 201, 162 S.E.2d 893 (1968).

Refusal of request is not error when correct instruction by trial court dealing with principles of law embodied in request, although in more abstract terminology, is given. Johnson v. Myers, 118 Ga. App. 773, 165 S.E.2d 739 (1968).

Failure of court to give requested charge in exact language requested when charge given covered same principle of law is not ground for new trial. Harkness v. Harkness, 228 Ga. 184, 184 S.E.2d 566 (1971).

If it can be determined that point at issue was presented to jury in substantially as clear and understandable a manner as that requested, keeping in mind that a jury is a lay audience, there should be no reversal when language conveys correctly the intent of the law and is so framed as to be applied with understanding to fact situation. Jackson v. Miles, 126 Ga. App. 320, 190 S.E.2d 565 (1972).

Simply because a request to charge is apt, correct, and pertinent, it is not necessarily error to fail to charge it, but test is whether court substantially covered principles embodied therein or whether it was sufficiently or substantially covered by general charge. Seaboard Coast Line R.R. v. Thomas, 125 Ga. App. 716, 188 S.E.2d 891, aff'd, 229 Ga. 301, 190 S.E.2d 898 (1972).

It is no longer necessary to give exact language of requests to charge when same principles are fairly given to jury in general charge of court. Shirley v. State, 245 Ga. 616, 266 S.E.2d 218 (1980).

Since the repeal and reenactment of this section by Ga. L. 1965, p. 18, § 17, there is presently no requirement in this state that the court instruct the jury in the exact language of a request, even though the request may be correct as an abstract principle of law which is directly applicable to a material issue when the charge given by the court substantially covers the same principles. Gay v. City of Rome, 157 Ga. App. 368, 277 S.E.2d 741 (1981).

Since a trial court's charge on accomplice testimony was virtually identical to the charge on accomplice testimony contained in the pattern jury instructions and specifically approved by the Supreme Court of Georgia, the defendant could not, as a matter of law, have shown that this charge was harmful. Chapman v. State, 279 Ga. App. 200, 630 S.E.2d 810 (2006).

Prior inconsistent statement. — Although the defendant's counsel failed to secure a transcript of the defendant's daughter's juvenile court proceeding, wherein the daughter claimed sole responsibility for having shoplifted various items from a store, it was not shown that such a transcript or a jury charge on the daughter's prior consistent statements would have caused the jury to reject the testimony of the store's asset protection agent that the agent observed the defendant tear packaging off items of merchandise in the shoplifting trial; accordingly, there was no ineffective assistance of the defendant's counsel in violation of the Sixth Amendment and Ga. Const. 1983, Art. I, Sec. I, Para. XIV, and the failure of the trial court to have given the jury prior consistent statement jury instructions under O.C.G.A. § 5-5-24(b) was not harmful error. Tucker v. State, 282 Ga. App. 807,

640 S.E.2d 310 (2006).

Judge need not give requested charge when same matter is covered in charge given. — Reversal will not be granted because trial judge refused to give certain requested instructions to the jury, when same matter was fully and fairly presented in the charge given. Candler v. Smith, 50 Ga. App. 667, 179 S.E. 395 (1935) (decided under former Code 1933, § 70-207, as it read prior to its repeal and reenactment by Ga. L. 1965, p. 18, § 17).

History of power of trial judge to refuse requested charges covered by general charge. — Bibb Transit Co. v. Johnson, 107 Ga. App. 804, 131 S.E.2d 631 (1963) (decided under former Code 1933, § 70-207, as it read prior to its repeal and reenactment by Ga. L. 1965, p. 18, § 17).

Refusal to charge in accordance with oral request is equivalent of mere failure to charge. Ware v. State, 156 Ga. 749, 120 S.E. 528 (1923) (decided under former Penal Code 1910).

Trial court is not obligated to rewrite instruction which either party requests to be given. Tatum v. State, 57 Ga. App. 849, 197 S.E. 51 (1938) (decided under former Code 1933, § 70-207, as it read prior to its repeal and reenactment by Ga. L. 1965, p. 18, § 17).

Party who has requested a charge cannot complain thereof. Laing v. Bodiford, 25 Ga. App. 460, 103 S.E. 743 (1920) (decided under former Penal Code 1910).

Charges given at request or insistence of counsel for defendant furnished no ground for granting new trial at the defendant's instance. Coleman v. State, 141 Ga. 731, 82 S.E. 228 (1914) (decided under former Penal Code 1910).

When party in request to charge takes position at trial that there was a certain issue to be submitted to the jury, the party cannot justly complain in the party's motion for new trial that there was no such issue because evidence was undisputedly to the contrary. Davis v. Laird, 108 Ga. App. 729, 134 S.E.2d 467 (1963) (decided under former Code 1933, § 70-207, as it read prior to its repeal and reenactment by Ga. L. 1965, p. 18, § 17).

When incompleteness in charge arose from party's requested instructions. — Party will not be heard to complain that trial court failed to give complete charge to jury when incompleteness arose from instructions requested by that party and there was no request or objection regarding such incompleteness. Marlow v. Lanier, 157 Ga. App. 184, 276 S.E.2d 867 (1981).

Asserting error on appeal barred. — Defendant's consent to reversal of the usual order of events, such that the jury was instructed before closing arguments were made, barred the defendant from asserting error on appeal. Williams v. State, 277 Ga. 853, 596 S.E.2d 597 (2004).

Trial court's alleged error in instructing the jury that the jury could consider the level of certainty shown by a witness about the witness's identification when addressing the reliability of identifications was waived since the defendant requested the instruction; because the defendant requested the instruction, substantial error review under O.C.G.A. § 5-5-24(c) was unavailable. Brewer v. State, 280 Ga. App. 582, 634 S.E.2d 534 (2006).

When the defendant requests that certain charge not be given the defendant may not thereafter complain that the trial court erred by not delivering the proper charge. Burton v. State, 151 Ga. App. 176, 259 S.E.2d 176 (1979).

Criminal defendant's failure to request charge or object to the charge's omission is decisive against the defendant. — Where criminal defendant fails to request charge, or fails to object to trial court's omission to charge, such failure to request or object has been decisive against him. Thomas v. State, 234 Ga. 615, 216 S.E.2d 859, answer conformed to, 136 Ga. App. 165, 220 S.E.2d 736 (1975).

Refusal of proper request on doctrine of avoidance, when raised by evidence, is reversible error. Kroger Co. v. Roadrunner Transp., Inc., 634 F.2d 228 (5th Cir. 1981).

Refusal of requested charge on comparative negligence. — When the court refused the defendant's request to charge on comparative negligence, and evidence created issues on defenses that the plaintiff failed to exercise ordinary care, the trial court erred in refusing upon

Requested Instructions (Cont'd)
3. Application (Cont'd)

request to charge the jury on application of the comparative negligence rule. Crafton v. Livingston, 114 Ga. App. 161, 150 S.E.2d 371 (1966).

State or accused may request charge on lesser crimes. — State or accused may, by written application to trial judge at or before close of evidence, request the judge to charge on lesser crimes than are included in those set forth in the indictment or accusation, and the judge's failure to so charge as requested, if evidence warrants such requested charge or charges, shall be error. Bouttry v. State, 242 Ga. 60, 247 S.E.2d 859 (1978).

Entitlement to charge regarding polygraph results admitted at trial. — When polygraph results are admitted at trial, either party is entitled, upon request, to have jury charged concerning meaning of this evidence. Ross v. State, 245 Ga. 173, 263 S.E.2d 913 (1980).

Court has discretion to hear objections to requests to charge. — Subsection (b) does not require that counsel be offered opportunity before charge of court to object to requests to charge, although the court, in the court's discretion, may hear objections to requests at that time. Windsor Forest, Inc. v. Rocker, 115 Ga. App. 317, 154 S.E.2d 627 (1967).

Restatement of grounds supporting given charge. — Court is afforded every opportunity to be informed as to contention of respective parties concerning jury instruction requests and no useful purpose could possibly be served by requiring that ground upon which counsel contends charge should be given be repeated after court has announced to counsel the court's decision that requested charge will not be given and has instructed the jury omitting such requested charge. Continental Cas. Co. v. Union Camp Corp., 230 Ga. 8, 195 S.E.2d 417 (1973).

Party submitting request to charge is not required to restate grounds of objection to refusal to charge timely submitted written requests after court has heard argument on request and had made its ruling thereon. Meadows v. Oates, 156 Ga. App. 242, 274 S.E.2d 634 (1980).

Rule XV of the Local Rules of the Southern Judicial Circuit, which provides that "All requests to charge shall be filed in writing with the court, in duplicate and with supporting authorities, prior to the introduction of any evidence by any party," is not in conflict with O.C.G.A. § 5-5-24, which specifically permits the trial court to select an earlier time than the close of the evidence for the submission of requests to charge. Walker v. State, 168 Ga. App. 130, 308 S.E.2d 404 (1983).

When trial court gives to jury defendant's previously rejected charge on circumstantial evidence, but when defense counsel is not misled or uninformed other than as to this charge, and no request is made by defense counsel to argue the case as to the circumstantial evidence rule to the jury, the initial rejection of the requested instruction is not, by itself, a proper basis for the grant of a new trial. Thomas v. State, 168 Ga. App. 587, 309 S.E.2d 881 (1983).

Failure to request charge as to constitutional right not to testify. — In the absence of a timely written request, the trial court does not err in failing to charge the jury that the defendant has a constitutional right not to testify and that no inference could be made as a result of the defendant's failure to testify on the defendant's own behalf. Stephens v. State, 157 Ga. App. 414, 278 S.E.2d 70 (1981).

Failure to instruct on a lesser included crime is not error, regardless of whether the evidence would have authorized or demanded such a charge, in the absence of a written request. Daniel v. State, 248 Ga. 271, 282 S.E.2d 314 (1981).

In the absence of a timely, written request, the failure to charge on a lesser-included offense is not error. Partridge v. State, 187 Ga. App. 325, 370 S.E.2d 173 (1988).

Timely, written request to charge a lesser included offense must be made by application to the trial judge at or before the close of the evidence. Jackson v. State, 213 Ga. App. 170, 444 S.E.2d 126 (1994).

Failure to give unrequested instruction on collateral issue. — Defendant cannot complain about the trial court's failure to give an unrequested instruction on a collateral issue, especially

when the omission is not clearly harmful and erroneous as a matter of law. Schubert v. State, 160 Ga. App. 227, 286 S.E.2d 514 (1981).

In aggravated assault prosecution, court complied with O.C.G.A. § 5-5-24 by informing counsel before closing argument of the court's proposed action on the requests to charge, by charging the jury after the arguments, and by filing with the clerk all of the submitted requests to charge. Simmons v. State, 172 Ga. App. 695, 324 S.E.2d 546 (1984).

Request after court's failure to charge sua sponte. — Defendant was not erroneously denied the opportunity for re-argument in light of the trial court's decision to charge the jury as to robbery by intimidation since the charge on robbery by intimidation was given as the result of the state's objection to the trial court's failure to give a charge sua sponte, not as the result of the trial court's subsequent decision to give a request that had earlier been refused. Turner v. State, 180 Ga. App. 141, 348 S.E.2d 572 (1986).

Incomplete and inaccurate request not honored. — When the defendant requested a charge on the defense of good character but the defendant's request was not a complete and, consequently, not an accurate statement of the law concerning "good character," the court was not bound to honor the request. Only exceptional cases require the charge without a request of good character. Williams v. State, 187 Ga. App. 355, 370 S.E.2d 210 (1988).

Failure to inform counsel of proposed action on requests. — Trial court's failure to comply with the requirement that counsel be informed before closing argument of the trial court's proposed action on requests for jury instructions did not require reversal of the defendant's conviction since the jury charges involved were not supported by the evidence at trial and the error caused no harm to the defendant. Bentley v. State, 261 Ga. 229, 404 S.E.2d 101 (1991).

Jury Charge

1. In General

Perfection not required. — Dialectical perfection, metaphysical nicety, abstract inerrancy, are not expected or required of state trial courts. Smith v. Poteet, 127 Ga. App. 735, 195 S.E.2d 213 (1972).

Jury charge that is "harmful as a matter of law" within the meaning of O.C.G.A. § 5-5-24(c) is one that is so blatantly apparent and prejudicial that it raises the question of whether the losing party has been deprived of a fair trial because of it, or a gross injustice has resulted that is directly attributable to the alleged error. Mercker v. Abend, 260 Ga. App. 836, 581 S.E.2d 351 (2003).

Charge is responsibility of court and not of counsel. A-1 Bonding Serv., Inc. v. Hunter, 125 Ga. App. 173, 186 S.E.2d 566 (1971), aff'd, 229 Ga. 104, 189 S.E.2d 392 (1972).

In all civil cases the jury shall receive the law exclusively from trial judge and any departure from this rule will constitute reversible error. Metropolitan Publishers Representatives, Inc. v. Arnsdorff, 153 Ga. App. 877, 267 S.E.2d 260 (1980).

Reading of law to court in presence of jury by counsel constitutes reversible error. Central of Ga. R.R. v. Sellers, 129 Ga. App. 811, 201 S.E.2d 485 (1973).

Court's duty as to charging jury is to charge on law as to controlling, material, substantial, and vital issues. Fowler v. Gorrell, 148 Ga. App. 573, 251 S.E.2d 819 (1978).

Charge must include law of case pertaining to substantial issues, whether or not requested. — Law of case must be given to jury to extent of covering substantial issues made by evidence, whether requested or not, or attention be called to it or not; otherwise verdict will be set aside. Fowler v. Gorrell, 148 Ga. App. 573, 251 S.E.2d 819 (1978).

Charges must be relevant and necessary. — Trial court is required "after arguments are completed" to instruct comprehensively on the law applicable to the case, i.e., those charges which are relevant and necessary to weigh the evidence and enable the jury to discharge the judge's duty, and which would constitute error if not given. Griffith v. State, 264 Ga. 326, 444 S.E.2d 794 (1994).

Instructions are sufficient which substantially cover issues made by

Jury Charge (Cont'd)
1. In General (Cont'd)

pleadings and evidence, absent a timely written request. Siegel v. 1156 Woodland, Inc., 115 Ga. App. 178, 154 S.E.2d 263 (1967).

Charge should be sufficiently clear to be understood. — It is not necessary in considering a charge to assume a possible adverse construction, but charge that is sufficiently clear to be understood by jurors of ordinary understanding is all that is required. Clark v. State, 153 Ga. App. 829, 266 S.E.2d 577 (1980).

Court should not give conflicting rules of law in charge and leave jury to choose between the rules. Johnson v. State, 148 Ga. App. 702, 252 S.E.2d 205 (1979).

Jury instructions must always be viewed as a whole. Shirley v. State, 245 Ga. 616, 266 S.E.2d 218, cert. denied, 449 U.S. 879, 101 S. Ct. 227, 66 L. Ed. 2d 102 (1980).

Charges may be made prior to end of evidence's submissions. — It is not error for certain charges to be made to the jury prior to and during the receipt of evidence, nor is it error to instruct the jury concerning their duties before any evidence is received. Hammond v. State, 169 Ga. App. 97, 311 S.E.2d 523 (1983).

Preliminary instructions no substitute for complete jury instructions. — As a general rule, preliminary instructions given before evidence is presented cannot serve as a substitute for complete jury instructions required by O.C.G.A. § 5-5-24 after closing arguments are completed. Massey v. State, 270 Ga. 76, 508 S.E.2d 149 (1998).

Charge containing two distinct propositions which conflict with each other is calculated to leave the jury in such a confused condition of mind that the jury cannot render an intelligible verdict, and requires the grant of a new trial. Clements v. Clements, 247 Ga. 787, 279 S.E.2d 698 (1981).

Whole charge may be sound even if disjointed fragments are objectionable. — While the specific portion of a charge of which complaint is made, when torn asunder and considered as a disjointed fragment, may be objectionable, when put together and considered as a whole, the charge may be perfectly sound. Howell v. State, 157 Ga. App. 451, 278 S.E.2d 43 (1981).

Charge is intended to state and explain law. — Province of jury is to ferret out and determine questions of fact through the jury's own process of reasoning. Emory Univ. v. Lee, 97 Ga. App. 680, 104 S.E.2d 234 (1958) (decided under former Code 1933, § 70-207, as it read prior to its repeal and reenactment by Ga. L. 1965, p. 18, § 17).

Charge must cover substantial, controlling issues made by pleadings and evidence. — It is duty of trial judge in every case, with or without request, to charge jury fully and correctly upon all substantial and controlling issues made by pleadings and evidence. Hilburn v. Hilburn, 210 Ga. 497, 81 S.E.2d 1 (1954) (decided under former Code 1933, § 70-207, as it read prior to its repeal and reenactment by Ga. L. 1965, p. 18, § 17).

It is duty of court, even without request, to give appropriate instructions on every substantial and controlling issue raised by pleadings and evidence. McCrackin v. McKinney, 52 Ga. App. 519, 183 S.E. 831 (1936) (decided under former Code 1933, § 70-207, as it read prior to its repeal and reenactment by Ga. L. 1965, p. 18, § 17).

Purpose of requiring written instructions is to prevent dispute as to what was charged. Citizens Bank v. Fort, 15 Ga. App. 427, 83 S.E. 678 (1914) (decided under former Penal Code 1910).

It is necessary that it explicitly appear to jury that judge personally gives instructions. Georgia R.R. & Banking Co. v. Flowers, 108 Ga. 795, 33 S.E. 874 (1899); Blandon v. State, 6 Ga. App. 782, 65 S.E. 842 (1909).

Correctness of charge must be determined by the whole, taken together. — If, taking all instructions collectively, the law seems to have been properly expounded to the jury, the judgment will not be reversed, though some one opinion may be erroneous, as correctness of charge must be determined by the whole, taken together. Ellis v. Britt, 181 Ga. 442, 182 S.E. 596 (1935) (decided under former Code 1933, § 70-207, as it

read prior to its repeal and reenactment by Ga. L. 1965, p. 18, § 17).

Charge though abstractly correct is nevertheless erroneous unless authorized by evidence. Groover v. Cudahy Packing Co., 61 Ga. App. 707, 7 S.E.2d 287 (1940) (decided under former Code 1933, § 70-207, as it read prior to its repeal and reenactment by Ga. L. 1965, p. 18, § 17).

To justify charge on given subject, there need not be direct evidence on that point; it is enough if there be something from which a legitimate process of reasoning can be carried on in respect to it. Hawkins v. State, 80 Ga. App. 496, 56 S.E.2d 315 (1949) (decided under former Code 1933, § 70-207, as it read prior to its repeal and reenactment by Ga. L. 1965, p. 18, § 17).

General instructions previously given may warrant refusal of specific charge. Bank of Lafayette v. Phipps, 30 Ga. App. 769, 119 S.E. 427 (1923) (decided under former Penal Code 1910).

One cannot complain of charge which gives one's unwarranted defense. Stripling v. Calhoun, 98 Ga. App. 354, 105 S.E.2d 923 (1958) (decided under former Code 1933, § 70-207, as it read prior to its repeal and reenactment by Ga. L. 1965, p. 18, § 17).

Legally correct, pertinent charge not rendered erroneous by failure to charge another pertinent principle. — Charge that is otherwise legally correct, applicable, and pertinent to issues in case is not rendered erroneous by failure of court to charge another pertinent legal principle. Wilson v. Harrell, 87 Ga. App. 793, 75 S.E.2d 436 (1953) (decided under former Code 1933, § 70-207, as it read prior to its repeal and reenactment by Ga. L. 1965, p. 18, § 17).

Excerpt from charge of trial court which is correct in itself is not rendered erroneous because some other essential and correct principle of law is not included therein or added thereto. Hudson v. Cole, 102 Ga. App. 300, 115 S.E.2d 825 (1960) (decided under former Code 1933, § 70-207, as it read prior to its repeal and reenactment by Ga. L. 1965, p. 18, § 17).

In such a case, the motion for a new trial should assign error on the failure of the court to charge the other essential and correct principle of law involved and not on the charge given. Hudson v. Cole, 102 Ga. App. 300, 115 S.E.2d 825 (1960) (decided under former Code 1933, § 70-207, as it read prior to its repeal and reenactment by Ga. L. 1965, p. 18, § 17).

To cure erroneous charge. — Fact that judge also gave correct charge on avoiding negligence did not cure error when he did not call jury's attention to erroneous charge and correct or retract it. Brooks v. Wofford, 88 Ga. App. 731, 77 S.E.2d 563 (1953) (decided under former Code 1933, § 70-207, as it read prior to its repeal and reenactment by Ga. L. 1965, p. 18, § 17).

It is not presumed that jury pays more attention to incorrect charges than to others. Fievet v. Curl, 96 Ga. App. 535, 101 S.E.2d 181 (1957) (decided under former Code 1933, § 70-207, as it read prior to its repeal and reenactment by Ga. L. 1965, p. 18, § 17).

Court may, in the court's discretion, recharge jury without request from the jury. Hyde v. State, 196 Ga. 475, 26 S.E.2d 744 (1943) (decided under former Code 1933, § 70-207, as it read prior to its repeal and reenactment by Ga. L. 1965, p. 18, § 17).

Court has discretion to supplement charge or give additional charge after jury retires. — Court, after having seemingly completed the charge and instructed the jury to retire, has discretion in supplementing charge or in giving an additional charge to the jury. Southern Ry. v. Lee, 59 Ga. App. 316, 200 S.E. 569 (1938) (decided under former Code 1933, § 70-207, as it read prior to its repeal and reenactment by Ga. L. 1965, p. 18, § 17).

Judge may charge contentions made by pleadings. — It was not reversible error to state in charge of court contentions of parties as made by pleadings, especially when the court instructed the jury that pleadings were not evidence and were not to be so considered. Langran v. Hodges, 60 Ga. App. 567, 4 S.E.2d 489 (1939) (decided under former Code 1933, § 70-207, as it read prior to its repeal and reenactment by Ga. L. 1965, p. 18, § 17).

Court may state contentions made by petition though some are unsupported by evidence. — It is not im-

Jury Charge (Cont'd)
1. In General (Cont'd)

proper, in charging jury, to state contentions made by allegations of the petition, or to give them by a narrative reading of the petition, even though some of the contentions in either instance are unsupported by evidence. Limbert v. Bishop, 96 Ga. App. 652, 101 S.E.2d 148 (1957) (decided under former Code 1933, § 70-207, as it read prior to its repeal and reenactment by Ga. L. 1965, p. 18, § 17).

Court sufficiently states contentions by referring jury to pleadings. — When contentions of parties to suit are not complicated and can be easily ascertained by jury from inspection of the pleadings, the court sufficiently states the contentions of the parties by referring the jury to the pleadings. Tharpe v. Cudahy Packing Co., 60 Ga. App. 449, 4 S.E.2d 49 (1939) (decided under former Code 1933, § 70-207, as it read prior to its repeal and reenactment by Ga. L. 1965, p. 18, § 17).

It is error to instruct as to contention of plaintiff which has been stricken from petition and as to which no evidence was introduced. Ellison v. Robinson, 96 Ga. App. 882, 101 S.E.2d 902 (1958) (decided under former Code 1933, § 70-207, as it read prior to its repeal and reenactment by Ga. L. 1965, p. 18, § 17).

Absent request, charge need not cover matters merely collateral to main issue. — Mere failure to charge upon minor points to which court's attention was not called at the time, is not ground for new trial. Wiley v. State, 3 Ga. App. 120, 59 S.E. 438 (1907).

It is not error, in absence of timely written request, to fail to charge with reference to matters merely collateral or illustrative of main issues. McCrackin v. McKinney, 52 Ga. App. 519, 183 S.E. 831 (1936) (decided under former Code 1933, § 70-207, as it read prior to its repeal and reenactment by Ga. L. 1965, p. 18, § 17).

In absence of timely written request, trial court's failure to charge upon incidental or collateral matters is not error. Hilburn v. Hilburn, 210 Ga. 497, 81 S.E.2d 1 (1954) (decided under former Code 1933, § 70-207, as it read prior to its repeal and reenactment by Ga. L. 1965, p. 18, § 17).

New trial not warranted by slight errors and inaccuracies of expression not calculated to mislead. Weeks v. Reliance Fertilizer Co., 23 Ga. App. 128, 97 S.E. 664 (1918) (decided under former Penal Code 1910).

Significance to be attached to technical words when used in charge should be explained so that jury might comprehend full import of instructions given them. City of Summerville v. Sellers, 94 Ga. App. 152, 94 S.E.2d 69 (1956) (decided under former Code 1933, § 70-207, as it read prior to its repeal and reenactment by Ga. L. 1965, p. 18, § 17).

Court need not draw distinctions between technical terms whose general meanings are commonly understood. — When charge embraces section of Code which contains technical words or expressions, the meaning of which is probably not understood by a person unlearned in the law, court should so define them as to convey to the jury a correct idea of their meaning, but it is unnecessary for the court, even upon request, to explain words and expressions which are of ordinary understanding and self-explanatory. Floyd v. State, 58 Ga. App. 867, 200 S.E. 207 (1938) (decided under former Code 1933, § 70-207, as it read prior to its repeal and reenactment by Ga. L. 1965, p. 18, § 17).

Generally, in absence of proper written request so to do, it is not cause for a new trial that court, in charging jury, failed to define or draw distinctions between technical terms, when essential contentions and rules of law were given, and especially when general meaning and effect of such terms are commonly understood. A.A.A. Hwy. Express, Inc. v. Hagler, 72 Ga. App. 519, 34 S.E.2d 462 (1945) (decided under former Code 1933, § 70-207, as it read prior to its repeal and reenactment by Ga. L. 1965, p. 18, § 17).

Failure to define defense relied upon. — When on trial of defendant charged with crime of murder, defense relied on was that homicide was result of accident or misfortune, and court correctly charges jury the law in relation thereto, it was not error for court to omit to define what would constitute accident or misfortune, in absence of request so to

do. Daniel v. State, 171 Ga. 335, 155 S.E. 478 (1930) (decided under former Penal Code 1910).

Failure to define negligence or instruct as to proximate cause, absent request, is not error. Southern Grocery Stores, Inc. v. Cain, 50 Ga. App. 629, 179 S.E. 128 (1935) (decided under former Code 1933, § 70-207, as it read prior to its repeal and reenactment by Ga. L. 1965, p. 18, § 17).

Failure to charge on defense of misidentification. — When a trial court charged the jury fully on the presumption of innocence, reasonable doubt, burden of proof, credibility of witnesses, and impeachment of witnesses, it is not error to fail to charge, sua sponte, on identification. Clay v. State, 232 Ga. App. 656, 503 S.E.2d 560 (1998).

Failure to charge on witness identification not error. — Trial court did not err in failing to charge the jury on witness identification with regard to a defendant's trial for armed robbery and other crimes as the defendant never requested the charge and identification was not an issue since there was no eyewitness testimony that specifically identified the defendant as the perpetrator of the armed robbery or of the theft of the pickup truck. Johnson v. State, 293 Ga. App. 32, 666 S.E.2d 452 (2008).

Instructing that allegations of negligence are not supported by proof. — In absence of written request so to do, it is not necessary for court to instruct jury that any one or more allegations of negligence in petition are not supported by proof and must not be considered by the jury. Black & White Cab Co. v. Clark, 67 Ga. App. 170, 19 S.E.2d 570 (1942) (decided under former Code 1933, § 70-207, as it read prior to its repeal and reenactment by Ga. L. 1965, p. 18, § 17).

Failure to charge on impeachment of witnesses, absent timely, written request, is not error. Robinson v. State, 114 Ga. 445, 40 S.E. 253 (1901); Williamson v. State, 143 Ga. 267, 84 S.E. 584 (1915) (decided under former Penal Code 1910); Ware v. State, 156 Ga. 749, 120 S.E. 528 (1923) (decided under former Penal Code 1910).

Failure to charge upon burden of proof does not require new trial, absent proper request. Knapp Bros. Mfg. Co. v. Cook, 171 Ga. 330, 155 S.E. 321 (1930) (decided under former Penal Code 1910).

Charging upon theory entirely dependent on defendant's statement. — Trial court is not required to give to the jury instructions upon any theory which depends for its existence solely upon the defendant's statement, unless there be presented to court before beginning the court's charge an appropriate written request. Marsh v. State, 174 Ga. 83, 161 S.E. 817 (1931) (decided under former Penal Code 1910).

Requirements for charge if multiple defendants. — While it would have been better had a trial court explicitly told a jury to decide the guilt or innocence of each codefendant separately, the court's instructions were not sufficiently prejudicial to deprive the defendant of a fair trial, especially since the defendant neither failed to request such an instruction nor made any objection to the trial court's charge. Miller v. State, 258 Ga. App. 322, 574 S.E.2d 392 (2002).

Charge on element of intent. — Trial court properly instructed the jury that, in order to convict the defendant, a finding of intent was required; then, the trial court differentiated the types of intent involved and read the elements of each crime directly from the statutes for the jury's consideration and thus, as a whole, the jury instructions appropriately enabled the jury to judiciously determine the guilt or innocence of the defendant. Williams v. State, 252 Ga. App. 280, 556 S.E.2d 170 (2001).

No objectionable summary of reasonable doubt standard. — Trial court correctly charged the jury as to the rape count of the indictment and its lesser included offenses and properly instructed the jury as to the state's burden to prove the defendant's guilt beyond a reasonable doubt, substantially in accordance with the pattern charge because there was no objectionable summary of the reasonable doubt standard as an honest belief, and while the best practice would not have been to employ the word "believe" in the court's charge, the trial court did not improperly summarize the burden of proof or otherwise confuse the jury in doing so; the

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1. In General (Cont'd)

trial court made no attempt to summarize the court's reasonable doubt charge as an honestly held belief or to otherwise explain the charge, and twice after giving the charge, the trial court made reference to the court's reasonable doubt charge as initially given by instructing the jury that the jury could convict the defendant of rape and child molestation if the jury believed beyond a reasonable doubt that the defendant was guilty thereof. Alexander v. State, 308 Ga. App. 245, 707 S.E.2d 156 (2011).

2. Recharge and Correction of Erroneous Charge

When jury requests recharge on any point, it is duty of court to do so. Mathews v. Taylor, 155 Ga. App. 2, 270 S.E.2d 247 (1980).

It is not necessary on recharge to cover subject in toto. Creamer v. State, 229 Ga. 704, 194 S.E.2d 73 (1972).

Judge is not required to restate entire charge when jury requests only partial recharge. Andrews v. Lovell, 145 Ga. App. 246, 243 S.E.2d 666 (1978).

Trial court has discretion to recharge in full or only upon points requested. Williams v. State, 151 Ga. App. 765, 261 S.E.2d 487 (1979).

Correction of erroneous charge. — When incorrect charge has been called to the jury's attention, and withdrawn from the jury, and a correct charge given, there is no merit in assignment of error complaining of incorrect charge. Jones v. State, 246 Ga. 109, 269 S.E.2d 6 (1980).

When erroneous statement is made, it is not cured by correct statement in another portion of charge unless jury's attention is called to correction by a retraction of erroneous statement or in some other like manner. Johnson v. State, 148 Ga. App. 702, 252 S.E.2d 205 (1979).

Trial court did not err in denying the defendant's motion for mistrial because it was within the trial court's discretion to decide whether a mistrial was the only corrective measure or whether any prejudicial effect of a jury instruction handout error could otherwise be corrected; the trial court did not abuse the court's discretion in determining that any prejudicial effect could be adequately addressed by remedial instructions, together with a correct copy of the jury charge, such that a mistrial was not the only corrective measure that would preserve defendant's right to a fair trial, and the charge as a whole, including the remedial actions taken by the trial court, was not likely to confuse the jury. Britton v. State, 310 Ga. App. 742, 713 S.E.2d 914 (2011).

Purpose of subsection (a) of O.C.G.A. § 5-5-24 is to allow correction of errors in the charge when there is still time to do so. Vaughn v. Protective Ins. Co., 243 Ga. App. 79, 532 S.E.2d 159 (2000).

Failure to recharge held error. — Trial court erred by failing to recharge the jury on the presumption of innocence after the close of evidence and completion of arguments by counsel. Blandburg v. State, 209 Ga. App. 752, 434 S.E.2d 510 (1993).

No error in recharge. — Because the jury in defendant's criminal matter requested clarification for purposes of the jury's deliberations, whereupon the trial court recharged the jury on the offense of aggravated assault, in violation of O.C.G.A. § 16-5-21, such was not error under O.C.G.A. § 5-5-24(c) or under the holding in Dukes, as the initial charge and the recharge were not based on the entire aggravated assault statute but instead, were only based on that part of the O.C.G.A. § 16-5-21 that related to the allegations in the indictment. Johnson v. State, 279 Ga. App. 669, 632 S.E.2d 688 (2006).

No error in failure to recharge. — Trial court's error in failing to comply with O.C.G.A. § 5-5-24(b) was harmless given the strength of the evidence of the defendant's guilt, and given that the jury deliberated the same day that the jury were given the instructions as to the presumption of innocence and reasonable doubt; it was highly probable that the trial court's failure to repeat the instructions as to the presumption of innocence and reasonable doubt in the final charge did not contribute to the verdict because the trial court charged the jury on the principles of reasonable doubt and the presumption of

innocence in the preliminary charge, referred the jury back to those instructions in the jury's final charge, and the court did so in the context of a one-day trial. Tidwell v. State, 312 Ga. App. 468, 718 S.E.2d 808 (2011), cert. denied, 2012 Ga. LEXIS 277 (Ga. 2012).

3. Application

Cautionary instructions are not favored since in most instances the instructions are productive of confusion and tend to restrict jury's untrammeled consideration of case. Herman v. Boyer, 154 Ga. App. 617, 269 S.E.2d 107 (1980).

Preliminary charges on presumption of innocence and other issues not required. — Defendant's trial counsel was not ineffective in failing to request that the trial court give preliminary instructions regarding the presumption of innocence, reasonable doubt, or the burden of proof because these doctrines were presented in the trial court's charge at the close of evidence as required by O.C.G.A. § 5-5-24(b). Decapite v. State, 312 Ga. App. 832, 720 S.E.2d 297 (2011).

Court must exercise care to avoid repetitious charges. — Care must be exercised to see that requested charges on same point will not subject court's charge to criticism that the charge is unduly repetitious; the fact that one party happened to request repetitious charges will not immunize charge from criticism. Gates v. Southern Ry., 118 Ga. App. 201, 162 S.E.2d 893 (1968).

Giving of redundant requests is more likely error than exercise of restrictive discretion. — It is trial court's duty to see that charge is fair in any and all events. In carrying out that duty trial judges should bear in mind that error is more likely to exist in a too liberal giving of redundant requests than from exercising of restrictive discretion in charging the jury. Gates v. Southern Ry., 118 Ga. App. 201, 162 S.E.2d 893 (1968).

Charge which is not applicable to facts should not be given. Todd v. State, 149 Ga. App. 574, 254 S.E.2d 894 (1979).

When any evidence supports particular point, it is not error to charge law regarding such point. Smith v. Lott, 246 Ga. 366, 271 S.E.2d 463 (1980).

Charge on damages. — Instruction that the only issue was the amount of damages, if any, and the jury could find from "absolutely nothing to anything" was not error because there was some evidence that the plaintiff suffered no damages as a result of the accident. Wright v. Barnes, 240 Ga. App. 684, 524 S.E.2d 758 (1999).

Affirmative defense need not be specifically charged if case as a whole is fairly presented. — If affirmative defense is raised by evidence, including defendants' own statements, trial court must present affirmative defense to jury as part of case in the jury's charge, even absent a request; such affirmative defense, however, need not be specifically charged if case as a whole is fairly presented to jury. Booker v. State, 247 Ga. 74, 274 S.E.2d 334 (1981).

Charge on good character is only required when direct examination relates to general reputation, good or bad. Witnesses' opinion of appellant while sober did not establish the witnesses' knowledge of the witnesses' general reputation in the community so as to place the appellant's character in issue. Aldridge v. State, 247 Ga. 142, 274 S.E.2d 525 (1981).

Charge on circumstantial evidence is demanded only when case is wholly dependent thereon. Hudson v. State, 127 Ga. App. 452, 193 S.E.2d 919 (1972).

Necessary charge when guilt of defendant depends solely on circumstantial evidence. — When guilt of defendant is dependent solely on circumstantial evidence it is error to fail to charge that if proved facts are consistent with theory of innocence, defendant should be acquitted. Thompson v. State, 154 Ga. App. 704, 269 S.E.2d 474 (1980).

Failure to object to a jury charge in a criminal case constituted a waiver except when there had been a substantial error in the charge which was harmful as a matter of law. Jones v. State, 252 Ga. App. 332, 556 S.E.2d 238 (2001).

Because the defendant failed to object to the trial court's jury charge on aggravated stalking or reserve exceptions to the charge, the defendant waived the claim for appellate review; the trial court's instruction that "the existence of a written

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3. Application (Cont'd)

order is presumptive evidence of notice to the defendant" was not harmful as a matter of law. Presley v. State, 307 Ga. App. 528, 705 S.E.2d 870 (2011).

Failure to object to a jury charge in a civil case constituted a waiver. — Passenger waived any error in the trial court's charge to the jury on the duty of a guest passenger with respect to the negligence of the driver because it was an incomplete statement of the law as the passenger failed to object to the charge below; under O.C.G.A. § 5-5-24(a), the appellate court could not consider the claim for the first time on appeal. McCannon v. Wilson, 267 Ga. App. 815, 600 S.E.2d 796 (2004).

Failure to object to jury charge in probate court proceeding. — As to the use of the term "lunatic" in a probate court's jury instructions in a will contest case, the relatives made no objection to the instruction at the conclusion of the probate court's instruction; therefore, the relatives were not permitted to complain of the instruction on appeal. This was not a situation in which review is warranted pursuant to O.C.G.A. § 5-5-24(c). Kersey v. Williamson, 284 Ga. 660, 670 S.E.2d 405 (2008).

Instruction on general legal principles necessary to reach correct verdict. — Upon trial of criminal case, trial judge with or without request should instruct jury as to general principles of law which of necessity must be applied in reaching correct verdict on issues. Tift v. State, 133 Ga. App. 455, 211 S.E.2d 409 (1974).

Court need not instruct jury regarding "inherent pardoning power" during guilt-innocence phase of criminal trial. Chafin v. State, 246 Ga. 709, 273 S.E.2d 147 (1980).

Instructing jurors to vote consistently with individual judgment. — When instructions were conditioned on each juror voting consistently with the juror's individual judgment the fact that the court omitted to charge that jurors should not abandon the jurors' convictions to be congenial did not constitute a deprivation of due process. Byrd v. State, 156 Ga. App. 522, 275 S.E.2d 108 (1980).

No need to assume a possible adverse construction. — Charge that is sufficiently clear to be understood by jurors of ordinary understanding is all that is required. Howell v. State, 157 Ga. App. 451, 278 S.E.2d 43 (1981).

Failure to charge on presumption of innocence. — Trial court's failure to properly charge the jury after closing arguments on the presumption of innocence, burden of proof, and the standard of proof was reversible error. The error was not harmless because the jury was presented with conflicting testimony and the eyewitness was an informant whose identity was not revealed to the defendant. Little v. State, 230 Ga. App. 803, 498 S.E.2d 284 (1998).

Jury instruction did not denigrate the presumption of innocence by informing the petit jury that the grand jury had already determined that there was sufficient evidence to warrant a trial when the judge specifically instructed the jury that "every person is presumed innocent until proved guilty." Catchings v. State, 256 Ga. 241, 347 S.E.2d 572 (1986).

Failure of charge to indicate which of several counts may support punitive damages. — It is error to deny the defendant's motion for new trial on the issue of punitive damages when the plaintiff sued the defendant on two counts, only one of which could support an award of punitive damages, but the trial court's charge did not so indicate and the Court of Appeals was, therefore, unable to determine the count upon which the jury hinged the jury's award of punitive damages. Marriott Corp. v. American Academy of Psychotherapists, Inc., 157 Ga. App. 497, 277 S.E.2d 785 (1981).

In plaintiff patient's medical malpractice suit against the defendants, a doctor and the doctor's professional corporation, the trial court did not err in refusing to give the patient's requested jury charge that a patient was entitled to believe and rely upon the affirmative representations of the patient's doctor, and that, while under the doctor's care, the patient had no duty to investigate or confirm the truth or accuracy of the doctor's representations,

as: (1) the patient failed to show how the charge was relevant in relation to the disputed issue of whether the doctor was negligent in failing to refer the patient to a specialist; and (2) the charge was not required even if, as the patient contended, the patient's credibility was at issue, because the trial court adequately charged the jury on credibility. Mercker v. Abend, 260 Ga. App. 836, 581 S.E.2d 351 (2003).

New trial not warranted since jury charge in medical malpractice case proper. — New trial was not warranted in a widow's action against a medical practice, alleging multiple claims that arose from her husband's death following cardiac surgery by the practice, as there was no error in the trial court's jury instructions on the standard of care that applied to the health care professionals, which included the doctors and nurses. Sagon v. Peachtree Cardiovascular & Thoracic Surgs., P.A., 297 Ga. App. 379, 677 S.E.2d 351 (2009).

Instruction on rules of road. — There was no substantial error in the jury charge when even though a certified copy of the driver's guilty plea to driving on the wrong side of the road was entered in evidence, it was not an admission of liability, and the injured person still had to establish the driver's negligence, causation, and damages; thus, there was no injustice in instructing on the rules of road, and when the administrator for the driver's estate failed to object to those charges, the administrator was not entitled to relief under the substantial error rule. Setliff v. Littleton, 264 Ga. App. 711, 592 S.E.2d 180 (2003).

Negligent hiring, retention, and entrustment instruction. — In an action arising from a collision between an automobile driver and a truck driver, the jury's punitive damages verdict against the employer of the truck driver was improper as the employer could not be vicariously liable when the truck driver had been discharged from personal liability because the automobile driver failed to request instructions to charge on negligent hiring, retention, and entrustment and failed to object on the instructions given under O.C.G.A. § 5-5-24(a). Am. Material Servs. v. Giddens, 296 Ga. App. 643, 675 S.E.2d 540 (2009).

Charge on retreat required when defendant claimed self-defense. — Trial court erred in failing to charge a jury on the principles of retreat even thought the request for the instruction was made orally because self-defense was the defendant's sole defense, the prosecution placed the concept of retreat in issue during cross-examination of the defendant, and evidence of the defendant's guilt on charges that included aggravated assault was not overwhelming. Felder v. State, 291 Ga. App. 740, 662 S.E.2d 826 (2008).

Failure to object to jury instruction regarding damages. — Although the condemnee contended that the trial court erred in failing to inform the jury that the jury could consider the right to cure as a part of consequential damages, the court was correct in explaining to trial counsel that evidence of damage to property as a result of a taking, as represented by a cost to cure, may be considered a factor in establishing the reduced fair market value of the remaining property after the taking although the cost to cure may not be recovered as a separate element of damage; although the trial court instructed the jury that the cost to cure may not be recovered as a separate element of damage, the court did not inform the jury that the cost to cure could be a factor in establishing the reduced fair market value of the remaining property after the taking. But the condemnee did not take advantage of the opportunity provided by the court to have the condemnee's expert clarify cost to cure for the jury, and the condemnee waived any claim of error because the condemnee made no objection following the court's instruction. Moreover, the appellate court found no substantial error in the court's instruction that was harmful as a matter of law in light of the court's charge to the jury at the end of trial concerning consequential damages. RNW Family P'ship, Ltd. v. DOT, 307 Ga. App. 108, 704 S.E.2d 211 (2010).

4. Harmless Error

Mere verbal inaccuracy not reversible error. — When it appears that word complained of represents merely a verbal inaccuracy, and charge as a whole lays

Jury Charge (Cont'd)
4. Harmless Error (Cont'd)

down principle of law involved correctly, case will not be reversed on this ground. Riviera Equip., Inc. v. Omega Equip. Corp., 155 Ga. App. 522, 271 S.E.2d 662 (1980).

Inaccuracies in charge which do not mislead or obscure meaning, do not require new trial. Johnson v. State, 148 Ga. App. 702, 252 S.E.2d 205 (1979).

Charging an entire statute when only part is applicable. — Even though not every phrase and portion of a Code section may be applicable, it is generally held that a new trial will not be granted if court gives in charge an entire statute or Code provision when part thereof is applicable even though part may be inapplicable under facts in evidence. Bagley v. State, 153 Ga. App. 777, 266 S.E.2d 804 (1980).

Trial court's instruction of the jury on the entirety of O.C.G.A. § 16-6-4(c) when the aggravated child molestation charge was based on physical injury to a child was not a substantial error under O.C.G.A. § 5-5-24(c); the indictment was read to the jury, the indictment was sent with the jury for deliberations, and the jury was instructed that the state's burden was to prove every material allegation in the indictment and every essential element of each crime beyond a reasonable doubt. Anderson v. State, 282 Ga. App. 58, 637 S.E.2d 790 (2006), overruled on other grounds, Schofield v. Holsey, 281 Ga. 809, 642 S.E.2d 56 (2007).

Incorrect charge on damages when verdict is for proper amount. — Though true measure of damages may not have been given in charge, no new trial is required if verdict does not exceed amount of damages which should have been found had charge been correct. Southern Concrete Prods. Co. v. Martin, 126 Ga. App. 534, 191 S.E.2d 314 (1972).

Erroneous charge on measure of damages as harmless error. — In cases when plaintiff seeks damages, and jury fails to return verdict in the plaintiff's favor, failure of the court to charge on the measure of damages is harmless error when there has been a jury verdict finding no liability. Marshall v. Fulton Nat'l Bank, 155 Ga. App. 51, 270 S.E.2d 281 (1980).

If jury returns verdict in favor of defendant as to liability, any error in instruction as to damages is harmless. Garrison v. Rich's, 154 Ga. App. 663, 269 S.E.2d 513 (1980).

When only contested issues relate to liability of defendant and amount of damages inflicted, and verdict in favor of defendant is returned by jury, charge of court calculated to affect finding of jury on question of amount of damages only, and not calculated to affect finding upon question of defendant's liability or nonliability, will not require new trial whether erroneous or not. Don Howard's Music Mart, Inc. v. Southern Bell Tel. & Tel. Co., 154 Ga. App. 648, 269 S.E.2d 506 (1980).

Defendant who neither requested charge nor objected to charge, has waived defendant's rights and has no standing to complain on appeal. Atlanta & W.P.R.R. v. Armstrong, 138 Ga. App. 577, 227 S.E.2d 71 (1976).

Waiver of error by proceeding with closing argument. — When court charges jury before closing arguments, counsel waives error by proceeding with closing argument. Evans v. Moore, 131 Ga. App. 169, 205 S.E.2d 507 (1974).

Failure to charge on certain issues not error absent written request or objection. — Trial court does not commit error by failing to charge on certain issues when there was no written request to charge on issues and no objection was made to charge as given. Cochran v. Quinter, Inc., 156 Ga. App. 109, 274 S.E.2d 113 (1980).

Failure to give an unrequested charge on circumstantial and secondary evidence was not error when the state's case depended primarily on the victim's testimony which was not circumstantial, and the trial court gave an instruction regarding reliance on circumstantial evidence. Nobles v. State, 233 Ga. App. 63, 503 S.E.2d 321 (1998).

Harmless omission from instructions of some element will not be reviewed. — Instructions fall under general rule that when no objection is made to mere omission to include some element not rising to the threshold of harmful

error as a matter of law, enumerations of error will not be considered on appeal. Byrd v. State, 156 Ga. App. 522, 275 S.E.2d 108 (1980).

Failure to instruct jury to limit consideration of evidence to particular purpose. — It is well recognized that when evidence is admitted for one purpose, it is not error for the court to fail to instruct the jury to limit the jury's consideration to purpose for which the evidence is admissible in absence of request to so instruct. Tankersley v. State, 155 Ga. App. 917, 273 S.E.2d 862 (1980).

Failure to charge relative to good character of accused. — Proper instruction should be given in every case when the accused puts the accused's character in issue; but in absence of timely request, an omission to give specific charge on the subject will not require new trial. It is only in exceptional cases when the court fails to charge relatively to the good character of the accused that a new trial should be granted. Spear v. State, 230 Ga. 74, 195 S.E.2d 397 (1973).

Absent written request, failure to charge on question of character evidence is not error. Smith v. State, 153 Ga. App. 519, 265 S.E.2d 852 (1980).

Failure to charge on law of impeachment of witnesses not error when not requested. Butts v. Davis, 126 Ga. App. 311, 190 S.E.2d 595 (1972).

Charge on impeachment by proof of conviction was not reversible error even though the defendant had not placed the defendant's character in issue because of the overwhelming evidence of the defendant's guilt. Peterson v. State, 212 Ga. App. 147, 441 S.E.2d 481 (1994).

Charge on weight of opinion evidence is not required, absent timely written request. Burger v. State, 245 Ga. 458, 265 S.E.2d 796 (1980).

Failure to charge on theory not relied on as defense. — When theory of accident is not relied on as a defense, failure to charge on this theory, in absence of timely written request, is not error. Morrow v. State, 155 Ga. App. 574, 271 S.E.2d 707 (1980).

Failure to charge on voluntary manslaughter. — When party failed to present written request to charge voluntary manslaughter at or before close of evidence, trial court's failure to so charge does not constitute reversible error. Bouttry v. State, 242 Ga. 60, 247 S.E.2d 859 (1978).

Failure to charge on duty to retreat where defendant argues self-defense. — Based on the overwhelming evidence of guilt of a charge of aggravated assault, the trial court's failure to sua sponte give a jury instruction on the duty to retreat was not harmful, and thus the issue was not reviewable under O.C.G.A. § 5-5-24; the only evidence that the defendant acted in self-defense was the defendant's own testimony and, as the jury saw a videotape of the altercation, the jury did not have to speculate on how the stabbing occurred. Buggle v. State, 299 Ga. App. 515, 683 S.E.2d 85 (2009).

Failure to charge on accident and justification. — In a prosecution for driving under the influence and making an improper lane change, because the defendant did not request instructions on accident and justification, the trial court did not err in failing to give them; moreover, because the jury was charged on involuntary intoxication, the failure to charge on accident was not harmful as a matter of law. Walker v. State, 280 Ga. App. 393, 634 S.E.2d 177 (2006).

Failure to charge knowledge of defendant prosecution for aggravated assault. — In a prosecution for aggravated assault, it was harmless error for the court not to charge that the defendant had knowledge that the persons assaulted were police officers when the defendant testified that the defendant knew they were police officers and that the defendant called 9-1-1 to summon the officers to the scene. Stevenson v. State, 234 Ga. App. 103, 506 S.E.2d 226 (1998).

In a prosecution for aggravated assault upon a police officer, failing to charge the jury expressly that an essential element of the offense is the defendant's knowledge that the victim was a police officer was harmless error because the defendant's testimony showed clearly that the defendant knew the man was a police officer. Priester v. State, 249 Ga. App. 594, 549 S.E.2d 429 (2001).

Charge on lesser crime than that included in indictment is discretion-

Jury Charge (Cont'd)
4. Harmless Error (Cont'd)

ary. — Trial judge may, of the judge's own volition and in the judge's discretion, charge on a lesser crime of that included in indictment or accusation. However, the judge's failure to do so, without written request by state or accused, is not error. Bouttry v. State, 242 Ga. 60, 247 S.E.2d 859 (1978).

Charging the wrong statute in a criminal action did not result in substantial harm when there was no reasonable probability that the defendant was convicted of committing the offense in a manner not charged in the indictment. Miller v. State, 240 Ga. App. 18, 522 S.E.2d 519 (1999).

Special instructions regarding legal terms and technical words. — When party has requested no special instructions as to meaning of legal terms and technical words, this is not generally a ground for new trial. Deshazier v. State, 155 Ga. App. 526, 271 S.E.2d 664 (1980).

"Level of certainty" charge. — There was no harmful error under O.C.G.A. § 5-5-24 in the giving of a "level of certainty" eyewitness identification testimony instruction; the identification of the defendant by two officers was highly reliable under the totality of factors mentioned in the instruction, and only one officer had been asked about the certainty of the officer's identification. Olivaria v. State, 286 Ga. App. 856, 650 S.E.2d 422 (2007).

Charge, in divorce, awarding custody when record establishes marriage is irretrievably broken. — When court's charge to jury in divorce case included award of custody and record supports factual determination that marriage was irretrievably broken, charge does not constitute substantial error. Harper v. Harper, 233 Ga. 253, 210 S.E.2d 773 (1974).

Civil conspiracy charge not harmful as a matter of law. — Trial court's instructing the jury on civil conspiracy was not harmful to the defendant as a matter of law because, to the extent that the plaintiff alleged that the defendant directly or indirectly through the defendant's doctors maliciously undertook actions aimed at destroying the plaintiff's medical practice, the plaintiff asserted a theory against the defendant that was cognizable regardless of the existence of a conspiracy. Alta Anesthesia Assocs. of Ga., PC v. Gibbons, 245 Ga. App. 79, 537 S.E.2d 388 (2000).

Instruction regarding sufficiency of evidence in civil matter. — In an action against the Georgia Department of Transportation alleging negligent placement of safety devices at an intersection, the trial court erred by instructing the jury that other collision evidence alone was not sufficient to show notice of a dangerous condition, but the error was harmless. McCorkle v. DOT, 257 Ga. App. 397, 571 S.E.2d 160 (2002).

Charge must be prejudicial for reversal. — Erroneous charge touching a theory not in issue under the evidence, unless prejudicial and harmful as revealed by the record, does not require or demand a reversal. Hall v. State, 176 Ga. App. 498, 336 S.E.2d 604 (1985).

Trial court's failure to instruct jury without request on doctrine of comparative negligence did not constitute gross miscarriage of justice requiring a new trial. King v. Communications, Inc., 166 Ga. App. 35, 303 S.E.2d 143 (1983).

Misstatement of limitation period. — Even though the trial court erred in charging the jury that the statute of limitations for incest is seven years, the error was harmless because the defendant's acts of incest occurred well within the applicable four-year limitation period. Wiser v. State, 242 Ga. App. 593, 530 S.E.2d 278 (2000).

Misstatement in jury charge harmless. — In a nuisance suit brought by homeowners against a city, any error in a charge referring to "owner or occupier" rather than "owner and occupier" was harmless; the city had not excepted to the charge on this ground, and the city had not shown that there were any homeowners who were not both owners and occupants of their homes. City of Atlanta v. Broadnax, 285 Ga. App. 430, 646 S.E.2d 279 (2007), cert. denied, No. S07C1445, 2007 Ga. LEXIS 615, 648 (Ga. 2007),

overruled on other grounds, Royal Capital Dev. LLC v. Md. Cas. Co., 291 Ga. 262, 728 S.E.2d 234 (2012).

Insurance coverage. — Although failure to have proof of insurance coverage in violation of O.C.G.A. § 40-6-10(a)(1) and driving without liability insurance in violation of § 40-6-10(b) are separate offenses, reversal was not mandated despite the fact that the trial court incorrectly instructed the jury because trial counsel failed to object or raise exceptions to the jury instructions as required by O.C.G.A. § 5-5-24(c) and there was no finding that there was a substantial error which was harmful as a matter of law. Augustin v. State, 260 Ga. App. 631, 580 S.E.2d 640 (2003).

5. New Trials for Refusal of Requested Charges

Writing necessary. — Request to charge, which is refused, must, to form basis of review, be in writing. Foster v. Ramsey, 102 Ga. App. 523, 116 S.E.2d 617 (1960) (decided under former Code 1933, § 70-207, as it read prior to its repeal and reenactment by Ga. L. 1965, p. 18, § 17).

For refusal to justify new trial, request must be written and contain pertinent, legal charge. — To make refusal to give request in charge ground for new trial, request must be a pertinent legal charge, and must be submitted in writing. Savannah, F. & W. Ry. v. Horn, 69 Ga. 759 (1882); Savannah & S. Ry. v. Davis, 28 Ga. App. 654, 112 S.E. 907 (1922) (decided under former Penal Code 1910).

Time of presentment must be alleged. — Assignment of error will not be considered when time of presenting request is not alleged. Southern Ry. v. Williams, 19 Ga. App. 544, 91 S.E. 1001 (1917) (decided under former Penal Code 1910).

Must specify error. — If charge is not erroneous for any reason assigned, a new trial will not be granted. Brown v. State, 126 Ga. 105, 54 S.E. 914 (1906); Jones v. State, 126 Ga. 538, 55 S.E. 171 (1906); Williams v. State, 124 Ga. 782, 53 S.E. 98 (1906).

Motion must distinctly point out portion of charge challenged. — In order to be considered by appellate court, ground of motion for new trial assigning error upon charge of court must segregate from entire charge the part or parts thereof constituting alleged error. Rentz v. Hagan, 31 Ga. App. 729, 122 S.E. 247 (1924) (decided under former Penal Code 1910).

In a breach of contract and fraud action, although objections made at jury charge conferences do not preserve charging issues for appellate review, the appellate court still addressed the lessee's challenges because the appellate court was able to review the transcript of the charge conference, which transcript evidence demonstrated that the trial judge sufficiently understood the nature of the lessee's objections to enable the judge to rule intelligently on the specific point. Goody Prods. v. Dev. Auth. of Manchester, No. A12A1725, 2013 Ga. App. LEXIS 229 (Mar. 20, 2013).

When overwhelming evidence clearly establishes guilt of accused, erroneous charge will not work reversal. Bradford v. State, 69 Ga. App. 856, 26 S.E.2d 848 (1943) (decided under former Code 1933, § 70-207, as it read prior to its repeal and reenactment by Ga. L. 1965, p. 18, § 17).

When guilt of accused is clearly established aliunde, error in admission of testimony or in charge of court fades into immateriality and does not demand reversal. Miller v. State, 69 Ga. App. 847, 26 S.E.2d 851 (1943) (decided under former Code 1933, § 70-207, as it read prior to its repeal and reenactment by Ga. L. 1965, p. 18, § 17).

New trial not granted where verdict is not affected by refusal to charge as requested. Georgia R.R. & Banking Co. v. Scott, 37 Ga. 94 (1867); Powers v. State, 44 Ga. 209 (1871).

6. New Trial for Erroneous Charges

New trial permitted when instructions are not authorized by evidence. Culberson v. Alabama Constr. Co., 127 Ga. 599, 56 S.E. 765, 9 L.R.A. (n.s.) 411, 9 Ann. Cas. 507 (1907).

New trial permitted when instructions erroneously state party's con-

Jury Charge (Cont'd)
6. New Trial for Erroneous Charges (Cont'd)

tentions. Wilson v. Wilson, 130 Ga. 677, 61 S.E. 530 (1908).

New trial warranted by omission to instruct as to form of verdict of acquittal. Nalley v. State, 11 Ga. App. 15, 74 S.E. 567 (1912) (decided under former Penal Code 1910).

New trial warranted on Georgia RICO claims due to improper jury charge on standard of proof. — Trial court erred in a bifurcated suit asserting a claim of illegal insurance sales under the Georgia Racketeer Influenced and Corrupt Organizations Act (Georgia RICO), O.C.G.A. § 16-14-1 et seq., by instructing the jury that the suing passenger of a cab was required to prove the asserted Georgia RICO claims against two cab companies by clear and convincing evidence as the proper standard of proof to have been applied was a preponderance of the evidence. Am. Ass'n of Cab Cos. v. Parham, 291 Ga. App. 33, 661 S.E.2d 161 (2008), cert. denied, 2008 Ga. LEXIS 690, 728 (Ga. 2008).

Instructions applicable to matters wholly foreign to issue, calculated to mislead jury, demand new trial. Yopp v. State, 131 Ga. 593, 62 S.E. 1036 (1908).

When issue is murder or manslaughter, omitting charge regarding latter is error requiring new trial. Peterson v. State, 146 Ga. 6, 90 S.E. 282 (1916) (decided under former Penal Code 1910).

Failure to charge on circumstantial evidence requires new trial when guilt rests entirely upon circumstantial evidence. Kincaid v. State, 13 Ga. App. 683, 79 S.E. 770 (1913) (decided under former Penal Code 1910); Harris v. State, 18 Ga. App. 710, 90 S.E. 370 (1916) (decided under former Penal Code 1910).

In robbery prosecution, failure to charge regarding intent to steal is error requiring new trial. Blackshear v. State, 20 Ga. App. 87, 92 S.E. 554 (1912) (decided under former Penal Code 1910), Sledge v. State, 99 Ga. 684, 26 S.E. 756 (1896).

Failure to charge as to presumption of innocence is error requiring new trial. Butts v. State, 13 Ga. App. 274, 79 S.E. 87 (1913) (decided under former Penal Code 1910), later appeal, 14 Ga. App. 821, 82 S.E. 375 (1914) (decided under former Penal Code 1910).

Improper charge on presumption of innocence. — Habeas corpus relief in the form of a new trial was properly granted to an inmate from a malice murder conviction based on an erroneous instruction on the presumption of innocence in spite of a correct instruction on the presumption that was given during preliminary instructions to the jury prior to the presentation of any evidence; such preliminary instructions could not serve as a substitute for the complete jury instructions required by O.C.G.A. § 5-5-24(b) after closing arguments were completed, and the omission of comprehensive instructions that were relevant and necessary to weigh the evidence and enable the jury to discharge the jury's duty constituted plain error under O.C.G.A. § 5-5-24(c). Tillman v. Massey, 281 Ga. 291, 637 S.E.2d 720 (2006).

New trial required when charge intimates judge's opinion upon evidence. Morris v. State, 6 Ga. App. 395, 65 S.E. 58 (1909).

Charge concerning confessions when there is evidence only of incriminating admissions is error. Porter v. State, 11 Ga. App. 246, 74 S.E. 1099 (1912) (decided under former Penal Code 1910).

Instructions intimating opinion as to probative value of certain evidence are erroneous. Strickland v. State, 6 Ga. App. 536, 65 S.E. 300 (1909); Goolsby v. State, 148 Ga. 474, 97 S.E. 73 (1918) (decided under former Penal Code 1910).

Allen charge not fatally defective. — Allen charge was not fatally defective because, although the Allen charge contained some inaccurate language, the fact that the jury spent less than an hour deliberating after the charge was given did not prove coercion; it was not an abuse of discretion to deny defendant's motion for a new trial as it was just as likely that the jury reached a verdict quickly after the Allen charge due to a fresh perspective after a night away from deliberations.

Graham v. State, 273 Ga. App. 187, 614 S.E.2d 815 (2005).

DUI charge improper. — Jury charge that a DUI defendant's refusal to submit to a blood alcohol test could create an inference that the test would show the presence of alcohol which impaired the driver's driving was plain error, requiring a new trial, because the charge shifted the burden of proof to the defendant, requiring the defendant to rebut the inference that the defendant was an impaired driver. Wagner v. State, 311 Ga. App. 589, 716 S.E.2d 633 (2011).

Giving of pattern jury instruction on comparative negligence not harmless error. — Trial court erred in charging the jury with the pattern instruction on comparative negligence because the instruction had been superseded by O.C.G.A. § 15-12-33(a), as amended in the Tort Reform Act of 2005; a van driver preserved the objections to the erroneous jury instruction and verdict form, and given the possibility that the jury could have found negligence on the part of the car driver but failed to quantify that driver's negligence in precise terms and reduce the jury's award of damages accordingly, the errors were not harmless. Clark v. Rush, 312 Ga. App. 333, 718 S.E.2d 555 (2011).

Objections to Charge or Failure to Charge

1. In General

Purpose of subsection (a) is to afford trial court an opportunity to correct errors in instructions without necessity of appeal. Seagraves v. Abco Mfg. Co., 121 Ga. App. 224, 173 S.E.2d 416 (1970).

Obvious purpose of subsection (a) is to afford trial court opportunity to correct charge which has been given, and to consider grounds of objection at a time before jury has retired to consider the jury's verdict and at a time when corrections can be made in charge if, upon such consideration, the court deems correction proper. Continental Cas. Co. v. Union Camp Corp., 230 Ga. 8, 195 S.E.2d 417 (1973).

One purpose of subsection (a) is to afford trial judge an opportunity to correct errors in instructions without necessity of appeal. Fleet Transp. Co. v. Cooper, 126 Ga. App. 360, 190 S.E.2d 629 (1972).

Subsection (a) seeks to eliminate sporting aspect of objection to charge. — Statute will not allow counsel in civil case to gamble by refusing to object to possibly erroneous charge or omission in charge, hoping for a favorable verdict, and then relying upon the error to obtain new trial if verdict is unfavorable. Horton v. Ammons, 125 Ga. App. 69, 186 S.E.2d 469 (1971), aff'd sub nom. Smith v. Ammons, 228 Ga. 855, 188 S.E.2d 866 (1972); Christiansen v. Robertson, 237 Ga. 711, 229 S.E.2d 472 (1976).

Party cannot ignore during trial that which the party thinks to be error or injustice and take the party's chances on a favorable verdict and then complain later. Simmons v. Edge, 155 Ga. App. 6, 270 S.E.2d 457 (1980).

Duty on counsel. — This section places the duty on counsel to exercise a high degree of clarity in objecting to charges. Stone v. Burell, 161 Ga. App. 369, 288 S.E.2d 636 (1982); Turner v. Taylor, 179 Ga. App. 574, 346 S.E.2d 920 (1986); Tice v. Cole, 246 Ga. App. 135, 537 S.E.2d 713 (2000).

Failure to except to charge constitutes waiver. Pierce v. Pierce, 241 Ga. 96, 243 S.E.2d 46 (1978).

When court in a criminal case inquires whether there is any objection to charge, and defendant's counsel raises none, appellant waives right to enumerate error by failing to respond to court's inquiry. White v. State, 243 Ga. 250, 253 S.E.2d 694 (1979).

Failure to except before verdict generally results in a waiver of any defects in the charge, the exception under subsection (c) of O.C.G.A. § 5-5-24 applying only when there has been a substantial error which was blatantly apparent and prejudicial, and which resulted in a gross miscarriage of justice. Hunter v. Batton, 160 Ga. App. 849, 288 S.E.2d 244 (1982); Bryson v. Button Gwinnett Sav. Bank, 205 Ga. App. 668, 423 S.E.2d 691 (1992).

Any rights available to criminal defendant under subsection (a) of O.C.G.A. § 5-5-24 are waived when defense counsel states counsel has no objections to charge. Burgess v. State, 162 Ga. App. 212, 290 S.E.2d 554 (1982).

Objections to Charge or Failure to Charge (Cont'd)
1. In General (Cont'd)

When defense counsel neither objects nor reserves the right to later object, the defendant waives the right to raise the issue on appeal. Devoe v. State, 249 Ga. 499, 292 S.E.2d 72 (1982).

When the appellant fails to object to a particular charge at trial, appellant thereby waives appellate consideration of this issue. DOT v. 2.734 Acres of Land, 168 Ga. App. 541, 309 S.E.2d 816 (1983); Tyler v. Bennett, 215 Ga. App. 87, 449 S.E.2d 666 (1994).

In general, failure to object to the trial court's instruction to the jury before the jury returns the jury's verdict constitutes a waiver of the right to raise the issue on appeal. Henderson v. Glen Oak, Inc., 179 Ga. App. 380, 346 S.E.2d 842 (1986), aff'd, 256 Ga. 619, 351 S.E.2d 640 (1987).

Failure to object to a jury instruction that is allegedly confusing and prejudicial generally results in a waiver of any defects, except when the charge is substantially erroneous and harmful as a matter of law. Hunter v. Hardnett, 199 Ga. App. 443, 405 S.E.2d 286, cert. denied, 199 Ga. App. 906, 405 S.E.2d 286 (1991).

Failure to object to a jury instruction generally constitutes a waiver of any defects in the charge, absent a substantial error blatantly apparent and prejudicial, resulting in a gross miscarriage of justice, but even the review of a substantial error under O.C.G.A. § 5-5-24(c) is not available when the giving of an instruction, or the failure to give an instruction, is induced during trial by counsel for the complaining party or specifically acquiesced in by counsel. Queen v. Lambert, 259 Ga. App. 385, 577 S.E.2d 72 (2003).

Defendant waived appellate review of a jury charge because defendant did not object nor reserve objections to the instruction when the court asked for any objections to the jury charge; in fact, defendant made a specific request for and acquiesced in the contested charge. Courrier v. State, 270 Ga. App. 622, 607 S.E.2d 221 (2004).

In a nuisance suit wherein the plaintiff homeowners received a verdict in their favor as against the City of Atlanta with regard to recurrent flooding in a neighborhood, because the city failed to object in any manner to the jury instruction on damages, any alleged error was harmless since the city failed to make any exception to the instruction. City of Atlanta v. Broadnax, 285 Ga. App. 430, 646 S.E.2d 279 (2007), cert. denied, No. S07C1445, 2007 Ga. LEXIS 615, 648 (Ga. 2007), overruled on other grounds, Royal Capital Dev. LLC v. Md. Cas. Co., 291 Ga. 262, 728 S.E.2d 234 (2012).

Failure to request charge or object to omission distinguished from failure to object to charge. — White v. State, 243 Ga. 250, 253 S.E.2d 694 (1979).

In order to avoid waiver, if trial court inquires if there are objections to charge, counsel must state objections or reserve right to object on motion for new trial or on appeal. Jackson v. State, 246 Ga. 459, 271 S.E.2d 855 (1980); Lewis v. State, 215 Ga. App. 161, 450 S.E.2d 448 (1994).

Reservation of right to object in motion for new trial prevents waiver. — When trial court in a criminal case inquires whether there is objection and defendant's counsel states that counsel reserves the right to object in motion for new trial or appeal, there is no waiver. White v. State, 243 Ga. 250, 253 S.E.2d 694 (1979).

Waiver by acceptance of charge. — Invoking the right to request certain instructions in writing, as authorized in subsection (b) of O.C.G.A. § 5-5-24 does not avoid the waiver which occurs when, after the whole charge is given, express acceptance of the charge as stated. Roura v. State, 214 Ga. App. 43, 447 S.E.2d 52 (1994).

Errors harmful as a matter of law. — Appellate court was entitled to consider whether a substantial error in a jury charge was harmful as a matter of law, regardless of whether or not the defendant objected to the jury charge in the trial court. The trial court's failure to charge the jury on defendant's sole issue of self defense in the defendant's felony obstruction of an officer case involved substantial error that was harmful as a matter of law, even though the defendant did not object, as some evidence supported

giving the instruction and the failure to give the instruction was the equivalent of directing a verdict against the defendant. Watts v. State, 259 Ga. App. 531, 578 S.E.2d 231 (2003).

Absent objection, erroneous instructions not reviewable unless constituting substantial error as a matter of law. — Errors alleged to have been in charge but to which there was no exception as provided in subsections (a) and (b) will not generally be held harmful as a matter of law, and will not be considered unless it appears that gross injustice is about to result or has resulted, directly attributable to alleged errors. Barlow v. Rushin, 114 Ga. App. 304, 151 S.E.2d 199 (1966); Murray v. Richardson, 134 Ga. App. 676, 215 S.E.2d 715 (1975).

When party did not complain of instructions given jury before the jury returned the jury's verdict, and charges were not substantially in error so as to be harmful to the party as a matter of law, these alleged errors presented no question for review. Kirkman v. Miller, 116 Ga. App. 78, 156 S.E.2d 558 (1967).

When no exception was made to charge, or as to any failure of court to charge explanation thereof at any time before verdict, as is required by subsection (a), unless error appears that is harmful as a matter of law, the Court of Appeals is not authorized to consider enumeration. Holcomb v. Kirby, 117 Ga. App. 266, 160 S.E.2d 250 (1968).

In order to obtain review, objection to any charge or failure to charge should be made prior to the return of the jury's verdict, with the exception that when substantial error is made in the charge, the error will be reviewed by appellate courts without such objection. Dixon v. State, 224 Ga. 636, 163 S.E.2d 737 (1968).

When no objection is made before the verdict, error claimed on appeal will not be reviewed unless the error is deemed to be substantial and error as a matter of law under subsection (c). Bailey v. Todd, 126 Ga. App. 731, 191 S.E.2d 547 (1972), cert. denied, 409 U.S. 1113, 93 S. Ct. 927, 34 L. Ed. 2d 696 (1973).

When record discloses that no objection was made at trial to any part of the court's charge, there must have been substantial error in the charge which was harmful as a matter of law in order for the appellate court to consider and review the charge. Parks v. State, 230 Ga. 157, 195 S.E.2d 911 (1973).

Complaint concerning a charge to jury is barred when no objection is made at trial, unless the appellate court should find that the charge was harmful as a matter of law, i.e., that the charge was blatantly prejudicial or resulted in a gross miscarriage of justice. Lavender v. State, 234 Ga. 608, 216 S.E.2d 855 (1975).

When appellant did not object to charge of trial court on measure of damages as required by this section and court did not commit substantial error in charge which was harmful as a matter of law, no question for review is presented by enumerations of error on those grounds. Wright v. Thompson, 236 Ga. 655, 225 S.E.2d 226 (1976).

Party in civil case cannot complain of giving or failure to give instruction to jury, unless the party objects thereto before the jury returns the jury's verdict, unless it appears that the error contended is blatantly apparent and prejudicial. Mathews v. Penley, 242 Ga. 192, 249 S.E.2d 552 (1978), cert. denied, 440 U.S. 924, 99 S. Ct. 1255, 59 L. Ed. 2d 478 (1979).

Unless alleged error in portion of court's charge is blatantly apparent and prejudicial, appellant may not complain of the charge for the first time on appeal. McDaniel v. Gysel, 155 Ga. App. 111, 270 S.E.2d 469 (1980).

When appellant made no objection to trial court's charge, even when asked specifically by court if the appellant had any question or additions to the charge, unless there is substantial error which is harmful as a matter of law, such acquiescence in given instruction is reason enough to find appellant's enumeration of error regarding the charge to be without merit. Johnson v. State, 156 Ga. App. 411, 274 S.E.2d 778 (1980), cert. denied, 451 U.S. 989, 101 S. Ct. 2327, 68 L. Ed. 2d 848 (1981).

Review of charge enumerated as error is restricted to ground of objection stated on trial. Palmer v. Stevens, 115 Ga. App. 398, 154 S.E.2d 803 (1967); City of Macon v. Smith, 117 Ga. App. 363,

Objections to Charge or Failure to Charge (Cont'd)
1. In General (Cont'd)

160 S.E.2d 622 (1968); Goodyear Tire & Rubber Co. v. Johnson, 120 Ga. App. 395, 170 S.E.2d 869 (1969); Fidelity-Phenix Ins. Co. v. Mauldin, 123 Ga. App. 108, 179 S.E.2d 525 (1970).

Alleged error in damages instruction waived by failure to object. — Failure to object that the trial court erred by charging the jury on damages pursuant to O.C.G.A. §§ 51-12-5 and 51-12-6 before the jury returned the jury's verdict in an action for wrongful dispossession, trespass, conversion, and theft constituted a waiver of the right to raise the issue on appeal, and there was no substantial error which would require review under the exception set forth in subsection (c) of O.C.G.A. § 5-5-24. Sanders v. Hughes, 183 Ga. App. 601, 359 S.E.2d 396, cert. denied, 183 Ga. App. 907, 359 S.E.2d 396 (1987).

No waiver in absence of request for objections. — When counsel is never asked if counsel has any objection to a charge as given, counsel's right to relief under O.C.G.A. § 5-5-24 is not waived. Brady v. State, 169 Ga. App. 316, 312 S.E.2d 632 (1983).

Objections waived when counsel states counsel has no exceptions. — Defense counsel waives objections when counsel states, in response to the trial court's query, that counsel has no exceptions to a charge as given. Kirk v. State, 168 Ga. App. 226, 308 S.E.2d 592 (1983), aff'd, 252 Ga. 133, 311 S.E.2d 821 (1984); Mantooth v. State, 197 Ga. App. 797, 399 S.E.2d 505 (1990), overruled on other grounds, Wilson v. State, 277 Ga. 195, 586 S.E.2d 669 (2003).

When at the close of the trial court's charge, the defendant's trial counsel states counsel has no exceptions to the charge, this constitutes a waiver. Hunt v. State, 157 Ga. App. 407, 278 S.E.2d 61 (1981); Bryant v. State, 256 Ga. 273, 347 S.E.2d 567 (1986).

When the trial court specifically asked for exceptions to the charge and defense counsel neither objected nor reserved exceptions for post-conviction review, defendant's claims of error regarding the jury charge were thus waived. Leggon v. State, 249 Ga. App. 467, 549 S.E.2d 137 (2001).

Grounds enumerated as error but not raised during trial may not be raised for the first time on appeal. Jackson v. Meadows, 157 Ga. App. 569, 278 S.E.2d 8 (1981).

Variance between objection and error enumerated on appeal. — When the objection made at trial dealt only with the time when the decision was made known to counsel as to what the court would charge, that objection was not the error enumerated on appeal, when the enumerated error related to the "substance" of the charges not being made known to counsel. Jackson v. Meadows, 157 Ga. App. 569, 278 S.E.2d 8 (1981).

Form of objection unimportant. — It is not important in what format an allegation is cast so long as it is clear to the court what the specific error alleged is so that the court may have opportunity to correct the error. Jackson v. Meadows, 157 Ga. App. 569, 278 S.E.2d 8 (1981).

Failure to object to charge at time of trial precludes alleging error on that ground. Foster v. Harmon, 145 Ga. App. 413, 243 S.E.2d 659 (1978).

When at trial, plaintiff fails to make objection on ground enumerated as error, such enumeration presents nothing for court's consideration. Moon v. Combs, 116 Ga. App. 144, 156 S.E.2d 543 (1967).

When no objections were made to the failure to give requested charges, those objections cannot be considered on appeal. Nolen v. Murray Indus., Inc., 165 Ga. App. 785, 302 S.E.2d 689 (1983).

When the appellant did not raise an objection to the charge on avoidance in the court below prior to the return of the verdict, the objection cannot be raised for the first time on appeal. Lloyd v. Stone Mt. Mem. Ass'n, 165 Ga. App. 679, 302 S.E.2d 602 (1983).

Failure to object to any particular charge at trial waives appellate review of the charge. Kellett v. Department of Transp., 174 Ga. App. 214, 329 S.E.2d 514 (1985).

When the plaintiff challenges the trial court's "failure" to "caution" the jury about improper language contained in an order,

but no cautionary instructions were requested at the time the evidence was admitted, no exceptions were taken to the court's charge, and no requests for instructions on this issue were submitted by the plaintiff, in view of the plaintiff's failure to except to the charge or present to the court the charge requested, this enumeration is without merit. Eiberger v. West, 165 Ga. App. 559, 301 S.E.2d 914 (1983).

When the appellant enumerates as error the failure of the trial court to give requested charges on a defense to a criminal count, but it appears that, although given the opportunity to do so in the trial court, the appellant neither raised any objection to the charge, nor reserved the right to except to the trial court's charge at a later time, counsel waives counsel's right to assert error. Bivins v. State, 166 Ga. App. 580, 305 S.E.2d 29 (1983).

When a party fails to object to a charge at trial, the party's contention thereto as to trial error is without merit. Hudson Properties, Inc. v. Citizens & S. Nat'l Bank, 168 Ga. App. 331, 308 S.E.2d 708 (1983).

There is no difference between cases when counsel acquiesced in the giving of a charge and cases when counsel acquiesced in the failure to give a particular charge. If counsel expressly acquiesced in a jury charge as given, any objection to either the inclusion or the omission of a particular charge was waived. Bell v. Samaritano, 196 Ga. App. 612, 396 S.E.2d 520 (1990), aff'd, 260 Ga. 768, 400 S.E.2d 13 (1991).

In a personal injury action, when there was no objection to a charge respecting proximate cause on any occasion, any error was induced by the plaintiff, and precludes the plaintiff from maintaining the issue on appeal. Moore v. Sinclair, 196 Ga. App. 667, 396 S.E.2d 557 (1990).

Building purchaser's claim that the trial court erred by not giving a jury instruction that an incidental breach of a contract did not warrant rescission was deemed waived pursuant to O.C.G.A. § 5-5-24(a) and (c) after the purchaser failed to object to the failure to give the charge at the trial court level, and the purchaser did not show that it was a substantial error that was so harmful that it was within the exception to making an objection; the record revealed that the seller had insisted that the purchaser provide workers' compensation prior to beginning a salvage operation and when the purchaser did not, the seller barred the purchaser's workers from further work, which was a valid act based on the parties' agreement and the substantial nature of the compensation condition to the contract. Lawrence v. Bland, 259 Ga. App. 366, 577 S.E.2d 64 (2003).

When partnership failed to object to the trial court's charge instructing the jury on a cause of action for an accounting before the return of the jury's verdict, the claim of error was waived on appeal. Singleton v. Terry, 262 Ga. App. 151, 584 S.E.2d 613 (2003).

In a will dispute, because the appellants had not objected during the trial to the content of a jury charge, the trial court's conversation with the jury during a charge, or to an expert's opinion, these issues were not preserved for appellate review. Lillard v. Owens, 281 Ga. 619, 641 S.E.2d 511 (2007).

Any challenge to the jury instructions was waived for purposes of appellate review because trial counsel failed to object at trial to any portion of the jury instructions or to reserve the right to object later. Loadholt v. State, 286 Ga. 402, 687 S.E.2d 824 (2010).

No review absent proper objection. — Absent proper objection, Georgia appeals court will not review claim of error. Pittman v. Peebles, 148 Ga. App. 64, 251 S.E.2d 30 (1978).

When party fails to object to jury charge at time of trial the party is precluded from alleging error on appeal as to that ground. City Express Serv., Inc. v. Rich's, Inc., 148 Ga. App. 123, 250 S.E.2d 867 (1978).

When requirements of section have not been met, alleged errors present no question for review. Vogt v. Rice, 114 Ga. App. 251, 150 S.E.2d 691 (1966).

When counsel for appellant fails to comply with subsections (a) and (b) by not filing any written requests to charge, and in failing to give judge opportunity to correct erroneous instructions the judge may have given in the charge, enumerations of error based on certain erroneous

Objections to Charge or Failure to Charge (Cont'd)
1. In General (Cont'd)

instructions will not be considered. Georgia Power Co. v. Slappey, 121 Ga. App. 534, 174 S.E.2d 361 (1970).

Objections to charge of court are not required in criminal cases. Key v. State, 147 Ga. App. 800, 250 S.E.2d 527 (1978).

Subsection (a) of this section does not apply to criminal cases. Griffin v. State, 133 Ga. App. 508, 211 S.E.2d 382 (1974).

Appellant in criminal case may appeal and enumerate error on an erroneous charge or on erroneous failure to charge without first raising the issue in trial court. Gaither v. State, 234 Ga. 465, 216 S.E.2d 324 (1975).

There is no requirement to enter objection to erroneous criminal charge given unless the trial court specifically requires the defendant to enter objections prior to the return of the verdict or reserve the right to make such an objection. Gaines v. State, 177 Ga. App. 795, 341 S.E.2d 252 (1986).

Objections to pre-evidentiary statement. — Reservation of objections to the main charge does not encompass objections to the pre-evidentiary statement since, while O.C.G.A. § 5-5-24 relieves defendant of the responsibility of objecting to jury charges at the time of trial and allows reservation of objections for a motion for new trial or appeal, it only concerns the charge given the jury at the end of the case. Malone v. State, 219 Ga. App. 728, 466 S.E.2d 645 (1995).

When an omission to charge is involved, there is a requirement to request a charge and/or object to the charge's omission or suffer a waiver. Gaines v. State, 177 Ga. App. 795, 341 S.E.2d 252 (1986).

Defendant's objections to charge on attorney fees are waived by failure to make objections at trial. Nationwide Mut. Fire Ins. Co. v. Rhee, 160 Ga. App. 468, 287 S.E.2d 257 (1981).

Trial court's failure to charge the jury that the jurors were not required to accept expert testimony offered by the plaintiffs to establish attorney fees cannot be asserted as error in absence of a timely written request for such charge. Nationwide Mut. Fire Ins. Co. v. Rhee, 160 Ga. App. 468, 287 S.E.2d 257 (1981).

Judge's failure to inquire as to objection. — Waiver of rights under O.C.G.A. § 5-5-24 did not occur when the judge failed to inquire as to objection. Collins v. State, 176 Ga. App. 634, 337 S.E.2d 415 (1985).

Failure to charge one final time. — Court's failure to charge one final time was not harmful and erroneous as a matter of law when several times during the trial the court charged the substance of O.C.G.A. § 5-5-24. Yeargin v. State, 164 Ga. App. 835, 298 S.E.2d 606 (1982). But see Hanifa v. State, 269 Ga. 797, 505 S.E.2d 731 (1998).

Failure to answer jury question. — Trial court's failure to answer or respond to a deliberating jury's question on a jury charge cannot be challenged in a motion for a judgment notwithstanding the verdict when no objection to the court's failure to instruct the jury was made prior to the acceptance of the verdict. Parks v. Consolidated Freightways, 187 Ga. App. 576, 370 S.E.2d 827 (1988).

Trial court did not abuse the court's discretion in charging the jury on the definitions of a firearm and a weapon in response to the jury's question regarding the offense of hijacking a motor vehicle because those terms were included within the definition of hijacking a motor vehicle. Smith v. State, 304 Ga. App. 708, 699 S.E.2d 742 (2010), overruled on other grounds, Reed v. State, 291 Ga. 10, 727 S.E.2d 112 (2012).

Absence of the trial judge from the courtroom while the parties placed the party's objections on the record defeated a primary purpose of the requirement which is to ensure that the judge is afforded an opportunity to determine if a charging error in fact has occurred and to correct any error in the instructions prior to the verdict so that the necessity of an appeal will be obviated; the purpose is not simply to "perfect the record" for appeal. Crotts Enters., Inc. v. John Payne Co., 219 Ga. App. 173, 464 S.E.2d 844 (1995).

Failure to object to charge in bifurcated trial. — Although the defendant

failed to object to the trial court's practice in the second phase of a bifurcated trial and failed to request that the trial court repeat the court's instructions on reasonable doubt, presumption of evidence, and other general principles of law that the trial court had charged at the end of the first phase of the trial, the trial court erred in failing to give those instructions, which protect a defendant's constitutional rights; however, the error was harmless as the jury received the trial court's full instructions after arguments in the first phase of the trial and then, only three hours later, the jury began deliberations in the second phase of the trial. McKenye v. State, 247 Ga. App. 536, 544 S.E.2d 490 (2001), overruled on other grounds, Wallace v. State, 879 Ga. 275, 572 S.E.2d 579 (2002).

Preservation for review. — When a party failed to ask to reargue the facts in light of an instruction, any error attributable to the court's having surprised counsel with an instruction that counsel believed had been withdrawn was not preserved for appellate review; as counsel had excepted to the instruction on the record before the jury returned the jury's verdict, however, the appropriateness of the instruction itself had been preserved for review. White v. Scott, 284 Ga. App. 87, 643 S.E.2d 356 (2007).

2. Time for Objection

Duty to make timely objection. — O.C.G.A. § 5-5-24 does not relieve the criminal defendant of the obligation to make timely objection throughout the trial. This obligation is essential to the court's trying the case with as few errors as possible. Foshee v. State, 256 Ga. 555, 350 S.E.2d 416 (1986).

In a criminal case, defense counsel is not required to object immediately to the charge but may reserve the right to object on appeal. Sweat v. State, 173 Ga. App. 441, 326 S.E.2d 809 (1985).

Objection made after the charge and in response to the trial court's inquiry concerning exceptions to the court's instructions is timely, whether or not that objection was raised during a previous charge conference. Brown v. Sims, 174 Ga. App. 243, 329 S.E.2d 523, cert. vacated, 254 Ga. 538, 333 S.E.2d 371 (1985).

Objection to be made before jury returns verdict. — Objections to trial judge's charge should be made before the jury returns the verdict. Gaines v. City of Gainesville, 115 Ga. App. 220, 154 S.E.2d 280 (1967).

O.C.G.A. § 5-5-24 prohibits a party from complaining of the giving or failing to give jury instructions unless the party objects before the jury returns the jury's verdict, except when there has been a substantial error in the charge which was harmful as a matter of law. DOT v. Old Nat'l Inn, Inc., 179 Ga. App. 158, 345 S.E.2d 853, cert. vacated, 256 Ga. 315, 349 S.E.2d 748 (1986); Arvida/JMB Partners v. Hadaway, 227 Ga. App. 335, 489 S.E.2d 125 (1997).

Section requires making of objections before the jury returns the jury's verdict, not before the jury retires to deliberate. Bruce v. Calhoun First Nat'l Bank, 134 Ga. App. 790, 216 S.E.2d 622 (1975).

When objections to the court's instructions are not made before jury returns the verdict as required by this section, the objections are not considered. Callaway v. Atlantic & Pac. Tea Co., 115 Ga. App. 769, 156 S.E.2d 174 (1967).

When record does not reflect that the defendant made any objection or exception to instructions given the jury before returning the jury's verdict as required by this section, nothing is presented for consideration by pertinent enumerations of error. John L. Hutcheson Mem. Tri-County Hosp. v. Oliver, 120 Ga. App. 547, 171 S.E.2d 649 (1969).

Exceptions to charge not made at time required by subsection (a) raise no question for determination on appeal. Stubbs v. Daughtry, 115 Ga. App. 22, 153 S.E.2d 633 (1967).

Plaintiff waived objection to the charge to the jury on breach of contract or fraud because the plaintiff failed to except to the charge before the verdict. Smithson v. Parker, 242 Ga. App. 133, 528 S.E.2d 886 (2000).

Doctor and doctor's employer timely objected to the trial court giving a jury charge that was erroneous because the court instructed the jury on the loss of

Objections to Charge or Failure to Charge (Cont'd)
2. Time for Objection (Cont'd)

past and future wages as an element of damages and gave the jury specific guidelines on calculating such damages even though the patient disclaimed such damages and presented no evidence on those elements of damages as their objection which was lodged before the jury returned the jury's verdict was timely under Georgia statutory law. Schriever v. Maddox, 259 Ga. App. 558, 578 S.E.2d 210 (2003).

In a suit by homeowners for breach of an exclusive listing contract, when the homeowner's claimed on appeal that the trial court did not properly instruct the jury on the issue of attorney fees, to the extent that the homeowners did not raise this objection in the trial court, their objection was waived, under O.C.G.A. § 5-5-24(a). West v. Austin, 274 Ga. App. 729, 618 S.E.2d 662 (2005).

Failure to except before verdict generally results in waiver of any defects in charge. Bryant v. Housing Auth., 121 Ga. App. 32, 172 S.E.2d 439 (1970).

Party may not complain of the giving or failure to give an instruction to the jury unless the party objects to the instruction before the jury returns the jury's verdict, stating distinctly the party's objection and the grounds of the party's objection; failure to do so generally results in a waiver of any defects in the charge. Little v. Little, 173 Ga. App. 116, 325 S.E.2d 624 (1984).

Individual waived any error in charging the jury on O.C.G.A. § 53-4-30 as the individual failed to object when the charge was given and there was no error in giving the instruction within the meaning of O.C.G.A. § 5-5-24(c). Jackson v. Neese, 276 Ga. App. 724, 624 S.E.2d 139 (2005).

3. Form and Content of Objection

Formalistic, technically perfect objection not required. — The only requirement is that grounds of objection be stated distinctly enough for a reasonable trial judge to understand the objection's nature, enabling the judge to rule intelligently on the specific point. Horton v. Ammons, 125 Ga. App. 69, 186 S.E.2d 469 (1971), aff'd sub nom. Smith v. Ammons, 228 Ga. 855, 188 S.E.2d 866 (1972); Christiansen v. Robertson, 237 Ga. 711, 229 S.E.2d 472 (1976); DOT v. Old Nat'l Inn, Inc., 179 Ga. App. 158, 345 S.E.2d 853, cert. vacated, 256 Ga. 315, 349 S.E.2d 748 (1986).

Record should contain reasons for requested charge. — Grounds of objection, i.e. the reasons urged for the requested charge, should be placed somewhere on the record, although all that is needed after the charge is a perfunctory objection identifying the omitted requested charge; and while the record need not be made with any particular formality, enough should appear so that the reviewing court can ascertain the grounds urged below. Golden Peanut Co. v. Bass, 249 Ga. App. 224, 547 S.E.2d 637 (2001), aff'd, 275 Ga. 145, 563 S.E.2d 116 (2002), cert. denied, 537 U.S. 886, 123 S. Ct. 32, 154 L. Ed. 2d 146 (2002).

Objections should be sufficiently specific for trial court to identify precise basis. Jackson v. Meadows, 157 Ga. App. 569, 278 S.E.2d 8 (1981).

Objection must be sufficiently specific in order that the alleged error can be reasonably understood and addressed by the trial court. McGaha v. Kwon, 161 Ga. App. 216, 288 S.E.2d 289 (1982); Smaha v. Moore, 193 Ga. App. 23, 387 S.E.2d 13 (1989).

When at the conclusion of the charge conference, plaintiff simply restated the plaintiff's requested charge and asserted "[w]e ask that that should have been given, and we think it's proper. . . .We think that the charge was an accurate statement of the law and that it applies in this case," the objection failed to meet the requirements of O.C.G.A. § 5-5-24. James v. Tyler, 215 Ga. App. 479, 451 S.E.2d 506 (1994).

Objection stating that "I object to every charge that I tendered for you to consider that you didn't give" was insufficient. Evans Toyota, Inc. v. Cronic, 233 Ga. App. 318, 503 S.E.2d 358 (1998).

Objection to the failure to give a charge was insufficient when the objection consisted of simply listing the charge not given, without any statement of grounds. Mays v. Farah U.S.A., Inc., 236 Ga. App. 1,

510 S.E.2d 868 (1999); Adams v. Metropolitan Atlanta Rapid Transit Auth., 246 Ga. App. 698, 542 S.E.2d 130 (2000).

Plaintiffs in a personal injury case had preserved plaintiffs' objection to a jury recharge for review when plaintiffs' counsel objected on the grounds that the recharge was confusing, misleading, and contrary to the law, and the plaintiffs were not required to submit an alternate charge; the plaintiffs' objection clearly identified the paragraph of the recharge to which the plaintiffs were excepting and specified that the recharge was being challenged because the recharge was contrary to Georgia law, and that was all the law required to preserve an objection for appeal. Pearson v. Tippmann Pneumatics, Inc., 281 Ga. 740, 642 S.E.2d 691 (2007).

Appellate court erred by concluding that appellants failed to preserve an objection to a jury instruction for appeal. The appellants satisfied the specificity requirements of O.C.G.A. § 5-5-24(a) by distinctly stating the appellant's objection at the charge conference and by excepting to the charge as given at trial. McDowell v. Hartzog, 292 Ga. 300, 736 S.E.2d 395 (2013).

Rationale underlying requirement that objection be sufficiently specific, is to ensure that the trial judge is afforded an opportunity to correct any error in instructions prior to the verdict so that the necessity of appeal will be obviated. Hilliard v. Canton Whsle. Co., 151 Ga. App. 184, 259 S.E.2d 182 (1979).

Objection must be written, state grounds, and be made before jury returns verdict. — Appellant must make proper objection to charge as given or to a request refused and state the grounds therefor before the jury returns the jury's verdict. Wright v. Dilbeck, 122 Ga. App. 214, 176 S.E.2d 715 (1970). But see CSX Transp., Inc. v. Trism Specialized Carriers, Inc., 9 F. Supp. 2d 1374 (N.D. Ga. 1998), aff'd, 182 F.3d 788 (11th Cir. 1999).

When an appellant did not state distinctly the matter to which the appellant objected after the jury had been charged, and the grounds of the objection, there was nothing for the court to review. Alpha Beta Dickerson Southeastern, Inc. v. White Co., 235 Ga. App. 273, 509 S.E.2d 351 (1998).

Writing required. — When defendant's counsel only orally requested a jury charge on reckless conduct as a lesser-included offense of aggravated assault, the charge request was properly denied because under O.C.G.A. § 5-5-24(b) the request was required to have been made in writing. Shinholster v. State, 262 Ga. App. 802, 586 S.E.2d 708 (2003).

Objection must fully apprise court of error committed and correction needed to cure error. Wright v. Dilbeck, 122 Ga. App. 214, 176 S.E.2d 715 (1970). But see CSX Transp., Inc. v. Trism Specialized Carriers, Inc., 9 F. Supp. 2d 1374 (N.D. Ga. 1998), aff'd, 182 F.3d 788 (11th Cir. 1999).

Counsel is not required to suggest correct instruction in place of that objected to; statutory requirement is only that counsel shall state distinctly the matter to which counsel objects and the ground of counsel's objection. A-1 Bonding Serv., Inc. v. Hunter, 125 Ga. App. 173, 186 S.E.2d 566 (1971), aff'd, 229 Ga. 104, 189 S.E.2d 392 (1972).

Section requires statement of ground of objection or exception. Bailey v. Todd, 126 Ga. App. 731, 191 S.E.2d 547 (1972), cert. denied, 409 S.E. 1113, 93 S. Ct. 927, 34 L. Ed. 2d 696 (1973); Christiansen v. Robertson, 139 Ga. App. 423, 228 S.E.2d 350, rev'd on other grounds, 140 Ga. App. 725, 231 S.E.2d 828 (1976).

Appellant must make proper objection to a charge as given or to a request refused and state grounds therefor. Fidelity-Phenix Ins. Co. v. Mauldin, 123 Ga. App. 108, 179 S.E.2d 525 (1970).

Objection to charge without stating grounds is insufficient to raise reviewable question in appeals court. Christiansen v. Robertson, 140 Ga. App. 725, 231 S.E.2d 828 (1976).

Objection must distinctly point out portion of charge challenged. — To be reviewable, objection to a charge must be unmistakable in its purport in directing attention of the trial court to the claimed error and must distinctly point out the portion of the charge challenged. Black v.

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Aultman, 120 Ga. App. 826, 172 S.E.2d 336 (1969); Wright v. Dilbeck, 122 Ga. App. 214, 176 S.E.2d 715 (1970). But see CSX Transp., Inc. v. Trism Specialized Carriers, Inc., 9 F. Supp. 2d 1374 (N.D. Ga. 1998), aff'd, 182 F.3d 788 (11th Cir. 1999).

Failure to specify portion of charge objected to. — When the trial court asked for objections to the jury charge, the defendant stated some objections but did not mention the portion of the charge to which the defendant objected on appeal, and did not reserve the right to object in a motion for new trial or an appeal, thereby waiving the defendant's right to assert error on appeal, the Court of Appeals reviewed the charge but found that the charge was not harmful as a matter of law. Lancaster v. State, 190 Ga. App. 505, 379 S.E.2d 786 (1989).

Objection which identifies charge objected to but states no ground. — When objections to charge, while sufficient to identify charge objected to, state no grounds of objections, the objections are insufficient to meet the requirements of this section. Noble v. Kerr, 123 Ga. App. 319, 180 S.E.2d 601 (1971).

Cryptic statement, "objection," is entirely too vague and indefinite for decision by the trial court or by the appellate court. Jackson v. Meadows, 157 Ga. App. 569, 278 S.E.2d 8 (1981).

Enumeration of error or brief should refer to part of record when objection appears. — Enumeration of error or brief of counsel should refer to that part of record when objection to charge as given appears, and simple statement that counsel objects to refusal to give request is insufficient objection to charge. Johnson v. Myers, 118 Ga. App. 773, 165 S.E.2d 739 (1968).

O.C.G.A. § 5-5-24 is violated when appellant's enumerations of error complain of the trial court's instructions to the jury and the purported charges are set out but there is no reference to the location in the transcript and no mention of any objection made or where the objectionable material might be found. Sanders v. Bowen, 196 Ga. App. 644, 396 S.E.2d 908 (1990).

Items which grounds of error must clearly indicate. — Grounds of error urged must be stated with sufficient particularity to leave no doubt as to portion of charge challenged or as to what the specific ground of challenge is and the correction needed to cure the error. Black v. Aultman, 120 Ga. App. 826, 172 S.E.2d 336 (1969); Stone v. Burell, 161 Ga. App. 369, 288 S.E.2d 636 (1982).

Inadequate objection to jury charge. — Counsel's objection to a jury charge prior to the charge and then counsel's noting that counsel had excepted to the charge after the charge was given was an inadequate objection to the charge as given, pursuant to O.C.G.A. § 5-5-24(a), and did not preserve the alleged error for appeal. McDowell v. Hartzog, 312 Ga. App. 162, 718 S.E.2d 20 (2011).

Record must indicate objection was made prior to verdict and what objection was. — No questions are raised on appeal as to portions of charge when there is no reference in enumerations or in brief as to portions of record indicating that objections were made prior to the verdict and what the objections may have been. Yale & Towne, Inc. v. Sharpe, 118 Ga. App. 480, 164 S.E.2d 318 (1968).

Appellant who enumerated as error the court's charges to the jury on comparative negligence and backing but who submitted the record on appeal containing only portions of the trial transcript and did not show that objections were made to the charges did not merit a new trial. Beckford v. Riley, 206 Ga. App. 130, 424 S.E.2d 381 (1992).

Preservation of issue as to correctness of charge by oral objection. — While subsection (b) requires that requests for charge be submitted in writing, counsel in criminal case may preserve issue as to correctness of given charge by oral objection, for present law exempts the defendant in a criminal case from the strict requirements imposed on litigants in civil cases to preserve an issue on giving of or failure to give instructions to the jury. Reed v. State, 130 Ga. App. 659, 204 S.E.2d 335 (1974).

4. Application

Informal objection is sufficient when issue is important and the trial judge understands objection. — Where issue is important and trial court undoubtedly understood what counsel was objecting to and why counsel was objecting, an objection without formality is sufficient for consideration on appeal. Morey v. Dixie Lime & Stone Co., 134 Ga. App. 928, 216 S.E.2d 657 (1975).

General objection merely stating charge is irrelevant. — General objection to trial judge that charge is irrelevant, without clearly specifying what is contended should have been charged, is insufficient to entitle objection to review. City of Atlanta v. Layton, 123 Ga. App. 432, 181 S.E.2d 313 (1971).

Mere general exception to charge or portion of charge is insufficient to raise issue. Bailey v. Todd, 126 Ga. App. 731, 191 S.E.2d 547 (1972), cert. denied, 409 U.S. 1113, 93 S. Ct. 927, 34 L. Ed. 2d 696 (1973).

General objection to court's charge which points out no specific defect is insufficient; objection must be sufficiently specific to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the trial court. Royal Frozen Foods Co. v. Garrett, 119 Ga. App. 424, 167 S.E.2d 400, rev'd on other grounds sub nom. Garrett v. Royal Bros. Co., 225 Ga. 533, 170 S.E.2d 294 (1969).

Mere objection to giving of numbered request to charge, without stating grounds, does not satisfy section. Fidelity-Phenix Ins. Co. v. Mauldin, 123 Ga. App. 108, 179 S.E.2d 525 (1970); Moore v. Carrington, 155 Ga. App. 12, 270 S.E.2d 222 (1980).

Statement that litigant objects to certain requests to charge made by opposite party, designating the objections by number only and stating no grounds for the objections' disallowance, is not a compliance with requirement of subsection (a). MacDougald Constr. Co. v. State Hwy. Dep't, 125 Ga. App. 591, 188 S.E.2d 405 (1972).

Mere exception to failure to give numbered request to charge is insufficient as objection. Black v. Aultman, 120 Ga. App. 826, 172 S.E.2d 336 (1969); Reeves v. Morgan, 121 Ga. App. 481, 174 S.E.2d 460, rev'd on other grounds, 226 Ga. 697, 177 S.E.2d 68 (1970); Wright v. Dilbeck, 122 Ga. App. 214, 176 S.E.2d 715 (1970). But see CSX Transp., Inc. v. Trism Specialized Carriers, Inc., 9 F. Supp. 2d 1374 (N.D. Ga. 1998), aff'd, 182 F.3d 788 (11th Cir. 1999); Louisville & N.R.R. v. Moreland, 122 Ga. App. 850, 178 S.E.2d 904 (1970).

Proximate cause. — Court's failure to define the term "proximate cause" did not result in such a gross injustice as to raise a question of whether the defendant was denied a fair trial as the case did not involve evidence of multiple, intervening, or superseding causes or other factors that can render proximate cause an elusive concept when the jury was presented with evidence that the defendant negligently caused the automobile collision and that the plaintiff sustained back injuries. Gray v. Elias, 236 Ga. App. 799, 513 S.E.2d 539 (1999).

Trial court's charge containing the legal meaning of proximate cause and the charge's application to the facts was not error, even though the legal definition submitted by the plaintiff would have been elaborative and it would have been better had the court given this or some other definition of proximate cause. Hancock v. Bryan County Bd. of Educ., 240 Ga. App. 622, 522 S.E.2d 661 (1999).

Treatment of exception as abandoned. — If exception made is not argued or insisted upon, it will be treated as abandoned. Fidelity-Phenix Ins. Co. v. Mauldin, 123 Ga. App. 108, 179 S.E.2d 525 (1970).

Asserted error on recharge is not for consideration and review absent objection before verdict. Lanier v. Zayre of Ga., Inc., 125 Ga. App. 739, 188 S.E.2d 885 (1972).

Grounds cannot be enlarged on appeal to include grounds not urged before trial court. Bailey v. Todd, 126 Ga. App. 731, 191 S.E.2d 547 (1972), cert. denied, 409 U.S. 1113, 93 S. Ct. 927, 34 L. Ed. 2d 696 (1973).

Instruction which confused burden of coming forward and burden of proof. — When the trial judge charged the jury that once the propounder estab-

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lished a prima facie case, then the burden of coming forward with evidence to meet prima facie case is on caveator instead of charging the jury that burden of proof shifted to caveator, error in charge was not so prejudicial to propounder as to be reviewable on appeal absent objection at trial. Johnson v. Dodgen, 244 Ga. 422, 260 S.E.2d 332 (1979).

Deficiencies in transcript, in and of themselves, do not justify reversal. — In a civil case when the appellant has not shown that exceptions were made to a charge, and did not seek a hearing in the trial court to attempt to show that exceptions to charge were timely made, and all that is missing in the transcript is the charge of the court and exceptions made thereto, judgment will not be reversed because of deficiencies in the transcript. Albea v. Jackson, 236 Ga. 690, 225 S.E.2d 46 (1976).

Assertions of error concerning the damages portion of the court's charge which were not raised in the trial court cannot be considered on appeal. Thomason v. Harper, 162 Ga. App. 441, 289 S.E.2d 773 (1982).

Failure to object to reasonable doubt instruction. — Even though a criminal defendant waived objections to a reasonable doubt instruction by failing to preserve the objections after direct inquiry by the court, the issue concerning the language of the instruction would be considered on appeal since proof beyond a reasonable doubt is the "true question" involved in a criminal trial. Tyson v. State, 217 Ga. App. 428, 457 S.E.2d 690 (1995); Loyd v. State, 222 Ga. App. 193, 474 S.E.2d 96 (1996).

Failure to charge on retraction waived when charge not submitted. — When, in a defamation action, defendants failed to submit to the trial court a charge based on O.C.G.A. § 51-5-11(c), the defendants may not question on appeal the trial court's failure to give a charge on retraction, in view of subsection (b) of O.C.G.A. § 5-5-24. Williamson v. Lucas, 166 Ga. App. 403, 304 S.E.2d 412 (1983), aff'd, 171 Ga. App. 695, 320 S.E.2d 800 (1984).

Failure to request charge on forseeability. — After the defendant failed to request a jury instruction on foreseeability in a criminal trial, the trial court's failure to give such an instruction was not clearly harmful and erroneous as a matter of law under O.C.G.A. § 5-5-24(b); the trial court gave the complete pattern instruction on felony murder, as well as all other theories applicable to the evidence. Shepherd v. State, 280 Ga. 245, 626 S.E.2d 96 (2006).

When request on burden of proof vague. — When defendants never submitted a charge any more than vaguely outlining the burden of "clear and convincing" proof as to actual malice in an action for defamation of a public official, the defendants cannot complain on appeal of the trial court's failure to give a clearer charge on that issue, in view of subsection (b) of O.C.G.A. § 5-5-24. Williamson v. Lucas, 166 Ga. App. 403, 304 S.E.2d 412 (1983), aff'd, 171 Ga. App. 695, 320 S.E.2d 800 (1984).

Failure to object to charge in death penalty case not waiver. — Failure to object to a sentencing phase jury charge in a death penalty case when the jury was not informed that a life sentence could be recommended in spite of the presence of aggravating circumstances did not preclude review of that charge in a habeas corpus proceeding. Stynchcombe v. Floyd, 252 Ga. 113, 311 S.E.2d 828 (1984).

No waiver when trial court incorporated by reference objections. — When appellee made the threshold assertion that plaintiffs waived objection made during the charge conference by not excepting to the charge after the jury was instructed, and when the nature of the objection raised here was not entirely the same as that made at the charge conference, the Court of Appeals addressed the merits, because the trial court stated after the jury charge that the judge incorporated by reference the conference objections and rulings, and after recharge again took blanket note of the previous "exceptions;" by the court's "incorporation" statement, made unsolicited at a time when an invitation to state exceptions

should have been extended, the court implied that the court assumed the parties would raise exceptions similar to the objections voiced during the charge conference, and further that the court rejected the exceptions; thus, the court created an awkward situation for which the party was not penalized. Clemons v. Atlanta Neurological Inst., 192 Ga. App. 399, 384 S.E.2d 881 (1989).

Failure to object to charge on theory of accident. — Court of Appeals was unable to reach the merits of the contention that the trial court erred in giving the defendant's request to charge on the theory of accident when the plaintiff lodged no objection whatsoever in this regard before the trial court. Turner v. Taylor, 179 Ga. App. 574, 346 S.E.2d 920 (1986).

Failure to object to absence of requested charges. — When at the conclusion of the jury charge and following the court's inquiry whether or not there were objections to the charge, appellant made no objection to any absence of two of appellant's requested charges, appellant may not complain on appeal about their exclusion. Turner v. Taylor, 179 Ga. App. 574, 346 S.E.2d 920 (1986).

Because an appellant readily admitted that the appellant failed to request charges on circumstantial evidence and speculative damages and did not object to the charge given by the trial court, the appeals court refused to hold that the trial court's failure to give the charges, sua sponte, created such a gross injustice as to deprive the appellant of a fair trial. Cmty. Bank v. Handy Auto Parts, Inc., 270 Ga. App. 640, 607 S.E.2d 241 (2004).

Since defense counsel did not object to instructing the jury before closing arguments, no error was preserved for appeal. Bennett v. State, 279 Ga. App. 371, 631 S.E.2d 402 (2006).

Spouse in wrongful death complaint failed to preserve for appellate review the spouse's challenge to a trial court's failure to give an instruction to the jury as the spouse failed to object to the trial court's refusal to give the jury several instructions regarding how an employee's use of a cell phone related to determining whether the employee was acting within the scope of the employee's employment at a particular time. Wood v. B&S Enters., 314 Ga. App. 128, 723 S.E.2d 443 (2012).

Failure to object to charge at charge conference does not preclude a party from objecting to the charge when the charge is given. Koppar Corp. v. Robertson, 186 Ga. App. 856, 368 S.E.2d 807 (1988).

Failure to object to preliminary instructions. — Defendant could not acquiesce in the trial court's preliminary statement and complain of the statement for the first time on appeal under O.C.G.A. § 5-5-24. The trial court's preliminary instruction properly informed the jury that under Ga. Const. 1983, Art. I, Sec. I, Para. XI(a): (1) the jury was absolutely and exclusively the judge of the facts in the case; (2) the jury was, in this sense only, the judge of the law; (3) it was the province of the court to construe the law and give the law in the charge; and (4) it was the province of the jury to take the law as given, apply the law to the facts as found by the jury, and bring in a general verdict. Whitehead v. State, 258 Ga. App. 271, 574 S.E.2d 351 (2002).

Failure to charge on necessity of corroboration with accomplice's testimony. — When the state does not rely solely upon an accomplice's testimony to connect the defendant to the crime, no error occurs when the trial court fails to sua sponte charge the jury as to the necessity for corroboration. Palmer v. State, 286 Ga. App. 751, 650 S.E.2d 255 (2007), cert. denied, No. S07C1770, 2007 Ga. LEXIS 678 (Ga. 2007).

Failure to participate in proposed charge conference. — O.C.G.A. § 5-5-24 does not apply to the defendant when the record demonstrates that the defendant's counsel refused to participate in a proposed charge conference and announced that counsel had no objection to the proposed charges. Teague v. York, 203 Ga. App. 24, 416 S.E.2d 356 (1992).

Although plaintiff patient argued that the trial court erred in injecting the phrase "reasonable degree of medical certainty" into the jury charge on the standard of proof for proximate cause of injury in the patient's medical malpractice suit, any claim of error regarding the instruction was waived because, after raising the

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issue in the trial court, the patient's counsel expressly acquiesced in the trial court's position that the offending language had been effectively stricken and was not before the jury; even the review of substantial error under O.C.G.A. § 5-5-24(c) is not available when the giving of an instruction is specifically acquiesced in by counsel. Mercker v. Abend, 260 Ga. App. 836, 581 S.E.2d 351 (2003).

Defendant was properly denied a new trial because the trial court did not err in failing to charge a jury on impeachment of a witness by a prior conviction of a crime of moral turpitude where defendant did not enter a written request for the charge but in fact expressly agreed that it was not needed and in light of the overwhelming evidence of defendant's guilt. Holt v. State, 260 Ga. App. 826, 581 S.E.2d 257 (2003).

Failure to object to failing to define clear and convincing evidence. — Because an owner and its agent did not object to the trial court's failure to give a certain jury instruction, because their liability had already been established as a matter of law by way of their default, and because they failed to show harm resulting from the trial court's failure to define the clear and convincing evidence standard in O.C.G.A. § 51-12-5.1(b), they failed to preserved their claims on appeal in accordance with O.C.G.A. § 5-5-24(a). Waller v. Rymer, 293 Ga. App. 833, 668 S.E.2d 470 (2008).

Substantial Error as a Matter of Law

1. In General

Subsection (c) strictly construed. — While notwithstanding the provisions of subsections (a) and (b), the court shall consider and review erroneous charges when there has been a substantial error in the charge which was harmful as a matter of law, whether objection was made at trial or not, this provision must be construed strictly or it will result in an emasculation of the preceding provisions in subsections (a) and (b). Nathan v. Duncan, 113 Ga. App. 630, 149 S.E.2d 383 (1966).

Subsection (c) must be construed strictly or it will result in emasculation of the preceding provisions in subsections (a) and (b). Widener v. Mitchell, 137 Ga. App. 730, 224 S.E.2d 868 (1976).

Instances falling within subsection (c) are rare. — Instances when the charge will be found ground for reversal under subsection (c), when counsel has not taken exception, are likely to be very, very rare. Central of Ga. Ry. v. Luther, 128 Ga. App. 178, 196 S.E.2d 149 (1973).

Court should hesitate to exercise the rights under this provision unless it appears that a gross injustice is about to result or has resulted, directly attributable to the alleged error. Instances where the charge will be found ground for reversal are likely to be very, very rare. Seabolt v. Cheeseborough, 127 Ga. App. 254, 193 S.E.2d 238 (1972).

Appellant must have been deprived of fair trial. — Allegedly erroneous instruction must raise a question as to whether the appellant has been deprived of a fair trial as a result of the challenged instruction in order to fall within subsection (c) of O.C.G.A. § 5-5-24. Nelson v. Miller, 169 Ga. App. 403, 312 S.E.2d 867 (1984); Henderson v. Glen Oak, Inc., 179 Ga. App. 380, 346 S.E.2d 842 (1986), aff'd, 256 Ga. 619, 351 S.E.2d 640 (1987).

Defendant not deprived of fair trial by erroneous jury charge. Swanson v. DOT, 200 Ga. App. 577, 409 S.E.2d 74, cert. denied, 200 Ga. App. 897, 409 S.E.2d 74 (1991).

Trial court did not commit harmful error under O.C.G.A. § 5-5-24(c) in failing to charge the jury that an engineering firm had the burden of proof as to the firms' affirmative defenses of contributory and comparative negligence; any error did not result in a gross injustice, such as to raise a question as to whether a developer was deprived of a fair trial. Prime Retail Dev., Inc. v. Marbury Eng'g Co., 270 Ga. App. 548, 608 S.E.2d 534 (2004).

To constitute harmful error within the meaning of subsection (c) of O.C.G.A. § 5-5-24, an erroneous charge or failure to charge must result in a gross injustice, such as to raise a question as to

whether the appellant has been deprived of a fair trial. Hamrick v. Wood, 175 Ga. App. 67, 332 S.E.2d 367 (1985); Wisenbaker v. Warren, 196 Ga. App. 551, 396 S.E.2d 528 (1990); Greenhill v. State, 199 Ga. App. 218, 404 S.E.2d 577, cert. denied, 199 Ga. App. 906, 404 S.E.2d 557 (1991).

2. Application

Subsection (c) refers only to the failure to make an objection to the charge, and not to those instances when giving of an instruction, or failure to give an instruction, is induced by counsel for the complaining party during the course of trial, or specifically acquiesced in by counsel. Irvin v. Oliver, 223 Ga. 193, 154 S.E.2d 217 (1967).

Generally, if counsel fails to see error, it is not to be considered harmful. — Generally, if counsel, who are skilled and trained in law and who have prepared and tried the case, fail to see error and enter exception as provided in subsections (a) and (b), it is not to be regarded as harmful. Central of Ga. Ry. v. Luther, 128 Ga. App. 178, 196 S.E.2d 149 (1973).

Failure to enumerate error. — Even if the failure to give a charge on a defendant's burden to prove affirmative defenses, either generally or specifically directed at the affirmative defense of comparative negligence, amounted to a substantial error harmful as a matter of law under subsection (c) of O.C.G.A. § 5-5-24, since it was not enumerated as error on appeal, it could not be considered by the appellate court. Heath v. L.E. Schwartz & Son, 199 Ga. App. 452, 405 S.E.2d 290, cert. denied, 199 Ga. App. 906, 405 S.E.2d 290 (1991).

Types of erroneous charges that justify reversal although no objection made. — Reversals by reason of erroneous jury charges to which no exceptions are taken are generally those in which: (1) there was an erroneous presentation of the sole issue for decision; or (2) of a kind which would have been likely to unduly influence the jury; or (3) blatantly prejudicial to the extent of raising a question as to whether losing party has thus been deprived of a fair trial; or (4) gross injustice resulted therefrom. Mack v. Barnes, 128 Ga. App. 328, 196 S.E.2d 684 (1973).

Trial court properly did not instruct the jury, sua sponte under O.C.G.A. § 5-5-24(c), on a claim of right defense under O.C.G.A. § 16-8-10 to theft by deception charges under O.C.G.A. § 16-8-3 as a sole defense as the defendant did not object to the instructions given, and a claim of right defense was not warranted as the sole defense as the defendant testified about the reasons defendant was prevented from completing the jobs, and that the defendant had composed a list with defendant's pastor of how much work was done on each job, and how much defendant owed the people. Stratacos v. State, 312 Ga. App. 783, 720 S.E.2d 256 (2011).

Test under subsection (c) is whether arguments urged against specific instructions show probable error and, if so, whether it is of a kind which would have been likely to influence the jury either to find against the defendant or to return a larger verdict than the jury might otherwise have done. Yale & Towne, Inc. v. Sharpe, 118 Ga. App. 480, 164 S.E.2d 318 (1968).

Interpretation of words "substantial error ... harmful as a matter of law" should be construed as meaning blatantly apparent and prejudicial to extent that it raises question of whether losing party has, to some extent at least, been deprived of a fair trial because of it or a gross injustice is about to result or has resulted directly attributable to the alleged errors. Central of Ga. Ry. v. Luther, 128 Ga. App. 178, 196 S.E.2d 149 (1973).

Error contemplated by subsection (c) is not harmful unless a gross miscarriage of justice attributable to the error is about to result. Nathan v. Duncan, 113 Ga. App. 630, 149 S.E.2d 383 (1966); Hawkins v. State, 116 Ga. App. 448, 157 S.E.2d 800 (1967); Central of Ga. Ry. v. Luther, 128 Ga. App. 178, 196 S.E.2d 149 (1973); Widener v. Mitchell, 137 Ga. App. 730, 224 S.E.2d 868 (1976).

Subsection (c) is inapplicable unless it appears that error contended is blatantly apparent and prejudicial, and that gross miscarriage of justice attributable to the error is about to result. Metropolitan Transit Sys. v. Barnette, 115 Ga. App. 17,

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153 S.E.2d 656 (1967); Bryant v. Housing Auth., 121 Ga. App. 32, 172 S.E.2d 439 (1970); Sullens v. Sullens, 236 Ga. 645, 224 S.E.2d 921 (1976); Peek v. Department of Transp., 139 Ga. App. 780, 229 S.E.2d 554 (1976); Sturdivant v. Polk, 140 Ga. App. 152, 230 S.E.2d 115 (1976); McGarr v. McGarr, 239 Ga. 640, 238 S.E.2d 427 (1977); Jefferson v. Johnson, 143 Ga. App. 879, 240 S.E.2d 234 (1977); Fowler v. Gorrell, 148 Ga. App. 573, 251 S.E.2d 819 (1978); Jim Walter Corp. v. Ward, 150 Ga. App. 484, 258 S.E.2d 159 (1979); Dehler v. Setliff, 153 Ga. App. 796, 266 S.E.2d 516 (1980); Mathews v. Taylor, 155 Ga. App. 2, 270 S.E.2d 247 (1980).

Under subsection (c), nothing is presented for consideration on appeal unless it appears that error contended is blatantly apparent and prejudicial. Foskey v. State, 116 Ga. App. 334, 157 S.E.2d 314 (1967).

Under subsection (c), the appellate court is empowered to review instructions which are substantially and harmfully erroneous as a matter of law, that is, error that is blatantly apparent and prejudicial to the extent that the error raises a question as to whether the losing party has to some extent at least been deprived of a fair trial because of the error. Hollywood Baptist Church v. State Hwy. Dep't, 114 Ga. App. 98, 150 S.E.2d 271 (1966); Simmons v. Edge, 155 Ga. App. 6, 270 S.E.2d 457 (1980).

Unless charge to which no objection is made is so blatantly prejudicial and results in gross miscarriage of justice such charge will not be considered harmful as a matter of law. Venable v. State Hwy. Dep't, 138 Ga. App. 788, 227 S.E.2d 509 (1976).

Erroneous charge must be blatantly apparent and prejudicial to the extent that the charges raises a question as to whether the losing parties have, to some extent, at least been deprived of a fair trial because of it to be considered harmful as a matter of law. Dendy v. Metropolitan Atlanta Rapid Transit Auth., 163 Ga. App. 213, 293 S.E.2d 372 (1982), rev'd on other grounds, 250 Ga. 538, 299 S.E.2d 876 (1983).

Because the appellant stated that the appellant had no objections to a jury charge when the court made inquiry, and did not show that the allegedly erroneous charge was blatantly apparent and prejudicial to the extent that it raised a question whether the appellant had been deprived, to some extent, of a fair trial, the appellant waived the right to raise the issue on appeal. Maynard v. State, 171 Ga. App. 605, 320 S.E.2d 806 (1984).

When, in a murder prosecution, the trial court erroneously charged the jury that the jury could infer the defendant's intent to kill the victim from the defendant's use of a deadly weapon, but the defendant did not object to this charge, the charge was not a "substantial error," within the meaning of O.C.G.A. § 5-5-24(c), and the charge was subject to typical waiver rules, so defendant's failure to object at trial waived the issue on appeal. Morgan v. State, 279 Ga. 6, 608 S.E.2d 619 (2005).

Failure to define the term "extraordinary diligence" in an instruction on the law pertaining to the duty a carrier owes to the carriers passengers was not harmful error because the term is comprised of words of ordinary understanding and is self-explanatory. Adams v. Metropolitan Atlanta Rapid Transit Auth., 246 Ga. App. 698, 542 S.E.2d 130 (2000).

Unconstitutional to convict defendant of unindicted charge. — When a reasonable probability existed that the jury convicted the defendant of a firearms charge in a manner not charged in the indictment (through burglary, rather than during an aggravated assault), the error violated the defendant's due process rights and was sufficiently egregious to preclude a finding that the error was waived. Levin v. State, 222 Ga. App. 123, 473 S.E.2d 582 (1996).

Instructions on assumption of risk and avoidance of consequences in battery. — In an action for battery, instructions on the principles of assumption of risk and avoidance of consequences by exercise of ordinary care for one's own safety created the strong risk of misleading the jury to conclude that the principles charged constituted defenses to battery, resulting in substantial, prejudicial error.

Williams v. Knight, 211 Ga. App. 420, 439 S.E.2d 507 (1994).

Failure to charge on any legal theory of recovery is harmful as a matter of law. Fowler v. Gorrell, 148 Ga. App. 573, 251 S.E.2d 819 (1978).

New trial for failure, in charge, to give benefit of defense theory sustained by evidence. — When, in charge, trial judge fails to give benefit of a theory of defense which is sustained by evidence, a new trial must be granted. Fowler v. Gorrell, 148 Ga. App. 573, 251 S.E.2d 819 (1978).

Failure to give a charge on criminal defendant's sole defense, even without a request, constitutes reversible error if there is some evidence to support the charge. Moore v. State, 246 Ga. App. 163, 539 S.E.2d 851 (2000).

Failure to charge on defense of accident. — In an action to recover for injuries suffered when plaintiff fell from the plaintiff's horse during a riding lesson, when another horse got loose in the riding ring, the trial court erred by refusing to give a jury instruction on accident. Smoky, Inc. v. McCray, 196 Ga. App. 650, 396 S.E.2d 794 (1990).

Jury charge as to settlement with two codefendants tending to confuse jury. — When the trial court's charge to the jury as to the plaintiffs' settlement with two codefendants tended to confuse and mislead the jury, the case must be remanded to the trial court for a new trial, the magnitude of the error in the charge falls within the parameters of O.C.G.A § 5-5-24. King Cotton, Ltd. v. Powers, 190 Ga. App. 845, 380 S.E.2d 481 (1989).

"Deadly force" instruction given when police prosecuted. — In a prosecution against police officers for manslaughter, arising out of the shooting of the victim in a parking lot following a report that the victim had threatened someone with a knife, the justification charge given was wholly inadequate, as the charge applied to ordinary citizens, not to law enforcement officers acting in the line of duty, who are allowed to use deadly force on the reasonable belief that the suspect possesses a deadly weapon. Because this omission was harmful as a matter of law, the case was reversed, notwithstanding the fact that the charge was verbally requested after the jury began deliberating. Robinson v. State, 221 Ga. App. 865, 473 S.E.2d 519 (1996).

Charge must be necessarily harmful to complaining party to constitute substantial error. — Under subsection (c), before the appellate court will reverse the trial court because of an erroneous instruction not excepted to in the trial court, it must appear that such charge was necessarily harmful to the complaining party. Any charge which is not necessarily harmful to the complaining party is not such substantial error as to require reversal of the case, in the absence of a proper exception to the charge. Moon v. Kimberly, 116 Ga. App. 74, 156 S.E.2d 414 (1967); Allstate Ins. Co. v. Justice, 229 Ga. App. 137, 493 S.E.2d 532 (1997).

Charge which failed to define the elements of rape, and which was compounded by gratuitous references to irrelevant matters such as whether "an actual theft occurred" and "criminal negligence," was substantially in error, was harmful as a matter of law, and deprived the defendant of the defendant's right to a fair trial. Phelps v. State, 192 Ga. App. 193, 384 S.E.2d 260 (1989).

Child molestation as a lesser included offense of rape should not have been submitted to the jury because the rape indictment did not allege that the victim was under the age of 16, which is an essential element of the offense of child molestation. Heggs v. State, 246 Ga. App. 354, 540 S.E.2d 643 (2000).

Failure to charge lesser included offense. — Because the defendant was acquitted of the charges in the indictment and convicted only of a lesser included charge not listed in the indictment, statutory rape, an erroneous jury charge authorizing the conviction of statutory rape would have been a substantial error harmful as a matter of law; therefore, the appellate court addressed the merits of the defendant's appellate challenge to a jury instruction on statutory rape, despite the fact that the defendant did not object to the instruction at trial. Stulb v. State, 279 Ga. App. 547, 631 S.E.2d 765 (2006).

Charge which failed to define elements of assault. — In a prosecution for

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aggravated assault, failure to include in the charge the requisite elements of assault was reversible error. Howard v. State, 230 Ga. App. 437, 496 S.E.2d 532 (1998).

Charge precluding consideration of parties' rights unless third litigant prevails on independent issue. — Charge which would preclude the jury from considering rights of two litigants unless the third litigant prevails upon independent issue is tainted with substantial error. King v. Browning, 246 Ga. 46, 268 S.E.2d 653 (1980).

Error in instructing as to § 46-8-292, not harmful. — Error in instructing jury on former Code 1933, § 94-1108 (see O.C.G.A. § 46-8-292) (relating to proof of injury from running of train as prima-facie evidence of lack of reasonable skill and care) was not harmful to the extent required to come within necessity of noting exception as required by subsection (c) former Code 1933, § 70-207. Central of Ga. Ry. v. Luther, 128 Ga. App. 178, 196 S.E.2d 149 (1973).

Error in negligent entrustment charge. — Charge on negligent entrustment which omitted the element of "actual knowledge" constituted substantial error as a matter of law. Bloom v. Doe, 214 Ga. App. 94, 447 S.E.2d 72 (1992); Roura v. State, 214 Ga. App. 43, 447 S.E.2d 52 (1994).

Error induced by defense counsel not ground for new trial. — When counsel in a criminal case introduces evidence on theory of defense and thereafter asks for no charge on valid defense and responds to court that counsel has no exceptions, error in charge is self-induced and will not be ground for new trial. Mahomet v. State, 151 Ga. App. 462, 260 S.E.2d 363 (1979), cert. denied, 445 U.S. 943, 100 S. Ct. 1339, 63 L. Ed. 2d 776 (1980).

When counsel acquiesces in giving of or failure to give instruction. — Subsection (c) refers only to failure to make objection to charge, and not to those instances when giving of an instruction, or failure to give an instruction, is specifically acquiesced in by counsel. Brown v. Garcia, 154 Ga. App. 837, 270 S.E.2d 63 (1980).

When the defendant failed to object at trial to a jury instruction allowing intent to kill to be inferred from the use of a deadly weapon, the court found no substantial error because the jury could have concluded there was an intent to kill from the testimony of four witnesses that the defendant said the defendant was going to kill the victim; hence, no review of the instruction was required under O.C.G.A. § 5-5-24(c). Lester v. State, 262 Ga. App. 707, 586 S.E.2d 408 (2003).

In a first degree forgery prosecution, the trial court should not have instructed the jury that the jury was not bound to believe testimony as to facts incredible, impossible, or inherently improbable, but the defendant's failure to object, O.C.G.A. § 5-5-24(c), waived the error given the strength of the evidence against the defendant and the trial court's charge in its entirety. Overton v. State, 277 Ga. App. 819, 627 S.E.2d 875 (2006).

Review of substantial error under O.C.G.A. § 5-5-24(c) was not available to a defendant who argued that a trial court erred in failing to give a jury charge on justification after a drug buyer attempted to rob the defendant's acquaintance because the failure to give the instruction was acquiesced in by counsel pursuant to the defense theory that the defendant did not have a gun and was merely present at the scene as an innocent bystander. Newton v. State, 303 Ga. App. 852, 695 S.E.2d 79 (2010).

Acquisition of appellate jurisdiction over question of substantial error in charge. — If allegation of substantial error in charge is included in motion for new trial, jurisdiction of question for decision by appellate court is acquired in either of two ways: First, by specifically appealing from ruling on motion for new trial in notice of appeal and presenting such error in charge in enumeration of error, or, second, by filing notice of appeal from other appealable judgments and enumerating as error the ruling on motion for new trial. Tiller v. State, 224 Ga. 645, 164 S.E.2d 137 (1968).

Charge on element of intent. — Trial court's erroneous instruction that there is no requirement that the state allege or prove that the defendant had the intent to deliver drugs was reversible error even though a general instruction as to how criminal intent may be shown was given. Jackson v. State, 205 Ga. App. 513, 422 S.E.2d 673 (1992).

Because the defendant failed to object to a jury charge on criminal intent or to reserve any objections, any error asserted on appeal was waived, as there was no substantial error shown pursuant to O.C.G.A. § 5-5-24(c); the trial court's instruction did not improperly shift the burden of proof to the defendant and the instruction did not deprive the defendant of a fair trial. Allen v. State, 275 Ga. App. 826, 622 S.E.2d 54 (2005).

Failure to instruct on actual and constructive possession. — Whenthe prosecution and defense of a case turned on proof, or the lack of proof, that each of three defendants had actual or constructive possession of the cocaine and other dangerous drugs found under the seat of the rented car in which the defendants were passengers, without any instruction on the law of possession, the jury was left without appropriate guidelines for reaching the jury's verdict. The failure to so charge was substantial error and harmful as a matter of law and requires reversal of the convictions of both defendants. Ancrum v. State, 197 Ga. App. 819, 399 S.E.2d 574 (1990).

Failure to give an unrequested instruction on actual and constructive possession did not require reversal since, under the circumstances, it was not required in order to provide the proper guideline for the verdict. Edmond v. State, 228 Ga. App. 695, 492 S.E.2d 583 (1997).

Failure to instruct jury to disregard testimony of defendant's character. — Trial court's failure to instruct the jury to disregard the testimony of defendant's general character or conduct in other transactions was an error which was so "blatantly apparent" and "highly prejudicial" as to deprive defendant, who failed to object to the testimony, of the defendant's right to a fair trial. Barnett v. State, 178 Ga. App. 685, 344 S.E.2d 665 (1986).

Failure to charge as to value of property as separate lots in condemnation case. — On plaintiff's appeal from jury verdict in condemnation case involving a tract of land subdivided into 40 individual lots, the trial court did not instruct as to plaintiff's contentions regarding the value of the property as separate lots, although it would not admit separate tax records for each lot as evidence of their total value, so that any failure to give further instructions did not fall within the "harmful as a matter of law" requirement necessary to invoke subsection (c) of O.C.G.A. § 5-5-24. Blume v. Richmond County, 190 Ga. App. 366, 378 S.E.2d 694 (1989).

Charge on theory of reasonable probable use in a condemnation proceeding was erroneous because the charge allowed the jury to determine the value of the land on the date of the taking without ascribing any value to subterranean limestone deposits. Gunn v. DOT, 222 Ga. App. 684, 476 S.E.2d 46 (1996).

Charge on the burden of proof in a condemnation action was an error of law and was prejudicial because it went to the primary issue in the case, the value of the property, and shifted the burden of proof on that issue. Pendarvis Constr. Corp. v. Cobb County-Marietta Water Auth., 239 Ga. App. 14, 520 S.E.2d 530 (1999).

Reference to no-fault insurance law. — When the plaintiff's attorney specifically requests the court to instruct the jury that the plaintiff can recover above the $5,000 no-fault statute provisions, there is no substantial error requiring reversal in the court's referring to the Georgia no-fault insurance law during the course of the trial and in the court's charge to the jury. Childers v. Morris, 166 Ga. App. 229, 303 S.E.2d 769 (1983).

Misstatement as to statute of limitations. — Even though no objection was made to a jury charge, a misstatement therein as to the applicable statute of limitations in a child molestation case was reversible error since the jury could not have found defendant guilty if the correct charge had been given. Early v. State, 218 Ga. App. 869, 463 S.E.2d 706 (1995).

Slip of the tongue not substantial error. — When, in a condemnation action,

Substantial Error as a Matter of Law (Cont'd)
2. Application (Cont'd)

the use of "condemnees" rather than "condemnor" in the charge explaining the burden of proof is clearly inadvertent, a slip of the tongue, the error is not likely to confuse or mislead the jury and, thus, is not so substantial as to require reversal. Morrison v. DOT, 166 Ga. App. 144, 303 S.E.2d 501 (1983).

Charge regarding guilty plea. — In a negligence case, after the trial court charged the jury that there was evidence, via a traffic citation, of a plea of guilty by the defendant, which could be considered as an admission, it would have been appropriate to charge that, if the jury concluded no guilty plea was entered, the jury should disregard the citation, but in the absence of any such request or objection to the citation's omission, there was no basis for reversal. The trial court gave the charge requested by the defendant, which informed the jury that evidence of the plea was not conclusive of the issues before the jury, and the court otherwise fully instructed the jury on the general principles of negligence. Under these circumstances the exception of subsection (c) of O.C.G.A. § 5-5-24 was inapplicable, since even if the defendant did not acquiesce in the failure to charge, the charge as given did not amount to substantial error harmful as a matter of law. Hunter v. Hardnett, 199 Ga. App. 443, 405 S.E.2d 286, cert. denied, 199 Ga. App. 906, 405 S.E.2d 286 (1991).

Instructions erroneously stating operation of law. — In an action to recover damages for fraud connected with the sale and purchase of a car, the trial court's erroneous recharge directing the jury that the car would be returned to the seller by operation of law was so blatantly in error as to raise the question whether the buyer was deprived of a fair trial; further, the error was an error of law and the error was prejudicial because the error went to the primary issue in the case, the value of the car, and nothing in the evidence supported the jury verdict and subsequent judgment returning the car to the seller. Brown v. Garrett, 261 Ga. App. 823, 584 S.E.2d 48 (2003).

There was no substantial error in the jury charge as the friend who testified against the defendant had already been convicted of the crime at the time of the defendant's trial and there was no evidence of any deals with the state; defendant did not show that the allegedly erroneous charge was blatantly apparent and prejudicial to the extent that it raised a question whether defendant was deprived of a fair trial and thus waived objection to the charge. Jackson v. State, 259 Ga. App. 727, 578 S.E.2d 298 (2003).

With regard to a defendant's conviction on child molestation charges, the trial court did not err by failing to give a limiting instruction, absent a request, prior to testimony of certain acts the defendant committed against the victim two years before the incidents for which the defendant was on trial; defendant's failure to request such a limiting instruction required the defendant to demonstrate that the allegedly erroneous charge was blatantly apparent and prejudicial to the extent that the charge raised a question whether the defendant was deprived of a fair trial, however the defendant failed to make any such showing. Nichols v. State, 288 Ga. App. 118, 653 S.E.2d 300 (2007).

In convictions that included aggravated assault on a peace officer, defendant failed to show substantial error under O.C.G.A. § 5-5-24(c) in the instruction regarding use of a handgun as a deadly weapon because, viewed as a whole, the jury charge did not take from the jury's consideration the issue of whether the handgun was a deadly weapon. Smith v. State, 301 Ga. App. 670, 688 S.E.2d 636 (2009).

Error to find waiver based on induced error. — It was error to hold that personal injury plaintiffs waived appellate review of a jury recharge under O.C.G.A. § 5-5-24(c) based on the doctrine of induced error; the "induced error" consisted solely of the plaintiffs' alleged failure to request specific language that would have made the recharge accurate and to object to the absence of an instruction concerning the foreseeability of an intervening act, and thus the acts the court of appeals held to have induced the error were the same acts excused by

§ 5-5-24(c) when there was substantial error in the charge. Pearson v. Tippmann Pneumatics, Inc., 281 Ga. 740, 642 S.E.2d 691 (2007).

Error not harmful as a matter of law. — Trial court's failure to give a charge under O.C.G.A. § 24-4-6 was not harmful as a matter of law because the state presented direct evidence that the defendant committed the crime of kidnapping. Holden v. State, 287 Ga. App. 472, 651 S.E.2d 552 (2007), cert. denied, No. S08C0189, 2008 Ga. LEXIS 153 (Ga. 2008).

Failure to give inconsistent charge did not constitute substantial error. — In a wrongful death suit brought by a personal representative, a failure to give a certain instruction did not constitute substantial error; the instruction would have been inconsistent with the procedures adopted by the trial court and acquiesced in by the parties, and the representative had not requested the instruction, so the asserted error was waived. Turner v. New Horizons Cmty. Serv. Bd., 287 Ga. App. 329, 651 S.E.2d 473 (2007).

Incorrect charge on fraudulent intent. — An erroneous jury instruction regarding misrepresentation and concealment could be considered on appeal pursuant to O.C.G.A. § 5-5-24(c) even though grounds for an objection had not been stated as required by § 5-5-24(a). The charge, which incorrectly stated that fraudulent intent did not have to be proven, concerned legal principles that were central to the defense that a closing attorney had not acted with fraudulent intent. Lawyers Title Ins. Corp. v. New Freedom Mortg. Corp., 288 Ga. App. 350, 654 S.E.2d 190 (2007), cert. denied, 2008 Ga. LEXIS 288 (Ga. 2008).

Use of the word "a" instead of "the" was not substantial error warranting review absent an exception. — Trial court's substitution of the word "a" for "the" in a jury charge regarding the factors to be used in the equitable division of marital property was not so substantial or necessarily harmful as to warrant review under O.C.G.A. § 5-5-24(c) when no exception was taken by the spouse. Coe v. Coe, 285 Ga. 863, 684 S.E.2d 598 (2009).

RESEARCH REFERENCES

Am. Jur. 2d. — 58 Am. Jur. 2d, New Trial, § 240 et seq.

C.J.S. — 66 C.J.S., New Trial, § 70 et seq.

ALR. — Instruction mentioning or suggesting specific sum as damages in action for personal injury or death, 2 ALR2d 454.

Right of accused to additional argument on matters covered by amended or additional instructions, 15 ALR2d 490.

Error as to instructions on burden of proof under doctrine of res ipsa loquitur as prejudicial, 29 ALR2d 1390.

Absence of judge from courtroom during criminal trial prior to time of reception of verdict, 34 ALR2d 683.

Duty of trial court to instruct on self-defense, in absence of request by accused, 56 ALR2d 1170.

Right of defendant to complain, on appellate review, of instructions favoring codefendant, 60 ALR2d 524.

Remarks or acts of trial judge criticizing, rebuking, or punishing defense counsel in criminal case, as requiring new trial or reversal, 62 ALR2d 166.

Instructions on sudden emergency in motor vehicle cases, 80 ALR2d 5.

Provision in Rule 51, Federal Rules of Civil Procedure, and similar state rules and statutes, requiring court to inform counsel, prior to argument to jury, of its proposed action upon requests for instructions, 91 ALR2d 836.

Giving, in accused's absence, additional instruction to jury after submission of felony case, 94 ALR2d 270.

Instructions in a personal injury action which, in effect, tell jurors that in assessing damages they should put themselves in injured person's place, 96 ALR2d 760.

Instruction as to possible effect of verdict on insurance rates as prejudicial error, 100 ALR2d 345.

Prejudicial effect of statement of court that if jury makes mistake in convicting it can be corrected by other authorities, 5 ALR3d 974.

Permitting documents or tape recordings containing confessions of guilt of incriminating admissions to be taken into jury room in criminal case, 37 ALR3d 238.

Duty of court, in absence of specific request, to instruct on subject of alibi, 72 ALR3d 547.

Propriety and prejudicial effect of instructions on credibility of alibi witnesses, 72 ALR3d 617.

Instructions to jury: sympathy to accused as appropriate factor in jury consideration, 72 ALR3d 842.

Propriety of, or prejudicial effect of omitting or of giving, instruction to jury, in prosecution for rape or other sexual offense, as to ease of making or difficulty of defending against such a charge, 92 ALR3d 866.

Lesser-related state offense instructions: modern status, 50 ALR4th 1081.

5-5-25. Other grounds.

In all motions for a new trial on other grounds not provided for in this Code, the presiding judge must exercise a sound legal discretion in granting or refusing the same according to the provisions of the common law and practice of the courts. (Orig. Code 1863, § 3642; Code 1868, § 3667; Code 1873, § 3718; Code 1882, § 3718; Civil Code 1895, § 5483; Penal Code 1895, § 1062; Civil Code 1910, § 6088; Penal Code 1910, § 1089; Code 1933, § 70-208; Ga. L. 2013, p. 141, § 5/HB 79.)

The 2013 amendment, effective April 24, 2013, part of an Act to revise, modernize, and correct the Code, revised punctuation in this Code section.

JUDICIAL DECISIONS

Analysis

General Consideration
Duty and Discretion of Court
Application
1. In General
2. Adequacy or Legality of Damages
3. Grounds Warranting New Trial
4. Grounds Insufficient to Warrant New Trial
5. Improper Subject Matter for Motion for New Trial

General Consideration

Any ruling comprehended in scope of verdict may be urged in motion for new trial. Carrington v. Brooks, 121 Ga. 250, 48 S.E. 970 (1904).

Former Penal Code 1910, § 1089 (see O.C.G.A. § 5-5-25) is frequently construed with former Penal Code 1910, § 1084 (see O.C.G.A. § 5-5-50), providing that the first grant of a new trial will not generally be disturbed. Georgia S. & Fla. Ry. v. Bryan, 15 Ga. App. 253, 82 S.E. 913 (1914); Williams v. State, 27 Ga. App. 224, 107 S.E. 620 (1921).

Compare to motion in arrest of judgment. — Court of Appeals of Georgia could not consider the defendant's motion for a new trial as a viable procedural substitute for a motion in arrest of judgment. Kirkland v. State, 282 Ga. App. 331, 638 S.E.2d 784 (2006).

Ground of motion for new trial must be complete in itself, or rendered so by exhibit to motion. Barber v. State, 136 Ga. 831, 72 S.E. 248 (1911).

Grounds which cannot be understood without resort to brief of evidence. — Insufficient grounds of motion which are incomplete and cannot be understood without resorting to brief of evidence fail to present any question for

decision. Head v. State, 144 Ga. 383, 87 S.E. 273 (1915).

Insufficient objection. — The objection raised below was not sufficient to direct the trial court's attention to the claimed error and was not stated with sufficient particularity to leave no doubt about the portion of the charge challenged or what the specific ground of challenge was; therefore, the issue was not preserved on appeal. Anderson v. State, 231 Ga. App. 807, 499 S.E.2d 717 (1998).

Trial court did not err in denying the defendant's motions for a mistrial because the defendant requested a curative instruction after the motion for a mistrial was denied, and the trial court instructed the jury to disregard a witness's comment, and since defense counsel did not renew the mistrial motion thereafter, the defendant could not complain of the failure to grant the motion. Reese v. State, 289 Ga. 446, 711 S.E.2d 717 (2011).

Generally, new trial is granted only as to matters foreign to record, such as misbehavior of party or juror. Register v. State, 12 Ga. App. 1, 76 S.E. 649 (1912), later appeal, 12 Ga. App. 688, 78 S.E. 142 (1913).

Judge who imposes sentence need not have presided at first trial. — It is not error for different judge to preside and impose sentence than the one who presided at defendant's first trial. Gresham v. State, 149 Ga. App. 320, 254 S.E.2d 474 (1979).

Motions based on matters not appearing on face of record are in effect motions for new trial and are subject to all rules of law governing these motions. Leiter v. Arnold, 118 Ga. App. 108, 163 S.E.2d 235 (1968).

Approval of verdict necessary to finalize verdict when party moves for new trial on general grounds. — Before a verdict becomes final the verdict should, when the losing party requires by motion for new trial, receive approval of the mind and conscience of trial judge. Until the judge's approval is given, the verdict does not become binding in a case when a motion for new trial contains general grounds. Brown v. Service Coach Lines, 71 Ga. App. 437, 31 S.E.2d 236 (1944).

Georgia recognizes the extraordinary motion for new trial. House v. Balkcom, 562 F. Supp. 1111 (N.D. Ga. 1983), rev'd on other grounds, 725 F.2d 608 (11th Cir.), cert. denied, 469 U.S. 870, 105 S. Ct. 218, 83 L. Ed. 2d 148 (1984).

Cited in Holland v. Williams, 3 Ga. App. 636, 60 S.E. 331 (1908); Martin & Sons v. Bank of Leesburg, 137 Ga. 285, 73 S.E. 387 (1911); Western & Atl. R.R. v. Hughes, 278 U.S. 496, 49 S. Ct. 231, 73 L. Ed. 473 (1929); Hawes v. Roles, 49 Ga. App. 680, 176 S.E. 659 (1934); Candler v. Smith, 50 Ga. App. 667, 179 S.E. 395 (1935); Carter v. Powell, 57 Ga. App. 360, 195 S.E. 466 (1938); City of Macon v. Herrington, 198 Ga. 576, 32 S.E.2d 517 (1944); Salter v. Salter, 80 Ga. App. 263, 55 S.E.2d 868 (1949); Schwall v. McNeil, 232 Ga. 679, 208 S.E.2d 487 (1974); Watts v. Six Flags Over Ga., Inc., 140 Ga. App. 106, 230 S.E.2d 34 (1976); Smith v. Telecable of Columbus, Inc., 238 Ga. 559, 234 S.E.2d 24 (1977); Hancock v. Oates, 244 Ga. 175, 259 S.E.2d 437 (1979); Johnson v. State, 244 Ga. 295, 260 S.E.2d 23 (1979); Jackson v. Bekele, 152 Ga. App. 417, 263 S.E.2d 225 (1979); Murray v. State, 157 Ga. App. 596, 278 S.E.2d 2 (1981); Griggs v. State, 159 Ga. App. 219, 283 S.E.2d 77 (1981); Willis v. State, 249 Ga. 261, 290 S.E.2d 87 (1982); Stewart v. State, 165 Ga. App. 428, 300 S.E.2d 331 (1983); Malone v. State, 175 Ga. App. 379, 334 S.E.2d 222 (1985); Towns v. State, 185 Ga. App. 545, 365 S.E.2d 137 (1988); Griffin v. Peters, 262 Ga. 209, 415 S.E.2d 905 (1992); Bunch v. Mathieson Drive Apts., Inc., 220 Ga. App. 855, 470 S.E.2d 895 (1996); Prescott v. Builders Transp., Inc., 251 Ga. App. 280, 554 S.E.2d 241 (2001); Melcher v. Melcher, 274 Ga. 711, 559 S.E.2d 468 (2002); Brooks v. State, 281 Ga. 514, 640 S.E.2d 280 (2007); Walker v. State, 281 Ga. 521, 640 S.E.2d 274 (2007); Rivera v. State, 282 Ga. 355, 647 S.E.2d 70 (2007); State v. O'Neal, 292 Ga. App. 884, 665 S.E.2d 926 (2008); Laster v. State, 311 Ga. App. 360, 715 S.E.2d 768 (2011).

Duty and Discretion of Court

Section is mere declaration of what law was when Code was adopted, and confers no right or power on court other than that already existing. It is an inher-

Duty and Discretion of Court (Cont'd)

ent power in superior court to review its own rulings. Singer Mfg. Co. v. Lancaster, 75 Ga. 280 (1885).

Discretion on grounds not otherwise provided for. — Section gives trial court discretion regarding new trials on grounds not specifically provided for by law. Vaughan v. Car Tapes, Inc., 135 Ga. App. 178, 217 S.E.2d 436 (1975).

Discretion regarding extraordinary motions for new trial. — In considering all applications for new trial made on extraordinary grounds, the trial judge is vested with sound legal discretion. Johnson v. State, 244 Ga. 295, 260 S.E.2d 23 (1979).

Discretion to grant or refuse new trials extends to second verdict. Morgan v. Lamb, 16 Ga. App. 484, 85 S.E. 792 (1915).

Judge who did not preside at trial has less discretion than presiding judge. Throgmorton v. Trammell, 90 Ga. App. 433, 83 S.E.2d 256 (1954).

Appellate court is bound to recognize trial court's discretion to grant or refuse new trials. Cargyle v. Belcher, 43 Ga. 207 (1871).

Appellate courts have no discretion regarding new trials. — Law permits trial judge to refuse or grant new trials, in exercise of legal discretion, but it does not give appellate court any discretion in the matter; it can only grant new trials when errors of law have been committed, or when trial judge has abused the judge's discretion in refusing new trial. Prosser v. State, 60 Ga. App. 604, 4 S.E.2d 499 (1939); Holton v. State, 61 Ga. App. 654, 7 S.E.2d 202 (1940).

Discretion extends to passing upon alleged prejudice and bias of juror. — Discretion of trial judge in passing upon alleged prejudice and bias of juror from conflicting evidence on motion for new trial will not be interfered with, unless the discretion is manifestly abused. Bradberry v. State, 170 Ga. 859, 154 S.E. 334 (1930).

When credibility of witnesses and weight of testimony involved. — When credibility of witnesses and weight to be attached to testimony introduced is addressed solely to discretion of trial court in exercise of sound legal discretion, and where it appears that there was no abuse of discretion in a particular judgment, overruling motion for new trial must be affirmed. Wallace v. Wallace, 229 Ga. 607, 193 S.E.2d 832 (1972).

Trial judge presumed to exercise discretion required of the judge. — When there is nothing in an order overruling a motion for new trial to indicate that the judge was dissatisfied with the verdict on discretionary grounds, but on the contrary, in overruling the motion on all grounds and refusing a new trial on all of them indicated the judge's approval, the appellate court will not say the judge abused the judge's discretion, since the trial judge is presumed to have known the judge's obligation was to exercise legal discretion and that in overruling motion is presumed to have exercised this discretion. Brown v. Service Coach Lines, 71 Ga. App. 437, 31 S.E.2d 236 (1944).

Presumption that trial judge knew rule as to obligation to approve jury's verdict. — In interpreting language of order overruling motion for new trial, appellate court must presume that trial judge knew rule as to obligation to approve jury's verdict devolving upon the judge, and that in overruling the motion the judge did exercise this discretion, unless language of order indicates to contrary and that court agreed to verdict against the judge's own judgment and against the dictates of the judge's own conscience, merely because the judge did not feel that the judge had the duty or authority to override findings of jury upon disputed issues of fact. Brown v. Service Coach Lines, 71 Ga. App. 437, 31 S.E.2d 236 (1944).

First grant of new trial by judge not presiding throughout trial, generally not disturbed. — First grant of new trial by judge who did not preside during whole trial will not be disturbed, unless evidence demanded verdict rendered. Throgmorton v. Trammell, 90 Ga. App. 433, 83 S.E.2d 256 (1954).

Failure to rule on motion under § 9-11-16. — Where record disclosed no direct ruling on motion pursuant to former Ga. L. 1968, p. 1104, § 5 (see O.C.G.A.

§ 9-11-16) or that such ruling was ever requested, although motion was filed, there was no reversible error in failing to consider the motion. International Ass'n of Bridge Ironworkers, Local 387 v. Moore, 149 Ga. App. 431, 254 S.E.2d 438 (1979).

Trial court errs in ignoring mandate of former Ga. L. 1968, p. 1104, § 5 (see O.C.G.A. § 9-11-16 requiring pretrial conference upon timely motion. International Ass'n of Bridge Ironworkers, Local 387 v. Moore, 149 Ga. App. 431, 254 S.E.2d 438 (1979).

When question of substantive fact (not decision of law) is submitted to judge for trial, without the intervention of a jury, the judge's decision as to the facts is as binding upon the parties as a verdict and may be set aside under the same rules as apply to the vacating of the finding of a jury. Sunn v. Mercury Marine, 166 Ga. App. 567, 305 S.E.2d 6 (1983).

Application

1. In General

Nonappearance of party or counsel for good cause may be raised in motion for new trial. Vaughan v. Car Tapes, Inc., 135 Ga. App. 178, 217 S.E.2d 436 (1975).

Grants of such motions not disturbed absent manifest abuse of discretion. Vaughan v. Car Tapes, Inc., 135 Ga. App. 178, 217 S.E.2d 436 (1975).

To obtain new trial due to defendant's absence or absence of defendant's counsel at trial, the defendant must show that the defendant was without fault, and that the defendant had a good defense to the action. Haralson County Economic Dev. Corp. v. Hammock, 233 Ga. 381, 211 S.E.2d 278 (1974).

Motion for new trial on grounds of movant's absence from trial, such motion addressing itself to sound discretion of trial judge, movant must show both that the movant was diligent in the movant's own behalf or without fault and that the movant had a meritorious defense. Newman v. Greer, 131 Ga. App. 128, 205 S.E.2d 486 (1974).

To obtain new trial due to absence of counsel, it must be shown that party was without fault and that the party had a good defense to the action. Bloodworth v. Caldwell, 150 Ga. App. 443, 258 S.E.2d 64 (1979).

Application for new trial on ground of defendant's absence, although addressed to sound legal discretion of trial judge must be supported by showing of some meritorious explanation of absence, as well as a meritorious defense. Southern Ariz. Sch. for Boys, Inc. v. Morris, 123 Ga. App. 67, 179 S.E.2d 548 (1970).

When it appears from the motion for new trial that the defendant, without fault or lack of diligence on the defendant's part or on that of the defendant's counsel, has been precluded from trying the defendant's case on its merits in such manner that substantial injustice may have been done to the defendant, it is not an abuse of discretion to grant an original motion for new trial. Robinson v. Modern Coach Corp., 91 Ga. App. 440, 85 S.E.2d 826 (1955).

In extraordinary circumstances, motion for new trial may be brought under this section and the trial court must use sound legal discretion to grant new trial when the defendant, without fault or lack of diligence on the part of the defendant or defense counsel, has been precluded from trying the defendant's case on its merits in such manner that substantial injustice may have been done to the defendant. Lee v. Southeastern Plumbing Supply Co., 145 Ga. App. 465, 244 S.E.2d 33 (1978).

Excluded evidence. — Trial court did not err in denying the defendant a new trial, as a statement to police the defendant made was freely and voluntarily given upon the issuance of Miranda warnings, and the trial court properly excluded evidence of prior abuse committed against the victims by third parties on relevancy grounds, not under the rape shield statute, former O.C.G.A. § 24-2-3 (see now O.C.G.A. § 24-4-412). Segura v. State, 280 Ga. App. 685, 634 S.E.2d 858 (2006).

Evidence properly admitted. — Trial court did not err in denying the defendant's motion to suppress the results of a blood test, as the notice given to the defendant by a state trooper under the implied consent law, O.C.G.A. § 40-5-67.1(a), was sufficiently accurate to permit the defendant to make an informed decision about whether to consent

Application (Cont'd)
1. In General (Cont'd)

to testing, and the evidence failed to show that the defendant requested an independent test. Thus, the defendant was also properly denied a new trial on those grounds. Collins v. State, 290 Ga. App. 418, 659 S.E.2d 818 (2008).

Trial court did not err in denying the defendant's motion for mistrial when a police officer testified that the defendant admitted the defendant's involvement in another incident after the trial court had granted the defendant's motion in limine to exclude any evidence of the defendant's admitted involvement in another criminal matter because the officer's testimony referred to another incident and not another crime per se, and the defendant did not show that a mistrial was essential to preserve the defendant's right to a fair trial; any error was harmless in light of the overwhelming evidence of the defendant's guilt. Nyane v. State, 306 Ga. App. 591, 703 S.E.2d 53 (2010), cert. denied, No. S11C0420, 2011 Ga. LEXIS 538 (Ga. 2011).

Trial court did not err when the court denied the defendant's motion for new trial on the basis that the state proffered similar transaction evidence of an incident that occurred when the defendant was a juvenile because the trial court did offer to give a curative instruction to the jury, but trial counsel refused the curative instruction citing "strategy" as counsel's reasons; the trial court admonished the witness not to make any references to the juvenile court proceeding. Kitchens v. State, 289 Ga. 242, 710 S.E.2d 551 (2011).

Showing which permits new trial from adverse default judgment. — When motion for new trial sets up facts from which it appears that the defendant's lack of knowledge of proceedings, which resulted in adverse default judgment was through no fault of the defendant's own; that the defendant had no knowledge of the proceedings; that person upon whom service was made had no authority from it to accept service of process; that the defendant had a meritorious defense which would, upon another trial of the case, lead to a contrary result; and that, after being informed of default judgment against it, it immediately used all diligence possible to bring true facts before the court, the motion presents such a state of facts that first grant of new trial by the trial judge does not constitute an abuse of discretion. Robinson v. Modern Coach Corp., 91 Ga. App. 440, 85 S.E.2d 826 (1955).

When defendant is ill, defendant must notify court and obtain continuance if time permits. — When defendant had ample opportunity to inform the court of the defendant's sickness and obtain a continuance, but failed to do so, a new trial will not be granted on ground of the defendant's absence. Shivers v. State, 53 Ga. 149 (1874); Smith v. Fisher, 23 Ga. App. 245, 98 S.E. 96 (1919).

Defendant must exercise diligence in employing new counsel before trial. — It is not error to refuse new trial at instance of defendant who could have, in exercise of diligence, been present with counsel, which the defendant had ample opportunity to employ, after withdrawal of counsel already representing the defendant. Diprima v. Hicks, 89 Ga. App. 231, 79 S.E.2d 8 (1953).

Remedy for erroneous failure to hold party in contempt of court. — Motion for new trial is proper remedy for attacking judgment holding that party is not in contempt of court for failing to abide by alimony judgment. Berman v. Berman, 231 Ga. 216, 200 S.E.2d 870 (1973).

Jury misconduct warranting new trial. — For misconduct of jury to be cause for new trial it must affirmatively appear that neither party complaining nor that party's counsel had any knowledge of such misconduct before the verdict. Schmidt v. Parrish, 63 Ga. App. 663, 11 S.E.2d 921 (1940).

Trial court did not abuse the court's discretion by denying the defendant's motion for mistrial because a juror's improper behavior was brought to the trial court's attention immediately after the behavior occurred, and upon learning of the improper behavior, the trial court examined the offending juror without delay and subsequently dismissed the juror from the jury; the remaining jurors were then examined and indicated by their re-

sponse to the trial court's question that the jurors had not overheard any comments on the case by the offending juror, and thus, even though the alleged improper comment involved the ultimate issue in the case, the record reflected no evidence that the jury was tainted or that the defendant was harmed by the juror's misconduct. Brown v. State, 309 Ga. App. 511, 710 S.E.2d 674 (2011).

Use of perjured testimony at preliminary hearing. — When perjured testimony is used at a preliminary hearing but not at trial, and when the appellant does not demonstrate that testimony contributed to the appellant's conviction, there is no abuse of discretion in the judge's refusing to grant the appellant's motion for new trial. Johnson v. State, 244 Ga. 295, 260 S.E.2d 23 (1979).

Insufficiency of petition cannot be reached by exception to sufficiency of evidence in motion for new trial. Huson v. Farmer, 53 Ga. App. 131, 185 S.E. 119 (1936).

Claim of incompetence of counsel. — This catch-all section appears to be an appropriate vehicle for a claim that a new trial should be granted because counsel incompetently failed to timely move for a new trial on newly discovered evidence. House v. Balkcom, 562 F. Supp. 1111 (N.D. Ga. 1983), rev'd on other grounds, 725 F.2d 608 (11th Cir.), cert. denied, 469 U.S. 870, 105 S. Ct. 218, 83 L. Ed. 2d 148 (1984).

Court of appeals rejected the defendant's contention on appeal that the trial court prevented the defendant to fully develop an ineffective assistance of counsel claim at the hearing on a motion for a new trial, as the record was replete with evidence that the defendant was given a great deal of latitude and ample opportunity to develop the issue. Brown v. State, 285 Ga. App. 453, 646 S.E.2d 289 (2007), cert. denied, No. S07C1503, 2007 Ga. LEXIS 672 (Ga. 2007).

Trial court did not err in denying the defendant's motion for a new trial after the defendant was convicted of statutory rape because the defendant did not receive ineffective assistance of counsel; the trial court's determination that the defendant's trial counsel articulated a reasonable defense strategy was not clearly erroneous because counsel made a strategic decision that a specific line of investigation was unnecessary since the expected finding from the investigation would not have been helpful to the defense employed, and at trial, counsel presented evidence consistent with the defense strategy. Burce v. State, 299 Ga. App. 849, 683 S.E.2d 901 (2009).

Ineffective counsel established as to one charge but not as to other. — Because the defendant presented sufficient evidence to show that trial counsel was ineffective in failing to stipulate to the defendant's felon status or to obtain a jury charge limiting the jury's consideration of the defendant's criminal history, such failures prejudiced the defendant's defense sufficiently to require a new trial on a charge of aggravated assault; however, given the defendant's admission to possessing a gun at the time of the altercation, no prejudice resulted to warrant reversal and a new trial on the possession of a firearm by a convicted felon conviction. Starling v. State, 285 Ga. App. 474, 646 S.E.2d 695 (2007).

Untimely objection. — Because the defendant asserted for the first time in an out-of-time appeal that the trial counsel rendered ineffective assistance, but the defendant had failed to assert that claim at the trial court level, nor did the appellate counsel seek a new trial and raise that issue upon the out-of-time appeal request having been granted, the appellate court was barred from reviewing the issue; a claim of ineffective assistance had to be raised at the earliest possible time, which in this instance would have been through a new trial motion. Swan v. State, 276 Ga. App. 827, 625 S.E.2d 97 (2005).

Notice of appeal untimely. — Supreme court was without jurisdiction to review the propriety or substance of the trial court's order denying the property owners' motion for new trial because the owners failed to timely file a notice of appeal in regard to that order, and the builders' post-judgment motions for fees under O.C.G.A. §§ 9-11-68 and 9-15-14 did not toll the time for the owners' to appeal from the order denying the owners' motion for new trial; the trial court en-

Application (Cont'd)
1. In General (Cont'd)

tered a final judgment on October 4, 2007, and the owners' filing of a motion for new trial tolled the time for appeal under O.C.G.A. § 5-6-38(a), but as soon as the trial court issued the court's order disposing of the motion for new trial, the thirty-day time period to file a notice of appeal began to run, and the owners' filed the motion for new trial on March 9, 2009. O'Leary v. Whitehall Constr., 288 Ga. 790, 708 S.E.2d 353 (2011).

Notice of appeal timely. — Because the defendant filed a notice of appeal within 30 days after the trial court denied the defendant's motion for new trial, the defendant's appeal was properly before the court of appeals and would be considered on the motion's merits. Gomez-Oliva v. State, 312 Ga. App. 105, 717 S.E.2d 689 (2011).

Direct action in corporate dispute. — Trial court did not err in denying plaintiffs' motion for a new trial or, alternatively, judgment notwithstanding the verdict, pursuant to O.C.G.A. §§ 5-5-25 and 9-11-50, after a jury verdict was rendered in favor of defendant in a shareholder dispute arising from an agreement for purchase of the defendant's shares, as the direct action by the defendant on the counterclaim for breach of fiduciary duty/usurpation of corporate opportunity was properly brought under Thomas v. Dickson, 250 Ga. 772, 301 S.E.2d 49 (1983), because there were exceptional circumstances, despite the fact that the corporation did not fit the definition of a statutory close corporation under O.C.G.A. § 14-2-902. Telcom Cost Consulting, Inc. v. Warren, 275 Ga. App. 830, 621 S.E.2d 864 (2005).

Valid waiver by defendant. — Because the state presented sufficient extrinsic evidence showing that the defendant knowingly and voluntarily waived a jury trial, even though this evidence conflicted with the defendant's later testimony at the hearing on the motion for a new trial, the trial court did not err in denying the defendant a new trial. Davis v. State, 287 Ga. App. 783, 653 S.E.2d 107 (2007).

2. Adequacy or Legality of Damages

Jury's discretion regarding damages does not limit trial judge's discretion. — Broad discretion of jury as to amount of damages is not a limitation on the discretion of the trial judge to set aside the verdict when the judge thinks it unfair, unjust, contrary to evidence, excessive, or too small; but is a persuasive influence not lightly to be disregarded. Trial judge is not to substitute the judge's opinion for that of the jury, but merely sends the case for opinion of another jury. Hornsby v. Davis, 112 Ga. App. 419, 145 S.E.2d 633 (1965).

Rules governing jury's right to fix damages and courts' rights regarding new trials exist independently. — Rules of law governing (1) right of jury to originally fix damages; (2) right of appellate court to grant new trial where verdict is alleged to be excessive or inadequate; and (3) right of trial judge to grant new trial when in the judge's discretion the judge thinks verdict unfair, unjust, contrary to evidence, excessive, or too small, exist apart from and independent of each other. Brown v. Service Coach Lines, 71 Ga. App. 437, 31 S.E.2d 236 (1944).

Discretion in determination of legal adequacy of verdict for damages. — Determination of question, as to whether verdict for damages is inadequate in legal sense, lies within sound discretion of trial court. Brown v. Service Coach Lines, 71 Ga. App. 437, 31 S.E.2d 236 (1944).

Mere difference of opinion between appellate court and jury is insufficient. — New trial should not be granted due to mere difference of opinion between appellate court and jury as to amount of recovery in action of tort for unliquidated damages. Something more must be disclosed to warrant interference when substantial damages have been returned. Brown v. Service Coach Lines, 71 Ga. App. 437, 31 S.E.2d 236 (1944).

New trial regarding damages where unliquidated, tort damages involved. — When action sounds in tort, for recovery of unliquidated damages, to measurement of which no fixed rule of law can be applied, appellate court ought not to set aside verdict of jury simply because dam-

ages are, in its opinion, inadequate or excessive, unless it clearly appears that verdict is so grossly inadequate or excessive as to afford evidence of bias, passion, or prejudice, or of mistake and oversight, in failing to take into consideration the proper elements of damage in assessing amount of recovery. Brown v. Service Coach Lines, 71 Ga. App. 437, 31 S.E.2d 236 (1944).

When judge can conscientiously acquiesce in verdict, trial judge should approve verdict. — If trial court can conscientiously acquiesce in amount awarded in verdict, though it may not exactly accord with the court's best judgment or though some other finding might seem somewhat more satisfactory to the judge's mind, and if the judge's sense of justice is reasonably satisfied, the judge should, in absence of some material error of law affecting trial, approve it, and an appellate court will uphold the judge in so doing, and will not say that the judge abused the judge's discretion. Brown v. Service Coach Lines, 71 Ga. App. 437, 31 S.E.2d 236 (1944).

Abuse of discretion is prerequisite to interference with denial of new trial. — When the trial judge refuses to order a new trial on the ground of inadequate damages in a tort action, the appellate court will interfere with that discretion only in the case of manifest abuse. Brown v. Service Coach Lines, 71 Ga. App. 437, 31 S.E.2d 236 (1944).

3. Grounds Warranting New Trial

Misconduct, mistake, surprise, and prejudice. — Misconduct, mistake, surprise, and prejudice, and other grounds of failure, are provided against by expedience of new trial. Central of Ga. Ry. v. Harden, 113 Ga. 453, 38 S.E. 949 (1901).

Absence of party from providential cause unknown to the party's counsel is valid ground for motion for new trial. Hayes v. States, 91 Ga. 43, 16 S.E. 270 (1892).

General grounds did not warrant new trial. — Because there was some evidence supporting the jury's verdict in favor of homeowners in the homeowners' class action against a private water system owner, the trial court did not err in denying the owner's motion for new trial and the owner's motion for a judgment notwithstanding the verdict on general grounds, and since the case involved disputed factual issues, the trial court properly allowed the jury to resolve those issues. Although the owner argued that the jury did not interpret the facts as the owner believes the jury should have, that argument presented no grounds that would allow the court of appeals to find error by the trial court in refusing to overturn the jury's verdict. Jones v. Forest Lake Vill. Homeowners Ass'n, 304 Ga. App. 495, 696 S.E.2d 453 (2010).

When accused is forced to trial only with advice of counsel then and there appointed. — When counsel's absence is due to unintentional statement of solicitor (now district attorney) and accused is forced to trial with advice only of attorney then and there appointed by court, new trial will be granted. Johnson v. State, 1 Ga. App. 729, 57 S.E. 1056 (1907).

Illness of leading counsel for accused before trial concludes, so that accused is not able to give case the degree of care the case requires, is ground for new trial. Flanagan v. State, 106 Ga. 109, 32 S.E. 80, 71 Am. St. R. 242 (1898).

Ineffective assistance of counsel. — Defense counsel's introduction of certified copies of convictions of state's witnesses to impeach the witnesses, without redacting the portion that implicated defendant as a participant in those crimes, which were identical or incidental to the crimes for which the defendant was on trial, was deficient performance by counsel as the main evidence against the defendant was the testimony from those witnesses and there was no physical evidence that linked the defendant to the crimes, the fact that the defendant was involved with those same defendants in prior similar crimes could have led the jury to conclude that the same pattern was being repeated, and there was a reasonable probability that, but for counsel's ineffective assistance, the outcome of the trial would have been different, such that the defendant was entitled to a new trial pursuant to O.C.G.A. § 5-5-25. Whitaker v. State, 276 Ga. App. 226, 622 S.E.2d 916 (2005).

Trial court committed reversible error

Application (Cont'd)
3. Grounds Warranting New Trial (Cont'd)

when the court did not address a defendant's claim that defense counsel failed to support post-conviction remedies, deliberately foregoing a direct appeal for four years without the defendant's consent, because that ground was closely connected to the defendant's repeated effort to obtain appellate counsel and, as such, a hearing was required; moreover, the defendant was entitled to rely on the fact that a hearing on the motion was scheduled, and as a result, no action was taken to waive or abandon a right to a hearing. Jones v. State, 280 Ga. App. 287, 633 S.E.2d 806 (2006).

Upon the state's appeal pursuant to O.C.G.A. § 5-7-1(a)(7), as amended in 2005, the appeals court found that the defendant was properly granted a new trial based on ineffective assistance of trial counsel, given counsel's failure to interview any of the state's witnesses, present a viable defense to the charge of involuntary manslaughter, and adequately investigate whether the victim's death might have been an accident. State v. McMillon, 283 Ga. App. 671, 642 S.E.2d 343 (2007).

Because: (1) the defendant raised a colorable claim of ineffective assistance of trial counsel in a motion for a new trial based on counsel's failure to locate and present evidence of specific acts of violence by the alleged victim against third persons; (2) trial counsel's statement as to unsuccessfully attempting to locate these witnesses did not negate the possibility that a failure to do so constituted deficient performance; and (3) the defendant raised the ineffective assistance claim at the earliest practicable opportunity, albeit on appeal, the defendant asserted a colorable claim of ineffective assistance that required an evidentiary hearing on remand for the claim's resolution. Portilla v. State, 285 Ga. App. 401, 646 S.E.2d 277 (2007).

Trial court did not abuse the court's discretion in granting the defendant a new trial based on ineffective assistance of trial counsel as: (1) counsel's pretrial investigation was deficient; (2) counsel made no effort to investigate or to obtain the criminal records of the state's similar transaction witness before trial, and did not ask for more time or a continuance upon learning that the defendant did not have the records; (3) the defendant pointed out that the jury had doubts about the victim's testimony based on their verdict of guilt to sexual battery, as a lesser-included offense of child molestation, the crime the defendant was charged with committing; (4) there was evidence that the victim had reason to lie; (5) the charged incident was not reported until after the defendant's wife hired a divorce lawyer, who then arranged the first interview between the victim and investigators; and (6) given that the evidence against the defendant was not overwhelming, this impeachment evidence was particularly crucial. State v. Lamb, 287 Ga. App. 389, 651 S.E.2d 504 (2007), overruled on other grounds, O'Neal v. State, 285 Ga. 361, 677 S.E.2d 90 (2009).

Because the defendant's claim as to the pre-trial ineffective assistance of appointed counsel could not be resolved by the record on appeal, the denial of a new trial as to that claim was reversed, and the case was remanded for a hearing on that claim only. Robinson v. State, 288 Ga. App. 219, 653 S.E.2d 810 (2007).

Defendant, who was convicted of violating Georgia's Peeping Tom Statute, O.C.G.A. § 16-11-61, was entitled to a new trial since defendant's counsel failed to investigate the impact of defendant's multiple sclerosis, which might have been sufficient to create a reasonable doubt as to whether the defendant acted with the purpose of spying on the victim. Fedak v. State, 304 Ga. App. 580, 696 S.E.2d 421 (2010).

Trial court erred by denying the defendant's motion for new trial on the ground that trial counsel was ineffective by failing to move for a directed verdict as to a count of the indictment alleging that the defendant operated a motor vehicle as a habitual violator without a valid driver's license because the state failed to prove the charge alleged in that count; because the trial court would have been required to grant a motion for directed verdict, trial counsel was ineffective by failing to make

such a motion. Murray v. State, 315 Ga. App. 653, 727 S.E.2d 267 (2012).

Defendant prisoner absent because of imprisonment. — For rendition of guilty verdict to charge of murder in prisoner's absence, without the prisoner's consent, while the prisoner is in jail, motion for new trial is an available remedy. Frank v. State, 142 Ga. 741, 83 S.E. 645, 1915D L.R.A. 817, writ of error denied, 235 U.S. 694, 35 S. Ct. 208, 59 L. Ed. 429 (1914).

Right to be present violated. — Because the defendant had a right to be present in the courtroom during voir dire of the jury, regarding some suspicious telephone calls that some had been receiving, in order to assist trial counsel in effectively examining the jurors regarding the jurors' abilities to be fair and impartial, and the defendant did not waive that right, the trial court erred in denying the defendant's motion for a new trial. Vaughn v. State, 281 Ga. App. 475, 636 S.E.2d 163 (2006).

Abridgment of right of cross-examination. — When trial judge unduly abridges right of cross-examination, it is ground for a new trial. Strickland v. State, 6 Ga. App. 536, 65 S.E. 300 (1909).

Deprivation of right to opening and closing arguments. — Right to opening and closing arguments is a material one, and when claimants are deprived of that right, the claimants are entitled to new trial. Smith v. Dickens, 42 Ga. App. 168, 155 S.E. 510 (1930).

Defendants were improperly denied the right to open and close final argument where defense counsel used a police officer's report to cast doubt on the officer's recollection and credibility, and did not read the police and child services agencies' reports into evidence when attempting to implicate other family members; while the evidence was sufficient to support the convictions, the evidence was not overwhelming, so the error was not harmless and defendants were entitled to a new trial. Thomas v. State, 262 Ga. App. 492, 589 S.E.2d 243 (2003).

Judge's expression of opinion on evidence. — Any expression or intimation by judge of opinion as to what has or has not been proved renders grant of new trial necessary. Lovejoy v. State, 82 Ga. 87, 8 S.E. 66 (1888); Wright v. State, 5 Ga. App. 813, 63 S.E. 936 (1909).

Because the trial court's charge to the jury regarding the defendant's inculpatory statement amounted to plain error in expressing an opinion as to what had been proven, thereby violating O.C.G.A. § 17-8-57, a new trial was ordered on remand. Chumley v. State, 282 Ga. 855, 655 S.E.2d 813 (2008).

Improper comment on evidence by court was reversible error. — On appeal from an aggravated assault conviction, because the trial judge improperly commented on the evidence in violation of O.C.G.A. § 17-8-57 by telling the jury that the parties agreed that there was no gun involved in the incident, the comment amounted to reversible error entitling the defendant to a new trial. Brimidge v. State, 287 Ga. App. 23, 651 S.E.2d 344 (2007).

Address to jury not authorized by evidence. — When solicitor-general, (now district attorney) in address to jury, uses highly improper language not authorized by evidence or any fair deduction therefrom, and counsel for accused objects thereto and moves court to declare mistrial which is refused, new trial will be granted in interest of justice. Ficken v. State, 97 Ga. 813, 25 S.E. 925 (1895).

Error in jury instructions as to elements of offense charged. — Defendant's convictions on two counts of criminal solicitation to commit a felony (murder) were reversed for a new trial as the trial court erred in failing to instruct the jury on the definitions of the words "felony" and "murder" as essential elements of the crime charged. Essuon v. State, 286 Ga. App. 869, 650 S.E.2d 409 (2007).

Error in admitting parol evidence. — In an action involving the sale of land, because no adequate description of the property sought to be sold could be found within the four corners of the parties' final agreement, no exhibits were attached, and the words used in the contract did not provide a sufficient description of the land, the trial court erred in admitting parol evidence to provide a legally suffi-

Application (Cont'd)
3. Grounds Warranting New Trial (Cont'd)

cient description of the property at issue; hence, the property owners' motions for directed verdict, judgment notwithstanding the verdict, and for a new trial were erroneously denied. McClung v. Atlanta Real Estate Acquisitions, LLC, 282 Ga. App. 759, 639 S.E.2d 331 (2006).

Error in admitting expert testimony. — In a negligence action, the trial court erred by allowing the investigating police officer to give expert testimony about the color of the traffic light, as the color of the light was a question that average jurors could have answered for themselves, and because the color of the traffic light was the determining factor for assessing negligence, the officer's expert opinion on this issue likely influenced the jury's verdict; thus, based on such error, a new trial was ordered. Purcell v. Kelley, 286 Ga. App. 117, 648 S.E.2d 454 (2007).

Error in admitting similar transaction evidence. — While the state presented sufficient evidence of the victim's age to support an assault charge under O.C.G.A. § 16-5-21(a)(1), because the trial court clearly erred in admitting evidence of two burglaries the defendant committed in 1998 as similar transactions to help prove the issue of identity, the defendant's aggravated assault, burglary, robbery, theft, and battery convictions were reversed; thus, the matter was remanded for a new trial. Usher v. State, 290 Ga. App. 710, 659 S.E.2d 920 (2008).

Counsel not ineffective when objection made. — Based on the record, defendant's counsel clearly objected to the admission of similar transaction evidence, such that there was no ineffectiveness based on counsel's failure to object to the admission thereof for various purposes; denial of the defendant's new trial motion was accordingly proper. Boynton v. State, 317 Ga. App. 446, 730 S.E.2d 738 (2012), cert. denied, No. S13C0017, 2013 Ga. LEXIS 88 (Ga. 2013).

When sheriff enters jury room while case is under consideration. — Jury cannot be put in charge of sheriff who is acting as prosecutor, and if sheriff goes into jury room while the jurors have case under consideration this is good ground for new trial. Griffin v. State, 5 Ga. App. 43, 62 S.E. 685 (1908).

When the jury acts from improper considerations, such as passion, partiality, or corruption, in rendering its verdict, new trial will be granted. Flanagan v. State, 106 Ga. 109, 32 S.E. 80, 71 Am. St. R. 242 (1898).

Disqualification or incompetence of juror not waived by knowledge. — New trial is demanded when there is no doubt as to disqualification or incompetence of juror and when such disqualification has not been waived by knowledge thereof; a new trial is required for the reason that verdict is illegal and void. Ferguson v. Bank of Dawson, 53 Ga. App. 309, 185 S.E. 602 (1936).

Late knowledge of disqualifying relationship between juror and prosecutor. — When it appears that the juror is related within a prohibited degree to the prosecutor, the law declares disqualification; and when such relation is unknown to an accused until after the verdict, a new trial will be granted. Harris v. State, 188 Ga. 745, 4 S.E.2d 651 (1939).

Juror in criminal case who is related, by blood or marriage, within sixth degree to prosecutor, ascertained according to rules of civil law, is disqualified; and such disqualification, which was unknown to the defendant or the defendant's counsel until after the verdict, or which could not have been ascertained by either of the defendant or defense counsel before the verdict by exercise of due diligence, is cause for new trial. Tatum v. State, 206 Ga. 171, 56 S.E.2d 518 (1949).

When disqualification of juror because of interest, is shown to be true without dispute, and the disqualification was not known to the movant or the movant's counsel until after the verdict and the movant could not have discovered the disqualification by exercise of due diligence, it is error for the court to refuse the movant's motion for new trial, and this is so even though the juror filed the affidavit that the juror was not prejudiced on that account. Ferguson v. Bank of Dawson, 53 Ga. App. 309, 185 S.E. 602 (1936).

New trial granted when defendant was absent by leave of court. Pioneer

Mfg. Co. v. Callaway & Co., 76 Ga. 105 (1885).

New trial granted when key evidence was illegally obtained by police. — Because no exigency existed to justify a search after the defendant was handcuffed and placed under the watchful eye of a police officer, and even assuming that the defendant was under arrest while being detained in the kitchen, a search of the defendant's bedroom which yielded a shotgun, found under the bed in the bedroom; a box of unspent shotgun shells, and some loose unspent shotgun shells, was not one incident to the arrest; thus, the defendant's possession of a firearm while a convicted felon conviction was reversed, and the case was remanded for a new trial in which the illegally-obtained evidence could not be introduced. Hicks v. State, 287 Ga. App. 105, 650 S.E.2d 767 (2007).

Husband did not waive right to jury trial. — Trial court abused the court's discretion in denying a husband's motion for a new trial and to set aside the decree of divorce, as the husband's actions in showing up 45 minutes late in answering a calendar call did not amount to either an expressed or implied waiver of an asserted right to a jury trial, and the husband did not expressly consent to a bench trial. Walker v. Walker, 280 Ga. 696, 631 S.E.2d 697 (2006).

New trial granted when defendant physician was absent on urgent case. Powell v. Westmoreland, 49 Ga. 341 (1873).

New trial granted for error in refusing continuance. Bagley & Willet v. Shumate, 128 Ga. 78, 57 S.E. 99 (1907).

New trial granted when trial court failed to dismiss juror for cause. — In a medical malpractice action, because the trial court abused the court's discretion by failing to dismiss a specific juror for cause based on that juror's partiality to doctors and intimations that the doctors should be given special protections, and despite the clear efforts of the court and defense counsel to rehabilitate the juror, the decedent's spouse was awarded a new trial. Sellers v. Burrowes, 283 Ga. App. 505, 642 S.E.2d 145 (2007).

New trial ordered when evidence improperly admitted. — Because the seizure of cash found on the defendant's person was conducted based on a lawful arrest for a domestic violence act of assault, given information by the defendant's girlfriend, the girlfriend's obvious injuries, and the defendant's attempt to flee, the trial court properly denied suppression of the evidence; however, because the defendant maintained a reasonable expectation of privacy in the curtilage surrounding the defendant's residence, absent a warrant or exigent circumstances, suppression of cocaine found in that area was erroneously denied, and as such the defendant was erroneously denied a new trial. Rivers v. State, 287 Ga. App. 632, 653 S.E.2d 78 (2007).

In a negligent misrepresentation action filed by a business against its accountants, the business was entitled to a new trial as the trial court twice erred by admitting irrelevant and prejudicial evidence that: (1) the business was sold for $65.5 million in 2005, in order to establish the business's 1993 value, as the sale was too remote, the business had undergone physical changes since the sale, and the market conditions had also changed; and (2) the loans from a shareholder to purchase and operate the business were later reclassified as a shareholder investment of capital, and that the debt owed to the shareholder was forgiven in exchange for the issuance of additional stock in the business as such was irrelevant to the determination of whether the business was entitled to direct damages. Atlando Holdings, LLC v. BDO Seidman, LLP, 290 Ga. App. 665, 660 S.E.2d 463 (2008).

Improper and prejudicial argument by counsel is ground for new trial. Johnson v. State, 88 Ga. 606, 15 S.E. 667 (1891).

Improper comment on defendant's silence required new trial. — Because the trial court erroneously commented on the defendant's refusal to make a post-arrest statement to police, and the error, absent a curative instruction, was not harmless or the result of inadvertence, the defendant's robbery by sudden snatching conviction was reversed; thus, the trial court erred in denying the defendant a new trial on those grounds. Wright v. State, 287 Ga. App. 593, 651 S.E.2d 852 (2007).

Application (Cont'd)
3. Grounds Warranting New Trial (Cont'd)

No improper comment on right to remain silent by informing jury of defendant's request to terminate interview. — Trial court did not err in denying the defendant's motion for new trial because the state did not improperly comment on the defendant's pre-arrest right to remain silent; informing the jury of the defendant's termination of a custodial interview and invocation of the right to counsel did not amount to an improper comment on the right to remain silent warranting the reversal of the defendant's conviction. McClarin v. State, 289 Ga. 180, 710 S.E.2d 120 (2011), cert. denied, U.S. , 132 S. Ct. 1004, 181 L. Ed. 2d 745 (2012).

No improper reference on right to remain silent. — Trial court did not err in denying the defendant's motion for mistrial because a state witness's reference to the defendant's invocation of the right to remain silent was not directed to a particular statement or defense offered by the defendant, was made during a narrative explanation, and was promptly addressed with a thorough curative instruction by the trial court to the jury. DeLong v. State, 310 Ga. App. 518, 714 S.E.2d 98 (2011).

Trial court did not abuse the court's discretion in denying the defendant's motion for mistrial, which claimed that an investigator improperly commented on the defendant's right to remain silent, because the investigator's comment did not point at any specific defense offered by the defendant, and there was no indication in the record that the comment was intended to improperly influence the determination of the defendant's guilt or innocence or that the comment actually did so; the trial court promptly gave a thorough curative instruction to the jury. Williamson v. State, 315 Ga. App. 421, 727 S.E.2d 211 (2012).

Error in admitting erroneous impeachment evidence. — In a personal injury suit filed by a car driver against a truck driver, because the trial court erred by admitting evidence of the car driver's prior DUI charges and testimony by the investigating officer about charges filed against the car driver in traffic court, and by excluding an admission by the car driver's treating emergency room physician, a new trial was ordered. Laukaitis v. Basadre, 287 Ga. App. 144, 650 S.E.2d 724 (2007).

New trial authorized when prejudgment interest on damages exceeded recovery amount authorized by evidence. — Pursuant to instructions from trial court, while jury was authorized under O.C.G.A. § 13-6-13 to increase the $24,698.39 in breach of contract damages by adding prejudgment legal interest to damages at the rate of seven percent per annum simple interest from the date of the breach, jury's general verdict on the breach of contract claim in amount of $42,690.05 was in excess of any recovery authorized by the evidence; as a result, judgment entered on the verdict had to be reversed and the case remanded for new trial. Chacon v. Holcombe, 290 Ga. App. 767, 660 S.E.2d 851 (2008).

When person who had charge of jury was not sworn a new trial is required. Roberts v. State, 72 Ga. 673 (1884); Washington v. State, 138 Ga. 370, 75 S.E. 253 (1912).

Reading newspaper editorials which destroy freedom of mind of juror is cause for new trial. Styles v. State, 129 Ga. 425, 59 S.E. 249, 12 Ann. Cas. 176 (1907).

Lack of clarity in award. — Given the lack of clarity as to the award of a single amount of damages for the breaches of fiduciary duty by both the son and the son's wife, and an award of $92,000 in attorney fees, a new trial was ordered. Lou Robustelli Mktg. Servs. v. Robustelli, 286 Ga. App. 816, 650 S.E.2d 326 (2007).

Erroneous jury instruction. — Because the trial court erroneously instructed the jury as to a married couple's failure to wear their seatbelts as evidence of negligence or causation or to diminish any recovery, and such likely prejudiced them, a new trial was warranted. King v. Davis, 287 Ga. App. 715, 652 S.E.2d 585 (2007).

Failure to give instruction. — Because there was some evidence, even from

the state's witnesses, that showed that the defendant committed an act of following too closely, a traffic violation other than the more culpable offense of DUI, that may have caused the collision and resulting death, the trial court erred in failing to give the defendant's written request for an instruction on second-degree vehicular homicide; thus, the trial court erred in denying the defendant's motion for a new trial as to the first-degree vehicular homicide convictions. Brown v. State, 287 Ga. App. 755, 652 S.E.2d 631 (2007).

Defendant was entitled to a new trial because there was a reasonable possibility that the jury convicted the defendant of child molestation, O.C.G.A. § 16-6-4(a), in a manner not charged in the indictment since the trial court did not give a limiting instruction to ensure that the jury would find the defendant guilty in the specific manner charged in the indictment or instruct the jury not to consider child molestation as having occurred in another manner; when the jury expressed the jury's confusion by asking whether sexual conversations could constitute an immoral or indecent act, the trial court should have instructed the jury to limit the jury's consideration to determining whether the defendant was guilty of committing child molestation in the specific manner alleged in the indictment only. Smith v. State, 310 Ga. App. 418, 714 S.E.2d 51 (2011), cert. denied, 2012 Ga. LEXIS 249 (Ga. 2012).

Habeas action. — Since the petitioner's conviction had already been reviewed on direct appeal, the habeas corpus court erred in ordering a new appeal, as the proper remedy would have been to order a new trial; consequently, remand was ordered for the entry of an order granting a new trial. White v. Smith, 281 Ga. 271, 637 S.E.2d 686 (2006).

4. Grounds Insufficient to Warrant New Trial

Harmless error. — When it affirmatively appears that error has not resulted in injury, no new trial will be granted therefor; and in determining whether error has resulted in injury, court may look to record as a whole. Shefton v. State, 52 Ga. App. 103, 182 S.E. 528 (1935).

Because the trial court's admission of prejudicial hearsay testimony regarding the victim's ministry ordination certificates was harmless error, given the overwhelming evidence of the defendant's guilt, a voluntary manslaughter conviction, as a lesser-included offense of murder, was upheld on appeal; hence, defendant's motion for a new trial was properly denied. Smith v. State, 283 Ga. App. 722, 642 S.E.2d 399 (2007).

Comments by judge during defense counsel's closing argument did not constitute plain error. — Under a plain error analysis, there was no violation of O.C.G.A. § 17-8-57 in defendant's criminal trial because the trial judge's comments were limited in scope, were for the purpose of controlling the trial conduct and ensuring a fair trial, did not involve the issue of defendant's guilt or innocence, and did not express an opinion on the evidence as to what was proved or not; comments by the trial court judge during defendant's counsel's closing arguments were for the purpose of preventing misstatements to the jury concerning matters not in evidence and were not improper under O.C.G.A. § 17-8-75, and denial of defendant's new trial motion under O.C.G.A. § 5-5-25 was proper. Mathis v. State, 276 Ga. App. 205, 622 S.E.2d 857 (2005).

Comments by trial judge. — Because the trial court did not make improper comments about the defendant's credibility, in violation of O.C.G.A. § 17-8-57, but only directed the defendant to answer the questions being asked, and expressed no opinion as to the truthfulness of the defendant's testimony, whether responsive or not, those comments did not warrant a new trial. Anthony v. State, 282 Ga. App. 457, 638 S.E.2d 877 (2006).

Trial court did not err in denying the defendant's motion for a new trial on the ground that the trial judge made comments which unduly highlighted and overemphasized the testimony of the DNA expert, in violation of O.C.G.A. § 17-8-57, as the comments were clearly directed at one juror to encourage that juror to stay awake and pay attention to the presentation of the evidence. Carruth v. State, 286 Ga. App. 431, 649 S.E.2d 557 (2007).

Actions involving the trial judge did not warrant new trial. — Defen-

Application (Cont'd)
4. Grounds Insufficient to Warrant New Trial (Cont'd)

dant was not entitled to a new trial merely because the order appointing the senior judge under O.C.G.A. § 15-1-9.1(b)(2) was defective as that issue was raised for the first time in the new trial motion, which precluded appellate review; moreover, a new trial was not warranted due to a comment made by the sentencing judge, that could have been interpreted as an expression of the trial court's disapproval of the defendant's conduct, and such did not amount to an outright statement of bias. Williams v. State, 290 Ga. App. 829, 661 S.E.2d 563 (2008).

Venue sufficiently established. — Trial court did not err in denying the defendant's motion for new trial after the defendant was convicted of rape because venue was sufficiently established by a detective's testimony that the apartment complex where the crimes occurred was in DeKalb County, and even accepting the defendant's argument that the evidence only supported the conclusion that the victim could have been driven into another county before the rape occurred, that would not preclude a jury's conclusion that venue could be proper in DeKalb County; because the most definite testimony regarding the location of the crimes related to DeKalb County, the jury was authorized to find beyond a reasonable doubt that the rape could have occurred there. Bizimana v. State, 311 Ga. App. 447, 715 S.E.2d 754 (2011).

Standing. — Father was not entitled to a new trial on a termination of rights petition filed by the Department of Family and Children Services, as the father failed to legitimate the child at issue, and hence, lacked standing to challenge the termination of parental rights order. In the Interest of J.L.E., 281 Ga. App. 805, 637 S.E.2d 446 (2006).

Defendant's absence, due to lack of diligence. — It is no ground for new trial that the defendant, through lack of diligence, failed to be present upon call of case. Diprima v. Hicks, 89 Ga. App. 231, 79 S.E.2d 8 (1953).

Evidence properly admitted. — Convictions for driving under the influence of drugs and to the extent that the defendant was a less-safe driver were upheld on appeal as supported by sufficient evidence, given that the defendant drove erratically, manifested signs of impairment, and had three drugs in the defendant's system; hence, when coupled with the fact that no evidence of tampering with the defendant's urine sample was submitted, the trial court did not abuse the court's discretion in admitting the sample and in denying the defendant's motion for a new trial. Kelly v. State, 281 Ga. App. 432, 636 S.E.2d 143 (2006).

Defendant's amended motion for a new trial was properly denied, and an aggravated assault conviction was upheld on appeal, as the trial court did not abuse the court's discretion in admitting three photographs depicting the victim's knife wounds; the photographs were not inadmissible merely because the photographs also showed alterations to the victim's body made by medical personnel. McRae v. State, 282 Ga. App. 852, 640 S.E.2d 323 (2006), cert. denied, 2007 Ga. LEXIS 200 (Ga. 2007).

Because evidence of the defendant's prior drug use, and history of crimes committed against family members fueled by the drug usage, were properly admitted as relevant to the crime's charged, despite incidentally placing the defendant's character in issue, convictions for both aggravated assault and simple assault were upheld on appeal; moreover, even if the trial court erred by admitting this motive evidence, no reversible error resulted which required a new trial. Jones v. State, 283 Ga. App. 812, 642 S.E.2d 887 (2007).

Defendant's motion for a new trial was properly denied, as the evidence presented against the defendant was legally sufficient, similar transaction evidence was correctly admitted, and the fact that portions of the methamphetamine found, as a result of a search warrant was not tested, was not reversible error. Perry v. State, 283 Ga. App. 520, 642 S.E.2d 141 (2007).

In a prosecution for armed robbery and robbery by intimidation, the trial court did not err in admitting a copy of the defendant's fingerprint card, pursuant to former O.C.G.A. §§ 24-3-14 and 24-5-26

(see now O.C.G.A. §§ 24-8-803 and 24-10-1003), despite the defendant's claim that the testifying witness lacked personal knowledge with regard to the circumstances or time of the creation or transmission of the fingerprint card, as the card itself showed that the card was created and transmitted at the time of the defendant's arrest, and was handled in the gathering agency's regular and routine course of business; hence, the defendant was properly denied a new trial. Tubbs v. State, 283 Ga. App. 578, 642 S.E.2d 205 (2007).

While the state conceded that the trial court's instruction on prior consistent statements was incorrect, a new trial was not required because the statements in question were admitted, not as prior consistent statements, but as admissions by the defendant, and were introduced into evidence by the state as substantive evidence of the defendant's guilt. Hampton v. State, 282 Ga. 490, 651 S.E.2d 698 (2007).

While the state conceded that the trial court's instruction on prior consistent statements was incorrect, a new trial was not required because the statements in question were admitted, not as prior consistent statements, but as admissions by the defendant, and were introduced into evidence by the state as substantive evidence of the defendant's guilt. Hampton v. State, 282 Ga. 490, 651 S.E.2d 698 (2007).

As sufficient evidence supported the defendant's convictions, and no reversible error resulted from either the admission of the defendant's two prior convictions for both impeachment and sentencing purposes or based on the jury instructions given or refused, a new trial on these issues was unwarranted. Newsome v. State, 289 Ga. App. 590, 657 S.E.2d 540 (2008), cert. denied, No. S08C1042, 2008 Ga. LEXIS 494 (Ga. 2008).

Trial court did not err in admitting evidence of the defendant's 1993 interference with government property conviction; a new trial was properly denied, because the evidence was properly admitted, not as substantive evidence of the offense at issue, but only as to the issue of credibility, providing support for the evidence's admission. Tate v. State, 289 Ga. App. 479, 657 S.E.2d 531 (2008), cert. denied, No. S08C0986, 2008 Ga. LEXIS 386 (Ga. 2008).

Counsel's failure to appear for trial or notify client is insufficient ground to authorize new trial. Haralson County Economic Dev. Corp. v. Hammock, 233 Ga. 381, 211 S.E.2d 278 (1974).

Contesting sufficiency of indictment. — In a prosecution for burglary, because the variance between the indictment and the proof presented at trial did not misinform or mislead the defendant in any manner that resulted in surprise or impaired a defense, and the defendant could not be subjected to another prosecution for the same offense, the alleged variance was not fatal; as a result, the trial court did not err in denying the defendant's motions for a directed verdict or for a new trial. Chambers v. State, 284 Ga. App. 400, 643 S.E.2d 871 (2007).

Because the appeals court rejected the defendant's claim that the accusation failed to adequately charge venue, as a charge of DUI incorporated the words "Henry County" in the heading by using the phrase "as prosecuting attorney for the county and state aforesaid" in the body of the accusation, the trial court did not err in denying the defendant a new trial on that charge; but the court warned the state against such practice, as the solicitor could easily devise forms which stated with clarity the county in which the offense allegedly occurred, and thereby avoid the costs which resulted from having to repeatedly defend the type of challenge the defendant raised. Gordy v. State, 287 Ga. App. 459, 651 S.E.2d 471 (2007), cert. denied, 2008 Ga. LEXIS 128 (Ga. 2008).

Although the trial court might not have been presented with evidence that the defendant was in physical possession of a firearm during the hijacking of the victim's car, because the evidence that was presented authorized a finding that the defendant was a party to that crime, and that all those involved were joint conspirators, the trial court did not err in denying the defendant a new trial on grounds that the indictment charging possession of a firearm during the commission of a felony was at fatal variance with the proof presented at trial. Davis v. State, 287 Ga.

Application (Cont'd)
4. Grounds Insufficient to Warrant New Trial (Cont'd)

App. 786, 653 S.E.2d 104 (2007).

Effective assistance of counsel. — Defendant's motion for a new trial was properly denied because the defendant did not establish that the defendant received ineffective assistance of counsel. Defendant was aware of all of the charges against the defendant, the defendant did not inform counsel that there were jurors that the defendant wished to have stricken, it was sound trial strategy to not cross-examine the witness because the witness's testimony would have hurt the defendant, counsel did not request a charge on the voluntariness of the defendant's confession because it contradicted the defense of coercion, the evidence adequately demonstrated that the defendant was intoxicated when the defendant committed the assault and robbery, and the discrepancy in the victim's testimony regarding the car the perpetrator drove was not material since the defendant confessed to the crime. Blocker v. State, 265 Ga. App. 846, 595 S.E.2d 654 (2004).

On appeal from two child molestation convictions, the defendant was properly denied a new trial, because the admission of privileged testimony was not erroneous, and trial counsel was not ineffective by: (a) ignoring a consent order barring the state from introducing any written or oral admissions or statements the defendant made before and after a polygraph examination; (b) failing to assert the attorney-client privilege with respect to a polygraph expert's testimony; and (c) failing to adequately prepare a second polygraph expert who testified for the defense at trial; in fact, (1) counsel neither ignored the consent order nor performed deficiently when stipulating to the admission of the polygraph results; and (2) even assuming that counsel was deficient in failing to consult the defendant regarding the attorney-client privilege, the defendant failed to show a reasonable probability that the result would have been different in the absence of the second expert's cumulative testimony. Adesida v. State, 280 Ga. App. 764, 634 S.E.2d 880 (2006).

Defendant's ineffective assistance of counsel claims lacked merit, as the appeals court found that the trial counsel's tactical decision not to call the defendant's brother and sister-in-law as witnesses was strategic, and nothing in the record suggested that the defendant was denied a fair trial because trial counsel did not investigate the defendant's competency; hence, the trial court did not err in denying the defendant a new trial based on an ineffective assistance of counsel claim. Scott v. State, 281 Ga. App. 106, 635 S.E.2d 582 (2006).

In denying the defendant a new trial, the trial court expressly found that trial counsel was not ineffective, specifically finding that: (1) counsel's decision not to provide the defendant with a copy of the discovery was based on the fact that the defendant could not read and was going to rely on someone else at the jail to read the documents, and that counsel was concerned that showing the discovery to another inmate might produce a "snitch;" and (2) prior to trial, counsel spent two and a half hours with the defendant going over the state's evidence. Hence, the trial court concluded that counsel had a good reason for not giving the defendant a copy of the discovery, and that counsel was exceptionally effective in representing the defendant's interests. White v. State, 281 Ga. 20, 635 S.E.2d 720 (2006).

Trial court did not err in denying the defendant a new trial on grounds that the defendant's trial counsel was ineffective, as the defendant failed to show that the outcome of the trial would have been different if counsel would have: (1) filed a motion for funds to hire an expert on the reliability of cross-racial eyewitness identification and proffer what the testimony of this expert would have been; (2) verified that funds had been withdrawn from the respective ATM machines on the date of the crime or ascertain whether surveillance cameras might have refuted the state's evidence that the defendant was in the carjacked vehicle; and (3) proffered favorable testimony that the defendant alleged could have been provided by the two victims suggesting complicity. Pringle v. State, 281 Ga. App. 230, 635 S.E.2d 843 (2006).

As the jury could have found the defendant guilty after listening to the state's witnesses, a psychologist testimony regarding the defendant's competency did not influence the outcome of the trial; hence, defense counsel's failure to object to the psychologist raising the issue about the defendant's mental health was harmless, part of counsel's reasonable trial strategy, and did not amount to the ineffective assistance of counsel entitling the defendant to a new trial. Griffin v. State, 281 Ga. App. 249, 635 S.E.2d 853 (2006).

In a prosecution for trafficking in cocaine, the trial court did not err in refusing to instruct the jury on the affirmative defense of entrapment, as: (1) sufficient evidence was presented that the defendant voluntarily committed the offense upon being given the opportunity to do so; and (2) no evidence was presented to show that the informant employed undue persuasion, incitement or deceit to induce the defendant into selling drugs; thus, the defendant's claim of ineffective assistance of counsel for failing to present evidence to support an entrapment defense was rejected and did not warrant a new trial. Campbell v. State, 281 Ga. App. 503, 636 S.E.2d 687 (2006).

In a prosecution for armed robbery, possession of a firearm during the commission of a felony, and obstruction, the defendant was not entitled to a new trial based on allegations that trial counsel was ineffective, as: (1) a jury charge on the testimony of an accomplice was not required; and (2) in light of trial counsel's cross-examination of the accomplice, the court's credibility charge, as well as the overwhelming evidence of the defendant's guilt, a leniency instruction was unnecessary. Hayes v. State, 281 Ga. App. 749, 637 S.E.2d 128 (2006).

In a prosecution for rape, kidnapping, and sodomy, the defendant did not receive the ineffective assistance of trial counsel merely because counsel failed to impeach the victim's credibility with evidence concerning a 1996 drug arrest, as: (1) the evidence was irrelevant to the circumstances surrounding the defendant's attack on the victim; and (2) the victim never opened the door to an issue of good character; hence, the defendant failed to show that a new trial should have been ordered. Pierce v. State, 281 Ga. App. 821, 637 S.E.2d 467 (2006).

Counsel's trial strategy in failing to object to hearsay from a non-testifying codefendant was supported by a decision that the testimony was more beneficial than prejudicial, and that the complained-of testimony was necessary to refute the state's theory that the gun admitted against the defendant could have thrown from the defendant's car; moreover, because the defendant failed to show that but for the admission of that evidence, the outcome of the trial would have been different, the trial court did not err in denying the defendant a new trial on this ground. Ross v. State, 281 Ga. App. 891, 637 S.E.2d 491 (2006).

Appellate court rejected the defendant's contention that trial counsel was ineffective: (1) in failing to investigate another molestation charge filed against the defendant; (2) by failing to interview the defendant's mother; (3) in not investigating the state's failure to obtain a warrant to determine whether the defendant's computer contained or could access pornographic material; (4) by referring to the defendant's prior criminal record on DUI charges; (5) in introducing several letters from the defendant's daughter into evidence; and (6) by characterizing the defendant in closing argument as guilty of drunken and boorish behavior, as the trial court was authorized to believe counsel's testimony regarding counsel's sufficient preparation for trial, and finding that without a proffer of evidence concerning the defendant's computer, the defendant could not show a reasonable probability that the results of the proceedings would have been different; hence, the trial court did not err in denying the defendant a new trial on grounds that trial counsel was ineffective. Carey v. State, 281 Ga. App. 816, 637 S.E.2d 757 (2006).

Trial court properly denied the defendant's motion for a new trial, which alleged the ineffective assistance of counsel, as mere allegations, without evidence explaining how trial counsel's alleged failures affected the outcome of the trial, could not support the claims and counsel's trial tactics amounted to trial strategy.

Application (Cont'd)
4. Grounds Insufficient to Warrant New Trial (Cont'd)

Slaughter v. State, 282 Ga. App. 276, 638 S.E.2d 417 (2006).

Because there was nothing in the record to rebut the presumption that trial counsel had legitimate reasons for the strategic decisions made during the trial, specifically relating to concerns regarding a juror's dismissal, the state's examination of the victim's mother, the refreshment of the state's witness's recollection, and closing argument, a motion for a new trial was properly denied on these grounds. Hunter v. State, 282 Ga. App. 355, 638 S.E.2d 804 (2006).

Because the defendant failed to show how trial counsel was ineffective in failing to make objections, failing to file a futile motion to suppress, and failure to object to the admission of evidence, but instead counsel's actions were deemed part of a reasonable trial strategy, the ineffectiveness claim failed and the defendant was not entitled to a new trial on that count. Opio v. State, 283 Ga. App. 894, 642 S.E.2d 906 (2007).

Defendant failed to show ineffective assistance of defense counsel for failure to pursue a self-defense or justification defense with regard to the shooting death of the victim since at the hearing on the motion for new trial trial counsel testified that, given the state of the evidence, trial counsel did not consider a self-defense strategy to be viable, and would be at odds with the strategy chosen, namely to seek a conviction for the lesser crime of voluntary manslaughter. Trial counsel's decision not to pursue inconsistent defenses was made in the exercise of reasonable professional judgment and was reasonable since the evidence from three eye-witnesses showed that the defendant went to the defendant's car and retrieved a pistol, shot the unarmed victim when the victim was retreating, and then went to where the victim lay and shot the victim several more times. Taylor v. State, 282 Ga. 693, 653 S.E.2d 477 (2007).

Because the defendant failed to present the testimony of either trial counsel to support a claim of ineffective assistance of counsel, and thus, the record of the new trial hearing was silent as to what actions were taken by counsel to prepare for the plea or to investigate the ramifications of the previous plea, the trial court did not err in denying the defendant's withdrawal of the plea. Jackson v. State, 288 Ga. App. 742, 655 S.E.2d 323 (2007).

Defendant's ineffective assistance of counsel claims were without merit, because counsel: (1) adequately explained the decision not to call the defendant's spouse; (2) adequately met with the defendant to discuss the trial strategy and regarding the defendant's decision to waive the right to a jury trial; and (3) had reason to decline objection to the admission of an audio recording of the colloquy between the officers and the defendant at the scene, as that decision supported counsel's trial strategy. Thus, the defendant was not entitled to a new trial based on those claims. Defrancisco v. State, 289 Ga. App. 115, 656 S.E.2d 238 (2008).

Because trial counsel was not ineffective in failing to point out a purported discrepancy in the evidence to the jury, failing to investigate alleged evidence tampering, and failing to object to the inclusion of a charge on mutual combat in the jury instructions, or reserve objections to the instructions, the trial court did not err in denying the defendant a new trial. Sanders v. State, 283 Ga. 372, 659 S.E.2d 376 (2008).

Trial counsel was not ineffective for failing to request a continuance to review evidence and have the evidence tested by the defendant's own expert because the defendant presented no evidence at the motion for new trial hearing to support the defendant's bald assertion that there was a reasonable probability that the outcome of the proceeding would have been different had counsel sought a continuance or independent expert testing. Walker v. State, 288 Ga. 174, 702 S.E.2d 415 (2010).

Trial court did not err in denying the defendant's motion for new trial on the ground that the defendant's trial counsel was ineffective since counsel's motion for continuance did not comply with O.C.G.A. § 17-8-25 because the witness in question had not been subpoenaed and, thus, coun-

sel could not comply with the statute; the defendant did not show that the trial court's denial of the motion for continuance was reversible error. Presley v. State, 307 Ga. App. 528, 705 S.E.2d 870 (2011).

Trial court did not err by rejecting the defendant's claim of ineffective assistance of trial counsel on a motion for mistrial because the defendant failed to demonstrate that the defendant was deprived of effective assistance of counsel. Although the defendant argued that the defendant's trial counsel failed to ask prospective jurors certain questions during voir dire, the defendant made no assertion as to what answers any prospective juror would have given had he or she been asked any of those questions or as to what significance any such answer would have had. The defendant could not show prejudice with regard to the defendant's assertions that counsel failed to fully investigate the case and call essential witnesses because counsel made no proffer as to what a thorough investigation would have uncovered or what the essential witnesses would have said, and the defendant failed to show a reasonable probability that an objection or motion for mistrial related to a detective's testimony would have changed the outcome of the defendant's trial. Ware v. State, 307 Ga. App. 782, 706 S.E.2d 143 (2011).

Defendant failed to establish a claim of ineffective assistance of counsel due to counsel's failure to seek a mistrial after successfully objecting to a witness's testimony that the defendant told the witness that "he would have a shoot-out with police before he ever went back to jail" on the ground that the witness's response placed the defendant's character in evidence because even if counsel's failure to request a mistrial were deemed deficient, no mistrial would have been granted as a nonresponsive answer that impacted negatively on a defendant's character did not improperly place the defendant's character in issue, and another witness had already testified without objection that the witness did not call the police on another occasion because the defendant had told that witness "if the cops came he would come out shooting". Because failure to pursue a futile motion did not constitute ineffective assistance, the defendant failed to establish a claim of ineffective assistance of counsel. Billings v. State, 308 Ga. App. 248, 707 S.E.2d 177 (2011).

Trial court did not err in denying the defendant a new trial on the ground that the defendant's trial counsel's failure to object to the prosecutor's statement during closing argument amounted to ineffective assistance because the defendant could not demonstrate that the deficiency in trial court's performance prejudiced the defendant; the evidence of the defendant's guilt was overwhelming and there was no reasonable probability that the outcome of the defendant's trial would have been more favorable had trial counsel objected, even successfully, to the prosecutor's statement in argument. Jones v. State, 288 Ga. 431, 704 S.E.2d 776 (2011).

Trial court did not abuse the court's discretion in denying the defendant's motion for a new trial on the ground of ineffective assistance of counsel because the defendant did not show that: (1) the defense counsel was ineffective in failing to adequately investigate the case or meet with the defendant prior to trial; (2) the defense counsel was ineffective in failing to interview and cross-examine the prosecution's witnesses as the defendant did not establish a reasonable probability that further interviews and cross-examination would have resulted in a different outcome at trial; (3) the defense counsel was ineffective in failing to file a motion for immunity from prosecution/plea in bar pursuant to O.C.G.A. § 16-3-24.2 based upon the defendant's claim of self-defense as it was a matter of trial strategy and the defendant could not demonstrate how the failure to pursue such a claim harmed the defendant; (4) the defense counsel was ineffective in failing to request a jury charge on the use of force in defense of habitation; and (5) the defense counsel was ineffective in failing to test the thoroughness and good faith of the state's investigation. Smith v. State, 309 Ga. App. 241, 709 S.E.2d 823 (2011), cert. denied, No. S11C1266, 2011 Ga. LEXIS 954 (Ga. 2011).

Trial court did not err in denying the defendant's motion for new trial because the trial court properly rejected the defen-

Application (Cont'd)
4. Grounds Insufficient to Warrant New Trial (Cont'd)

dant's claim that trial counsel was ineffective for failing to introduce into evidence two medical evaluation documents, which the defendant alleged would have contradicted statements witnesses gave to the police; it was mere speculation that the witnesses' statements were inconsistent with the medical reports. McClarin v. State, 289 Ga. 180, 710 S.E.2d 120 (2011), cert. denied, U.S. , 132 S. Ct. 1004, 181 L. Ed. 2d 745 (2012).

Defendant was not entitled to a new trial on the basis that trial counsel was ineffective because the defendant failed to establish that there was a reasonable probability that, but for counsel's alleged deficiencies, the outcome of the trial would have been different; even assuming that trial counsel performed deficiently by failing to object to certain testimony, the defendant failed to show a reasonable probability that the outcome of the trial would have been different, and even if trial counsel had filed a motion to suppress certain evidence and that evidence had been excluded, the remaining evidence adduced at trial was overwhelming. Lowe v. State, 310 Ga. App. 242, 712 S.E.2d 633 (2011).

Because the defendant made no showing that the defendant's wife lacked authority to consent to a search of the marital residence, because the trial attorney's strategic decisions not to pursue a defense or to request a jury poll were not patently unreasonable, and because the defendant's claims were not waived by appellate counsel, the defendant failed to show that the defendant was entitled to a new trial based on counsels' alleged ineffectiveness. Davis v. State, 311 Ga. App. 699, 716 S.E.2d 710 (2011).

Defendant was not denied effective assistance of counsel due to trial counsel's failure to renew a motion for mistrial after the trial court gave a curative instruction because the defendant failed to demonstrate prejudice; trial counsel had twice moved for a mistrial, which the trial court denied, and the trial court did not abuse the court's discretion in giving the curative instruction, which preserved the defendant's right to a fair trial. Sanders v. State, 290 Ga. 445, 721 S.E.2d 834 (2012).

Trial court did not err in denying the defendant's motion for new trial on the grounds of ineffective assistance of counsel because any error in excluding a witness's testimony regarding the victim's allegedly prior false accusations of sexual abuse was harmless; the defendant could not show that trial counsel was deficient in failing to investigate a matter of which counsel was unaware of at the time. Ellis v. State, 316 Ga. App. 352, 729 S.E.2d 492 (2012).

Trial court committed no error in denying the defendant's motion for new trial because the defendant could not show that trial counsel was deficient for declining to ask for a contemporaneous limiting instruction; trial counsel did not ask for a contemporaneous limiting instruction on similar transaction evidence since counsel wanted to try to draw the least amount of attention to it as possible, and the trial court gave a limiting instruction on similar transaction evidence in the court's final charge to the jury. Sims v. State, 317 Ga. App. 420, 731 S.E.2d 105 (2012).

Not knowing case was set for trial. — Mere fact that counsel and clients had no knowledge that case was on calendar and set for trial is not in itself sufficient to support grant of new trial. Southern Ariz. Sch. for Boys, Inc. v. Morris, 123 Ga. App. 67, 179 S.E.2d 548 (1970).

Not knowing when case would be called. — Mere fact that plaintiff's counsel did not know exactly when case would be called, and so was not present to ask for continuance resulting in dismissal, was not ground for new trial, nor was the fact that counsel was trying the case in another court. Georgia v. Handshakers, Inc., 140 Ga. App. 641, 231 S.E.2d 575 (1976).

Refusal to allow defendant to dismiss counsel did not warrant new trial. — Because the record showed that the defendant never unequivocally asserted a right to self-representation, the trial court did not err in refusing to allow the defendant to dismiss trial counsel; thus, the trial court properly denied the defendant a new trial. Pulliam v. State, 287 Ga. App. 717, 653 S.E.2d 65 (2007),

cert. denied, 2008 Ga. LEXIS 159 (Ga. 2008).

Counsel not ineffective. — Because defense counsel's trial strategy, tactics, and tactical errors did not constitute ineffective assistance of counsel and because the defendant did not establish that the deficiency prejudiced the defense, the trial court's denial of defendant's motion for a new trial was not clearly erroneous. Ford v. State, 272 Ga. App. 798, 613 S.E.2d 234 (2005).

Defendant was not erroneously denied a new trial on grounds that trial counsel was ineffective, as the evidence, via trial counsel's testimony, showed that: (1) counsel, after gathering the defendant's medical history and interviewing the defendant's medical provider, did not believe the defendant was insane; and (2) counsel, after consulting with the defendant and gaining an approval, made a strategic decision not to pursue a mental health defense, opting instead to pursue a claim of self-defense. Radford v. State, 281 Ga. 303, 637 S.E.2d 712 (2006).

Defendant's ineffective assistance of counsel claim lacked merit, and did not warrant a new trial, as the defendant failed to show that trial counsel's actions, in which counsel also represented the co-defendant who was the passenger in the vehicle the defendant was driving, prejudiced the defense; further, counsel's actions did not slight the defense of one defendant for another, the principles contained in charges on mere presence and equal access were adequate, counsel was prepared for trial, and the prosecutor's closing argument statements were not prejudicial so as to warrant an objection. Garvin v. State, 283 Ga. App. 242, 641 S.E.2d 176 (2006).

In a murder prosecution, the appeals court rejected the defendant's claims that trial counsel was ineffective in failing to pursue a battered woman syndrome defense and by failing to request a jury instruction on the lesser offense of voluntary manslaughter, as: (1) the evidence showed that the defendant, after consultation with counsel, instead chose to focus exclusively on the defense of justification; (2) the evidence did not support a voluntary manslaughter charge; and (3) the defendant did not want the trial court to charge on voluntary manslaughter. Moreover, at the new trial hearing, because appellate counsel did not ask trial counsel about the decision not to seek the manslaughter instruction, that decision was presumed to be strategic. Ballard v. State, 281 Ga. 232, 637 S.E.2d 401 (2006).

Defendant's ineffective assistance of counsel claims lacked merit, as: (1) the defendant failed to give any specific examples of prejudice; (2) the defendant, after consultation with counsel, testified freely and voluntarily; and (3) any objections counsel might have made to a videotaped statement would have lacked merit, as those statements contained evidence of prior difficulties, admissible without notice and without the need for a pretrial hearing; hence, the defendant was not entitled to a new trial on those grounds. Campbell v. State, 282 Ga. App. 854, 640 S.E.2d 358 (2006).

Because the defendant failed to show that: (1) trial counsel's performance was deficient in failing to call a forensic interviewer as a witness, and that failure prejudiced the defense and would have changed the outcome of the trial; (2) trial counsel's decision not to object to the properly admitted testimony from a forensic interviewer as to the opinion rendered on the victim's intelligence and reactions to certain questions which were consistent with abuse was not ineffective; and (3) the defendant could not show that the failure to call the trial attorney affected the outcome of a motion for a new trial, the defendant's ineffective assistance of counsel claims against both trial and appellate counsel lacked merit; thus, the trial court did not err in denying the defendant's motion for a new trial. Freeman v. State, 282 Ga. App. 185, 638 S.E.2d 358 (2006).

Appeals court rejected the defendant's ineffective assistance of counsel claims regarding the admission of a tape-recorded statement and claim that trial counsel should have demanded a Jackson-Denno hearing or a hearing to determine the admissibility of a similar transaction, as: (1) proper res gestae evidence could be admitted without having to follow the rules regarding prior similar transactions; (2) assuming that trial coun-

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sel should have demanded a Jackson-Denno hearing, the defendant failed to show how a hearing would have altered the outcome of the trial; and (3) at a hearing on the motion for a new trial, the defendant failed to introduce any evidence whatsoever to suggest that the statement made was involuntary. White v. State, 282 Ga. App. 286, 638 S.E.2d 426 (2006).

Because the defendant failed to support an ineffective assistance of counsel claim with affirmative evidence showing an infringement of rights or a procedural irregularity in the taking of a prior guilty plea, and the defendant failed to show that an objection by trial counsel to the introduction of the prior plea would have been successful, a claim that trial counsel was ineffective, thus warranting a new trial, lacked merit. Lattimore v. State, 282 Ga. App. 435, 638 S.E.2d 848 (2006).

Defendant was not entitled to a new trial based on claims of ineffective assistance of trial counsel as the only evidence offered to support this claim was the defendant's own hearsay testimony as to what the desired witnesses were expected to testify to at trial, and such evidence was insufficient; further, the defendant failed to show that counsel's decision to forgo calling such witnesses was unreasonable. Brigman v. State, 282 Ga. App. 481, 639 S.E.2d 359 (2006).

Trial court did not err in denying the defendant a new trial on grounds that trial counsel was ineffective, specifically as to issues of the defendant's competency to stand trial and getting the defendant to agree to a bench trial, as: (1) the record showed that defense counsel adequately pursued the competency issue, filed pre-trial discovery motions, obtained an order for defendant's mental evaluation, hired a forensic psychologist to evaluate the defendant's competency, presented and examined witnesses, cross-examined the state's witnesses, and made a closing argument; (2) even if the court were to assume that trial counsel's failure to interview the various doctors constituted deficient performance, the defendant failed to show any prejudice resulting therefrom; and (3) the defendant failed to show that trial counsel was deficient regarding the decision to pursue a bench trial rather than a jury trial, given that the trial court found that the defendant agreed that the case should be submitted to the court on stipulated facts, rather than to the jury. Wafford v. State, 283 Ga. App. 154, 640 S.E.2d 727 (2007).

Defendant's trial counsel was not ineffective in failing to object to specifically challenged testimony presented against the defendant, and a new trial was not warranted based on that ineffectiveness, as: (1) counsel explained at the hearing on the new trial motion that objections were not made for strategic and tactical reasons, so as to not draw attention to some of the testimony; (2) some of the testimony hurt the credibility of the state's witnesses while enhancing the credibility of the defense theory; (3) counsel attempted to engender sympathy for the defendant; and (4) the defendant failed to show that the outcome of the trial would have been different if the objections would have been made. Walls v. State, 283 Ga. App. 560, 642 S.E.2d 195 (2007).

Because trial counsel was adequately prepared for trial, effectively engaged in plea negotiations, made timely objections, properly handled the defense, was not required to make meritless objections, and the defendant ultimately failed to show a reasonable probability that, but for counsel's alleged errors, the result of the trial would have been different, counsel was found to not be ineffective; thus, the defendant was not entitled to a new trial. Garrett v. State, 285 Ga. App. 282, 645 S.E.2d 718 (2007).

On retrial on one count of child molestation and two counts of aggravated child molestation, the defendant was not entitled to a new trial on grounds that trial counsel was ineffective in admitting notes generated by a forensic evaluator who interviewed the child victim, as the defendant had previously been found guilty in the first trial in which the notes were not introduced. Mewborn v. State, 285 Ga. App. 187, 645 S.E.2d 669 (2007).

Defendant's trial counsel was not inef-

fective in failing to obtain a mental evaluation of the defendant prior to trial to determine criminal responsibility, absent record evidence that counsel had advance notice of any mental health problems, and further discussions with the defendant's family would not have revealed a history of significant mental illness; hence, the defendant was not entitled to a new trial on those grounds. Breland v. State, 285 Ga. App. 251, 648 S.E.2d 389 (2007).

Because a transcript of the hearing on the defendant's motion for new trial was not included in the record on appeal, and absent any other proffer of the additional testimony and evidence that the alleged favorable witnesses would have testified to, the defendant could not show a reasonable probability that the outcome of the trial would have been different had trial counsel subpoenaed the witnesses; hence, the defendant's ineffective assistance of counsel claim based on that foundation failed. Dukes v. State, 285 Ga. App. 172, 645 S.E.2d 664 (2007).

Despite the defendant's contrary claims, trial counsel was not ineffective in failing to subpoena witnesses necessary to support a defense and failing to adequately raise all issues in the defendant's motion to suppress and motion for independent analysis of the suspected narcotics as: (1) the defendant failed to supply sufficient information about the whereabouts of the witnesses; (2) the defendant failed to produce the witnesses at the motion for a new trial hearing; (3) counsel's strategy in handling the suppression motion showed an appropriate exercise of discretion; and (4) under the theory of defense presented, counsel was not ineffective by failing to obtain an independent examination of the substance tested. McTaggart v. State, 285 Ga. App. 178, 645 S.E.2d 658 (2007).

In a prosecution against the defendant under O.C.G.A. § 16-6-4, because the defendant failed to show that trial counsel was ineffective in failing to present an alibi witness, and because the defendant failed to offer evidence that a medical examiner or witnesses from the Department of Family and Child Services would have been favorable to a defense, the defendant's ineffective assistance of counsel claims lacked merit. Herrington v. State, 285 Ga. App. 4, 645 S.E.2d 29 (2007), cert. denied, 2007 Ga. LEXIS 548 (Ga. 2007).

The Court of Appeals of Georgia upheld an order denying the defendant's motion for a new trial, as an ineffective assistance of counsel claim based on counsel's alleged failure to communicate lacked merit, given that no reasonable probability existed, nor did the defendant offer any, that the outcome of the trial would have been different absent counsel's alleged deficient performance. Chambers v. State, 284 Ga. App. 400, 643 S.E.2d 871 (2007).

Trial court did not err in denying the defendant's amended motion for a new trial based on trial counsel's alleged ineffective assistance as the evidence failed to show that counsel's trial strategy was unreasonable, the defendant failed to show prejudice by counsel's actions, and the defendant failed to preserve some of the challenges to counsel's actions for appellate review. Phillips v. State, 284 Ga. App. 224, 644 S.E.2d 153 (2007).

On appeal from convictions on one count of aggravated sexual battery and two counts of sexual assault, the trial court did not err in denying the defendant's motion for a new trial as the defendant failed to show that any prejudice resulted from counsel's failure to call the defendant's wife to testify for the defense, and the appeals court refused to speculate that the wife's testimony would have led to an acquittal. Lee v. State, 286 Ga. App. 368, 650 S.E.2d 320 (2007).

Because it appeared that trial counsel's strategy was to convince the court that insufficient circumstantial evidence was presented in order to convict the defendant, and counsel's decision not to hire an expert to testify as to how quickly the defendant could become intoxicated was a tactical matter to avoid getting into a battle of the experts, those decisions did not amount to ineffective assistance of counsel sufficient to warrant a new trial. O'Connell v. State, 285 Ga. App. 835, 648 S.E.2d 147 (2007).

Trial court properly denied the defendant a new trial based on numerous claims of ineffective assistance of trial counsel, as counsel was not ineffective in

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failing to: (1) make meritless objections; (2) raise what was considered a novel legal argument; (3) file futile motions that would not have changed the outcome of trial; (4) require corroboration of the defendant's confession; and (5) anticipate that the defendant's wife might mislead the defense; moreover, the defendant's claim that counsel was inadequately prepared for trial was belied by the record. Daly v. State, 285 Ga. App. 808, 648 S.E.2d 90 (2007), cert. denied, 2007 Ga. LEXIS 659 (Ga. 2007); 553 U.S. 1039, 128 S. Ct. 2441, 171 L. Ed. 2d 241 (2008).

Because trial counsel's strategic decision not to call a close family friend as a witness, who could have rebutted the state's evidence that the defendant was controlling, was supported by testimony that the witness would not have added anything to the defense and might have diluted the defendant's voluntary manslaughter theory, counsel was not ineffective in failing to have the witness testify; thus, the defendant was properly denied a new trial. Johnson v. State, 282 Ga. 96, 646 S.E.2d 216 (2007).

Defendant's ineffective assistance of counsel claims lacked merit, as a motion to strike or for a mistrial after the state's expert offered an opinion as to the victim's failure to immediately report the abuse was meritless, and counsel's decision as to how to present the defendant's testimony fell within the realm of reasonable trial strategy, and therefore could not be considered deficient; thus, the claims could not serve as the basis for a new trial. Gaines v. State, 285 Ga. App. 654, 647 S.E.2d 357 (2007).

Trial court properly denied the defendant's amended motion for a new trial as: (1) the defendant failed to support an assertion that trial counsel was ineffective in failing to listen to an audiotape of the defendant's second interview with the Georgia Bureau of Investigation prior to trial; (2) counsel's offhand comment as to hindsight was insufficient to support an inference of deficient performance; and (3) the defendant failed to show that prejudice resulted from counsel's alleged deficiency. Sturgis v. State, 282 Ga. 88, 646 S.E.2d 233 (2007).

Because trial counsel did not provide the defendant with ineffective assistance to the extent that the relevant strategic decisions made would not have affected the outcome of the trial, and counsel properly chose not to object to the court's failure to merge a kidnapping and false imprisonment conviction, as those were independent offenses, the defendant's motion for a new trial was properly denied. Snelson v. State, 286 Ga. App. 203, 648 S.E.2d 647 (2007).

Defendant's motion for a new trial was properly denied since defense counsel was not ineffective in: (1) failing to investigate the victim's reputation for violence and introduce evidence of that victim's prior violent acts; (2) failing to investigate the defendant's medical records; (3) failing to investigate a state witness's convictions for crimes of moral turpitude and request an impeachment charge concerning that witness; (4) advising defendant not to testify; and (5) failing to present evidence or argument at sentencing. Cross v. State, 285 Ga. App. 518, 646 S.E.2d 723 (2007), cert. denied, 2007 Ga. LEXIS 680 (Ga. 2007).

Trial court properly denied the defendant's motion for a new trial on appeal from the defendant's convictions of child molestation and aggravated child molestation because: (1) venue was adequately shown by the testimony of a single witness; (2) the defendant's trial counsel was not ineffective by failing to prepare for trial, investigate the case, subpoena important documents, interview key witnesses, and object to damaging testimony; and (3) the defendant failed to show that the outcome of the trial would have been different but for counsel's alleged shortcomings. Brooks v. State, 286 Ga. App. 209, 648 S.E.2d 724 (2007).

Rape conviction was upheld on appeal as the defendant was not entitled to a new trial based on defense counsel's failure to object to certain testimony from the victim about the defendant's history of selling drugs and failure to subpoena certain medical records, as: (1) testimony from the victim that the defendant gave the victim

drugs before some of the sexual encounters between them was admissible as part of the res gestae; and (2) the medical records were generally consistent with the victim's testimony, and therefore no prejudice resulted from failing to subpoena them. Mitchell v. State, 287 Ga. App. 517, 651 S.E.2d 821 (2007).

In a battery prosecution, setting aside the defendant's failure to object to a second attorney's representation at trial, a denial from the defendant's first attorney of an alleged promise to represent the defendant after that counsel's suspension had expired gave the trial court sufficient grounds for finding that no such promise occurred, eliminating the defendant's denial of the right to counsel claim; moreover, inasmuch as the defendant failed to challenge the trial court's finding that the second attorney's representation was effective, the defendant was not entitled to a new trial. Northington v. State, 287 Ga. App. 96, 650 S.E.2d 760 (2007).

Defendant's trial counsel was not ineffective in failing to object when a medical examiner testified that the victim's death was a homicide and not an accident, and despite the defendant's contrary claim, the testimony was not an expression of the witness' opinion on the ultimate issue in the case, as: (1) counsel did not consider the testimony objectionable because there was no dispute that the "manner" of the victim's death was a homicide, and such tactic was not unreasonable; (2) the ultimate issue for the jury to determine was whether the defendant acted with malice, in response to the victim's provocation, or whether self-defense was an issue; (3) counsel testified that an objection would have been in order had the medical examiner invaded the province of the jury by expressing the opinion that the homicide was a murder; and (4) the defendant failed to show any prejudice by the testimony presented. Berry v. State, 282 Ga. 376, 651 S.E.2d 1 (2007).

Because the defendant was not denied the effective assistance of trial counsel based on said counsel's failure to call certain witnesses, as the testimony that these witnesses would have provided would not have affected the outcome of the trial, and counsel was not ineffective to the extent that the defendant was denied the right to testify at trial, the trial court properly denied the defendant a new trial. Finch v. State, 287 Ga. App. 319, 651 S.E.2d 478 (2007).

Because trial counsel's decision not to object to statements that might have impugned the defendant's character was a tactical one, the trial court properly found that trial counsel was not ineffective; thus, the defendant was properly denied a new trial on those grounds. Page v. State, 287 Ga. App. 182, 651 S.E.2d 131 (2007).

Because the defendant was unable to establish prejudice resulting from trial counsel's alleged shortcomings, specifically that counsel was unprepared for trial, the defendant's ineffective assistance of counsel claim lacked merit; thus, the defendant was not entitled to a new trial on that ground. Bradford v. State, 287 Ga. App. 50, 651 S.E.2d 356 (2007).

Because the defendant did not claim below that trial counsel was ineffective for opening the door to impeachment, the defendant failed to timely raise this argument, and thus the claim was waived for purposes of appeal; as a result, the trial court did not err in denying the defendant's motion for a new trial on ineffective assistance of counsel grounds. Lipsey v. State, 287 Ga. App. 835, 652 S.E.2d 870 (2007).

Because counsels' advice against putting the defendant on the stand was tactical, counsel made the strategic decision not to strike a challenged juror, and the record reflected the basis for counsels' objection and motion for a mistrial during the state's closing argument, the defendant's allegations of ineffective assistance of counsel lacked merit; thus, the defendant was not entitled to a new trial as a result. Warner v. State, 287 Ga. App. 892, 652 S.E.2d 898 (2007).

Because a trial counsel's decision not to request a jury charge on a lesser-included offense in order to pursue an all-or-nothing defense was a matter of trial strategy, and there was no indication that the defendant would have agreed to charges on lesser-included offenses, given that the defendant relied on a claim of innocence, counsel was not ineffective in failing to request an instruction on a

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lesser-included offense; thus, the defendant was not entitled to a new trial on this ground. Davis v. State, 287 Ga. App. 786, 653 S.E.2d 104 (2007).

Ineffective assistance of counsel claims regarding the defendant's initial post-trial counsel's performance lacked merit, as counsel was neither professionally deficient nor prejudicial because: (1) the defendant waived any right to be present at the two juror interviews; (2) no deficiency could result from counsel's failure to raise meritless objections; and (3) the trial court specifically found that the defendant adequately understood the nature of the charges, comprehended the proceedings, despite being under the influence of prescribed anti-depressants, and was capable of aiding the defense. Hampton v. State, 282 Ga. 490, 651 S.E.2d 698 (2007).

Because the defendant's trial counsel was not ineffective in presenting a defense and requesting jury instructions on the defendant's claim of innocence, and was authorized to forego objection to a challenged portion of the state's closing argument, the defendant's ineffective assistance of counsel claims lacked merit and did not warrant a new trial. King v. State, 282 Ga. 505, 651 S.E.2d 711 (2007).

Ineffective assistance of counsel claims regarding the defendant's initial post-trial counsel's performance lacked merit, as counsel was neither professionally deficient nor prejudicial because: (1) the defendant waived any right to be present at the two juror interviews; (2) no deficiency could result from counsel's failure to raise meritless objections; and (3) the trial court specifically found that the defendant adequately understood the nature of the charges, and comprehended the proceedings, despite being under the influence of prescribed anti-depressants, and was capable of aiding the defense; thus, the evidence did not provide an adequate basis for the appellate court to conclude that the outcome of an amended motion for a new trial would have been different. Hampton v. State, 282 Ga. 490, 651 S.E.2d 698 (2007).

Because the defendant's trial counsel was not ineffective in failing to call a witness who would have testified that the victim fabricated claims of molestation, given evidence that: (1) the witness did not inform counsel of the witness before trial; (2) counsel articulated valid reasons for not calling the witness; (3) counsel challenged the state's evidence, arguing that the claims were fabricated; and (4) the defendant failed to show that any prejudice resulted from counsel's actions, the trial court properly denied the defendant a new trial based on ineffective assistance of counsel. Noe v. State, 287 Ga. App. 728, 652 S.E.2d 620 (2007).

Because any deficiency in counsel's failure to object to an investigator's testimony regarding the hearsay statements of an informant did not prejudice the defendant's defense, the jury was likely to deduce that the defendant was on parole from the fact that a parole officer initiated a search, and pretermitting whether the defendant's response to the investigator's request to search constituted "pre-arrest silence," no deficiency existed in counsel's reasonable strategic decision that the evidence was consistent with the defense, the defendant's ineffective assistance of counsel claims lacked merit. Cauley v. State, 287 Ga. App. 701, 652 S.E.2d 586 (2007).

Because: (1) it was likely that a mistrial would not have been granted after a police investigator testified about past dealings with the defendant; and (2) trial counsel's failure to request a curative instruction about the alleged improper injection of character evidence or question a witness about a note in which that witness recanted a statement amounted to reasonable trial strategy, the appeals court found that the defendant's claims of ineffective assistance of counsel lacked merit. Thus, a new trial based on those claims was unwarranted. Head v. State, 288 Ga. App. 205, 653 S.E.2d 540 (2007).

Because the defendant failed to show that any prejudice resulted from trial counsel's failure to investigate potential character witnesses and failure to "re-advise" the defendant of the right to testify following the state's introduction of rebuttal evidence, the defendant was not

entitled to a new trial on these grounds. Thomas v. State, 282 Ga. 894, 655 S.E.2d 599 (2008).

Defendant's ineffective assistance of counsel claims did not warrant a new trial because counsel's trial tactics did not amount to ineffective assistance: (1) the defendant could not complain from a self-made choice to testify; (2) counsel's closing argument was not deficient; and (3) counsel could not be ineffective simply because another attorney might have used different language or placed a different emphasis on the evidence. Davenport v. State, 283 Ga. 171, 656 S.E.2d 844 (2008).

Because the trial court was entitled to believe counsel's testimony at the hearing on the motion for new trial that counsel advised the defendant of the right to testify at trial and that counsel met numerous times with the defendant, with ample opportunity to discuss all aspects of the case with counsel, the defendant's ineffective assistance of counsel claim in support of a motion for a new trial had to be rejected. Warren v. State, 283 Ga. 42, 656 S.E.2d 803 (2008).

Because the defendant failed to show that trial counsel was ineffective in failing to request jury voir dire to determine whether jurors saw the defendant wearing handcuffs, and because sufficient evidence supported the defendant's burglary conviction to make a directed verdict of acquittal unnecessary, a motion for a new trial was properly denied. Brown v. State, 289 Ga. App. 297, 656 S.E.2d 582 (2008).

Because: (1) the defendant failed to show that counsel was deficient in failing to impeach a cohort in the crimes charged with a prior felony conviction; (2) counsel made the strategic decision to restrict the scope of the cohort's cross-examination; and (3) the defendant could not show any prejudice resulting from the counsel's actions, the defendant's ineffective assistance of counsel claim lacked merit. Thus, the defendant was not entitled to a new trial as a result of that claim. Jones v. State, 289 Ga. App. 219, 656 S.E.2d 556 (2008), cert. denied, 2008 Ga. LEXIS 381 (Ga. 2008).

Because the evidence showed that: (1) the defendant's trial counsel spent sufficient time investigating and preparing the case; (2) the defendant failed to present evidence of the victim's alleged "false reporting" conviction at the hearing on the motion for new trial or show how counsel's cross-examination of the victim on the false reporting would have affected the outcome of the trial; and (3) trial counsel contacted each and every person the defendant identified as a witness, the defendant's motion for a new trial on grounds that counsel was ineffective was properly denied. Kilby v. State, 289 Ga. App. 457, 657 S.E.2d 567 (2008).

On appeal from convictions on two counts of child molestation and one count of aggravated sexual battery, the trial court properly found that the defendant was not entitled to a new trial based on allegations of the ineffective assistance of defense counsel because: (1) the manner in which counsel handled alleged exculpatory evidence pertaining to a similar transaction witness and the cross-examination of that witness, was part of counsel's reasonable trial strategy; (2) the defendant's reciprocal discovery or due process rights were not violated; and (3) the existence of the information sought was known to the defendant, which could have been obtained with due diligence. Ellis v. State, 289 Ga. App. 452, 657 S.E.2d 562 (2008).

Defendant's ineffective assistance of counsel claim did not warrant a new trial in a prosecution for rape, kidnapping, aggravated stalking, and two counts of stalking; because of the limited nature of a challenged witnesses' trial testimony, defense counsel made a strategic decision not to seek recusal of the trial judge, who was the brother of the challenged witness, and counsel discussed with the defendant the reasons for not seeking recusal. Pirkle v. State, 289 Ga. App. 450, 657 S.E.2d 560 (2008).

New trial based on counsel's alleged ineffectiveness was unwarranted because the defendant made no affirmative showing that the purported deficiencies in trial counsel's representation in investigating a claim of possible jury tampering amounted to ineffective assistance of counsel and were not examples of a conscious and deliberate trial strategy. Dow-

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els v. State, 289 Ga. App. 369, 657 S.E.2d 279 (2008).

Because: (1) the defendant failed to meet the burden of establishing that the state possessed favorable information, or that the trial's outcome might have been different if videotapes from the cameras on the vehicles of the two responding officers had been produced; and (2) counsel was not required to make an objection to the admission of similar transaction evidence when such would have been futile, the defendant was not entitled to a new trial as a result. Hinton v. State, 290 Ga. App. 479, 659 S.E.2d 841 (2008).

Because the defendant failed to present any evidence of prejudice from trial counsels' alleged deficiency in failing to explore the possibility that the defendant's mental illness might have provided a viable trial defense, and that one counsel failed to adequately prepare the defendant for taking the witness stand, the trial court properly denied the defendant a new trial based on the ineffective assistance of counsel. Icenhour v. State, 290 Ga. App. 461, 659 S.E.2d 858 (2008).

New trial based on counsel's alleged ineffectiveness was properly denied because the defendant's numerous claims of ineffective assistance of counsel lacked merit; the defendant failed to show that: (1) the number of different instructions sought; (2) any additional investigation or preparation; (3) an objection to evidence of the prior difficulties between the defendant and the victim, and request for a contemporaneous limiting instruction; and (4) a request for an instruction on a defense not alleged, would have changed the outcome of the trial, and the tactical decision as to which defense to pursue was part of a reasonable trial strategy. Breazeale v. State, 290 Ga. App. 632, 660 S.E.2d 376 (2008).

Because the defendant failed to show that any prejudice resulted from trial counsel's alleged ineffectiveness in failing to discover and introduce the criminal record of one of the witnesses for the prosecution for impeachment purposes, a new trial was properly denied. Rivers v. State, 283 Ga. 108, 657 S.E.2d 210 (2008).

In prosecution against defendant on two counts of child molestation, because trial counsel was not ineffective in failing to request a specific jury charge addressing alleged improper bolstering testimony, present any expert testimony which was not helpful to defense, and elicit available favorable evidence and impeach the victim's testimony, defendant's convictions of related offenses were upheld on appeal; thus, the defendant was not entitled to a new trial on grounds that trial counsel was ineffective. Rouse v. State, 290 Ga. App. 740, 660 S.E.2d 476 (2008).

As a defendant failed to raise an issue regarding the alleged bolstering of a victim by a witness for the state in the defendant's motion for a new trial based on the alleged ineffectiveness of trial counsel, the issue was not preserved for purposes of appellate review. Carroll v. State, 292 Ga. App. 795, 665 S.E.2d 883 (2008).

Trial court did not err in denying the defendant's motion for a new trial on the ground that the defendant's trial counsel rendered ineffective assistance by failing to obtain an electronic enhancement of a videotape depicting a drug sale, which allegedly would have shown that the defendant was not the perpetrator of the offense, because the defendant failed to show that the defendant was prejudiced as a result of trial counsel's failure to obtain an electronic enhancement of the videotape prior to trial since the enhanced images failed to create a reasonable probability that the defendant was not the perpetrator depicted in the images. Moreover, an undercover officer unequivocally identified the defendant as the perpetrator based upon the officer's personal observations and independent memory of the defendant at the time of the drug sale, and although the defendant attempted to prove that another individual was the perpetrator depicted in the videotape's images, the defendant failed to proffer sufficient evidence in support of the defendant's claim. Faulkner v. State, 304 Ga. App. 791, 697 S.E.2d 914 (2010).

Trial court did not err in denying the defendant's motion for new trial on the

basis of ineffective assistance of counsel because trial counsel's decision not to object to a police officer's passing reference to the defendant's post-arrest silence was a valid exercise of reasonable professional judgment, the defendant failed to rebut the presumption that counsel performed within the wide range of reasonable professional assistance in failing to challenge hearsay testimony, counsel's defense strategy of implicating the codefendants was not unreasonable, and counsel did not fail to present evidence as promised in the counsel's opening statement. Jackson v. State, 306 Ga. App. 33, 701 S.E.2d 481 (2010).

Trial court did not err in denying the defendant's motion for new trial on the ground that trial counsel was ineffective in failing to object to statements the prosecutor made during closing argument because counsel did object, and defense counsel's objection was successful; while the defendant asserted that counsel should have further moved for a mistrial, such decisions generally fell within the ambit of strategy and tactics. Wilson v. State, 306 Ga. App. 827, 703 S.E.2d 400 (2010).

Trial court did not err in denying the defendant's motion for new trial on the ground that trial counsel was ineffective in failing to object to a question directed to an accomplice because counsel personally opened the line of questioning on cross-examination, and in the absence of counsel's testimony, it was presumed to be a strategic decision; having made that decision, trial counsel could not object, and because trial counsel succeeded in obtaining acquittal on the three most serious charges against the defendant that strongly supported the conclusion that the assistance actually rendered by trial counsel fell within that broad range of reasonably effective assistance that members of the bar in good standing were presumed to render. Wilson v. State, 306 Ga. App. 827, 703 S.E.2d 400 (2010).

Trial court did not err in denying the codefendant's motion for new trial on the ground that trial counsel was ineffective in failing to object to testimony from one of the victims and a police officer regarding the codefendant's prior purchase of marijuana from one of the victims because drug use showed the codefendant's motive to rob a home where the codefendant believed illegal drugs and money would be found; an accomplice testified that the motive for the robbery was that the victims kept drugs and cash in the apartment and that the codefendant planned the robbery and knew that drugs and money were kept in the house. Wilson v. State, 306 Ga. App. 827, 703 S.E.2d 400 (2010).

Trial counsel was not ineffective for failing to move for a mistrial when a state's witness interjected bad character evidence because the witness's improper remarks were fleeting, unsolicited, and nonresponsive to the prosecutor's examination questions, and since the defendant did not show that the defendant was otherwise entitled to a mistrial based upon the circumstances, trial counsel's failure to pursue a meritless motion does not constitute ineffective assistance of counsel; the trial court sustained the objections to the improper testimony and instructed the prosecutor and witness to restrict the examination and responses, the witness and prosecutor complied with the trial court's instructions, and there was no further mention of the bad character evidence. Boatright v. State, 308 Ga. App. 266, 707 S.E.2d 158 (2011).

Trial court did not abuse the court's discretion in denying the defendant's motion for new trial on the ground of ineffective assistance of counsel because trial counsel's decision not to request the production of the duct tape that was used to bind the defendant when the defendant was allegedly kidnapped was not patently unreasonable because the duct tape itself was cumulative of evidence that was introduced through the defendant's recorded police interview and trial counsel's cross-examination of a detective; even if it was assumed that trial counsel performed deficiently, the defendant proffered no evidence at the hearing on the defendant's motion for new trial that an analysis of the duct tape would have bolstered the defendant's alibi defense. Buis v. State, 309 Ga. App. 644, 710 S.E.2d 850 (2011).

Trial court did not err in denying the defendant's motion for new trial because

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trial counsel's failure to object to a detective's testimony did not amount to deficient performance since the testimony was not a statement of the victim's credibility or an invasion of the province of the jury; the testimony concerned the detective's reason for ending the interview with the victim and referring the victim to the Georgia Center of Child Advocacy, and even if the testimony that "a molestation incident occurred" did constitute improper bolstering, the defendant failed to show a reasonable probability that the testimony so prejudiced the defense as to affect the outcome of the trial. Furthermore, the motion was also properly denied because trial counsel's failure to object to the prosecutor's comments during closing argument did not constitute deficient performance; the comments of which defendant complained were permissible since the comments were the conclusion the prosecutor wished the jury to draw from the evidence and not a statement of the prosecutor's personal belief as to the veracity of a witness. Strickland v. State, 311 Ga. App. 400, 715 S.E.2d 798 (2011).

Trial court did not err in denying the defendant's motion for new trial on the ground of ineffective assistance of counsel because there was no evidence to support an instruction on defense of habitation pursuant to O.C.G.A. § 16-3-23 and, thus, trial counsel did not perform deficiently in failing to request such an instruction; there was no evidence that the victim was attempting to unlawfully enter or attack the defendant's vehicle at the time the defendant stabbed the victim, and under the facts, there could be no reasonable belief that stabbing the victim was necessary to prevent or terminate the other's unlawful entry into or attack upon a motor vehicle. Philpot v. State, 311 Ga. App. 486, 716 S.E.2d 551 (2011).

Because the armed robbery count of the indictment sufficiently alleged the elements of armed robbery, trial counsel was not ineffective for failing to challenge armed robbery, and the trial court did not err in denying the defendant's motion for new trial as to the ineffective assistance claim; that the property was taken from the person or immediate presence of another is necessarily inferred from the allegation of a use of an offensive weapon to accomplish the taking, and the alleged offense of "armed robbery" can be accomplished only via a taking from the person or immediate presence of another. Patterson v. State, 312 Ga. App. 793, 720 S.E.2d 278 (2011), cert. denied, No. S12C0574, 2012 Ga. LEXIS 327 (Ga. 2012).

Trial court did not err when the court denied the portion of the codefendant's motion for new trial alleging ineffective assistance of trial counsel because the alleged deficiencies in trial counsel's performance were either without factual basis or were decisions made as matters of trial strategy. Smith v. State, 290 Ga. 428, 721 S.E.2d 892 (2012).

Trial counsel was not ineffective for failing to object to the state's argument that no person in the circuit had ever been convicted and later proven innocent because the trial court would not have abused the court's discretion in denying the defendant's motion for mistrial had one been made and did not err when the court credited trial counsel's decision not to object to the prosecutor's closing argument as strategic; even assuming that the prosecutor should not have compared the defendant to others, the subject of wrongful convictions in other cases was brought up by the defendant, and the jury was not impressed either way by the colloquy. Stubbs v. State, 315 Ga. App. 482, 727 S.E.2d 229 (2012).

Counsel not ineffective for alleged intoxication. — Trial court did not err in denying the defendant's motion for a new trial on the basis of ineffective assistance of counsel because the defendant failed to show that the defendant's trial counsel was actually intoxicated on the second morning of the trial and that the defendant's counsel's performance after consuming alcohol affected the outcome of the defendant's trial; nothing in the record showed that the trial court erred in finding that there were no deficiencies in counsel's performance on the second morning of the trial. Long v. State, 307 Ga. App. 669, 705 S.E.2d 889 (2011).

When ineffective counsel did not result in prejudice. — Defendant's ineffective assistance of counsel claim did not warrant a new trial because sufficient evidence of the defendant's intoxication was presented in the record, and the defendant failed to show prejudice resulting from trial counsel's failure to object to defendant's admission to having a prior DUI conviction, even though it was error for trial counsel not to object. Thomas v. State, 288 Ga. App. 827, 655 S.E.2d 701 (2007).

New trial was unwarranted because: (1) the decision not to present the defendant's love interest as an alibi witness was clearly strategic, and thus, could not serve as the basis for an ineffectiveness claim; and (2) counsel's alleged failure to specifically object to the victim's testimony on bolstering and not on leading and speculation grounds impermissibly expanded the enumerated error. Scott v. State, 288 Ga. App. 738, 655 S.E.2d 326 (2007).

While the defendant's trial counsel was ineffective in failing to object to that portion of the state's closing argument in which the prosecutor referenced a slain officer's funeral a week prior, as that fact had no relevance to the charges the defendant was facing, based on the overwhelming evidence of guilt, including the defendant's admission, the defendant's convictions for trafficking in cocaine and possession of cocaine with intent to distribute were upheld on appeal; thus, a new trial was properly denied. Cantrell v. State, 290 Ga. App. 651, 660 S.E.2d 468 (2008).

Failure to disclose unknown reward. — Trial court did not err in denying a motion for a new trial when the state did not disclose a potential reward for one of the state's witnesses when the state's attorney did not know at the time of trial that any witness testifying for the state was subject to a reward. McBee v. State, 210 Ga. App. 182, 435 S.E.2d 469 (1993).

State found not to have committed discovery violation. — Absent any evidence of bad faith on the part of the state, or an order requiring production, the state did not fail to fully disclose all the information regarding the defendant's breath test results. Thus, the trial court did not err in denying the defendant either a mistrial or a new trial as a result. Rosandich v. State, 289 Ga. App. 170, 657 S.E.2d 255 (2008), cert. denied, 2008 Ga. LEXIS 380 (Ga. 2008).

Failure to establish Brady violation. — Trial court did not err in denying the defendant's motion for a new trial on the ground that the state withheld crucial impeachment evidence regarding an informant because the defendant failed to carry the burden of establishing a Brady claim; the defendant's trial counsel extensively questioned an agent about the informant's criminal history, and during the cross-examination of the agent, trial counsel elicited the fact that the informant had once been addicted to cocaine and again went through the informant's convictions, introducing copies of the convictions for the jury's consideration. Durham v. State, 309 Ga. App. 444, 710 S.E.2d 644 (2011).

Absence of key portions of trial record supported verdict. — Because the appellant failed to supply the appellate court with the entire trial transcript in the record on appeal, but only included the pretrial motions and the opening statements at trial, without a complete transcript the court of appeals had to presume that the evidence supported the jury's verdict; thus, a new trial was not warranted. Parekh v. Wimpy, 288 Ga. App. 125, 653 S.E.2d 352 (2007), cert. denied, No. S08C0520, 2008 Ga. LEXIS 319 (Ga. 2008).

Deputy sheriff's communications with jury. — Defendant's motion for a new trial was properly denied, as the challenged communications between a deputy sheriff and the jury members were not improper, the deputy properly instructed the jurors to direct their questions to the judge, and the deputy's communications to the jury did not prejudice the defendant. Jackson v. State, 282 Ga. App. 612, 639 S.E.2d 403 (2006).

Erroneous disallowance of challenge of juror for cause. — When it did not affirmatively appear from the record that the defendant in trial of misdemeanor case had exhausted the defendant's peremptory challenges at the time the panel of 12 jurors was accepted and sworn, the appellate court presumed that

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the defendant was not prejudiced by action of court in erroneously disallowing the defendant's challenge of certain jurors for cause, and did not grant reversal for alleged error. Borders v. State, 46 Ga. App. 212, 167 S.E. 213 (1932).

Juror impartial. — Trial court did not abuse the court's discretion in denying a motion for new trial motion pursuant to O.C.G.A. § 5-5-25 after the defendant was convicted of criminal charges arising from an incident involving an ex-girlfriend; the fact that one juror indicated that the juror's daughter went to school with the victim's daughter and the daughters had a sleepover a year earlier at the victim's house did not create actual juror partiality or circumstances that were inherently prejudicial to defendant's right to an impartial jury under Ga. Const. 1983, Art. I, Sec. I, Para. XI. Sims v. State, 276 Ga. App. 246, 622 S.E.2d 909 (2005).

Pretermitting whether a challenged juror would have been disqualified based on a relationship with the defendant, because the testimony from that juror at the new trial hearing did not reveal any bias for or against the defendant, or establish that the relationship affected the verdict, the defendant was not denied a fair and impartial trial. Moreover, even if the juror deliberately answered falsely, the defendant failed to show that a new trial was warranted because that juror had an evil motive or acted otherwise as one of the twelve jurors than with the required impartiality. Allen v. State, 290 Ga. App. 604, 659 S.E.2d 900 (2008).

Polling of jurors reveal consensus. — Trial court properly denied defendant's motion for a new trial and entered final judgments of conviction on the jury's verdict finding the defendant guilty of multiple child molestations even though the defendant alleged multiple grounds for overturning the verdict, as the polling of the last juror was sufficient to establish that the verdict against the defendant was unanimous since the juror said the guilty verdict against the defendant was "her verdict now." That response showed, along with other jurors similar responses, that the verdict was unanimous and it thus did not matter that the juror answered in response to a question before that the verdict had not been that juror's verdict. Benefield v. State, 264 Ga. App. 511, 591 S.E.2d 404 (2003).

Voir dire was not inadequate. — Trial court acted within the court's discretion in granting an insurance premium finance company's motion in limine to preclude an insured from mentioning irrelevant corporate affiliations of the company during the course of the trial in any address to the jury, and the court properly denied the insured's motion for new trial under O.C.G.A. §§ 5-5-23 and 5-5-25 because the voir dire was broad enough to ascertain the fairness and impartiality of the prospective jurors, and the insured was not prohibited from asking more general questions that could have ferreted out the potential bias the insured claimed was so critical since the only limitation placed on voir dire was a prohibition against asking any questions about any affiliation with the company, and the insured failed to explore other avenues open to the insured for detecting juror bias; a corporation was not the company's insurer, and the insured did not provide the trial court with proof of any direct, demonstrable financial stake by the corporation in the outcome of the case. Floor Pro Packaging, Inc. v. AICCO, Inc., 308 Ga. App. 586, 708 S.E.2d 547 (2011).

Jury foreperson's alleged untruthfulness in voir dire. — Because the defendant failed to present sufficient evidence to show that if the jury foreperson had given a truthful answer to counsel's question regarding whether any juror had ties to law enforcement, and that the foreperson would have been dismissed for cause, the defendant was not entitled to a new trial on this ground. Allen v. State, 286 Ga. App. 469, 649 S.E.2d 583 (2007).

Because the defendant failed to show error by the record in order to support a claim that the trial court impermissibly communicated with the jury during the hearing on a motion for a new trial, the appeals court rejected that claim. Thornton v. State, 288 Ga. App. 60, 653 S.E.2d 361 (2007), cert. denied, 2008 Ga.

LEXIS 283 (Ga. 2008).

Prejudicial statements made during voir dire. — Trial court erred in denying the defendant's motion for mistrial when prejudicial statements were made during voir dire because although a prospective juror stated that the juror was not sure if the defendant was the same person accused of raping his grandmother in a prior case, the state elicited more information from the juror, hereby providing the other prospective jurors with the name of another alleged rape victim in a crime for which the defendant was not on trial; the trial court did not undertake any measures to ascertain what, if any, impact the remark had on the panel's ability to decide the case, and the evidence was inherently prejudicial and deprived the defendant of the right to begin the trial with a jury free from even a suspicion of prejudgment or fixed opinion. Bell v. State, 311 Ga. App. 289, 715 S.E.2d 684 (2011).

Crying juror inadequate for motion for mistrial. — Trial court did not abuse the court's discretion in denying the defendant's motion for a mistrial after a juror started crying as the victim's widow and two other family members of the victim allegedly ran out of the courtroom crying during the state's closing arguments because contrary to the defendant's description of the scene during closing arguments, the trial court stated that the court did not adopt the defense attorney's recitation of what occurred. Carter v. State, 289 Ga. 51, 709 S.E.2d 223 (2011).

Grand jury composition. — Trial court did not err in failing to grant the defendant a new trial on the ground that the grand jury was composed of 25 people in violation of O.C.G.A. § 15-12-61(a), as the claim was waived, and the trial court found as a fact that the grand jury was properly comprised. Daly v. State, 285 Ga. App. 808, 648 S.E.2d 90 (2007), cert. denied, 2007 Ga. LEXIS 659 (Ga. 2007); 553 U.S. 1039, 128 S. Ct. 2441, 171 L. Ed. 2d 241 (2008).

Charging entire Code section when parts are inapplicable. — It is not usually cause for a new trial that an entire Code section is given, even though a part of the charge may be inapplicable under the facts in evidence. Stevens v. State, 247 Ga. 698, 278 S.E.2d 398 (1981), cert. denied, 463 U.S. 1213, 103 S. Ct. 3551, 77 L. Ed. 2d 1398 (1982).

Failure to request jury charge. — Though defendant's counsel erred by failing to request a jury charge on good character evidence and such error amounted to a deficient performance of counsel, defendant's conviction for malice murder and the denial of a motion for a new trial was upheld on appeal; no prejudice resulted to the defendant due to the deficiency in that the evidence of guilt was so overwhelming that, had the jury instruction been given, there was no likelihood that the outcome of the trial would have been different. Lucas v. State, 279 Ga. 175, 611 S.E.2d 55 (2005).

While the prosecution against the defendant on charges of burglary, theft by taking, and criminal trespass included both direct and circumstantial evidence, convictions on those charges were not reversed merely because the trial court failed to charge former O.C.G.A. § 24-4-6 (see now O.C.G.A. § 24-14-6) as the defendant failed to request that charge; hence, the defendant's motion for a new trial was properly denied. Rodriguez v. State, 283 Ga. App. 752, 642 S.E.2d 705 (2007).

Because trial counsel made a strategic decision not to present a written request for a lesser-included misdemeanor obstruction charge given that the defendant decided to pursue an "all or nothing" defense, and, as a result, the trial court did not err in not charging the jury on misdemeanor obstruction, sua sponte, which would have undermined that defense, trial counsel was not ineffective in failing to request the charge; hence, the defendant was not entitled to a new trial on those grounds. Owens v. State, 288 Ga. App. 771, 655 S.E.2d 244 (2007), cert. denied, 2008 Ga. LEXIS 274 (Ga. 2008).

Improperly admitted evidence properly ruled out not grounds for mistrial. — Trial court did not abuse the court's discretion in denying the defendant's motion for a mistrial in defendant's shoplifting case as the trial court's action in immediately ruling out improperly admitted evidence and instructing the jury to disregard the evidence meant a mistrial

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was not necessary to preserve defendant's right to a fair trial. Bradford v. State, 261 Ga. App. 621, 583 S.E.2d 484 (2003).

Trial counsel was not ineffective for failing to obtain copies of defendant's cell phone records, and the trial court did not err in denying the defendant's motion for a new trial on this ground. According to the defendant, these records would have shown that calls were made from defendant's cell phone to the victim's father, rebutting the father's testimony that the defendant would not talk to the father; however, the defendant admitted at trial that the defendant's coworkers would not allow the defendant to speak with the victim's father. Stanford v. State, 288 Ga. App. 463, 654 S.E.2d 173 (2007), cert. denied, 2008 Ga. LEXIS 461 (Ga. 2008).

Evidentiary issues did not warrant new trial. — Burglary conviction was upheld on appeal and, thus, the defendant was properly denied a new trial as: (1) sufficient evidence was presented that the defendant entered the victim's home without permission with the intent to commit a theft therein; and (2) the state properly presented res gestae evidence, even if such improperly placed the defendant's character in evidence. Meyers v. State, 281 Ga. App. 670, 637 S.E.2d 78 (2006).

Because the defendant waived a confrontation clause, as well as any other constitutional objection, to testimony concerning a statement overheard from a woman fleeing the scene of the crime on appeal, and the victim's testimony, as well as the defendant's own admission, supported a robbery by intimidation conviction, such was upheld on appeal; hence, the trial court did not err in denying the defendant a new trial. Jordan v. State, 283 Ga. App. 85, 640 S.E.2d 672 (2006).

Trial court properly denied the defendant a new trial, given sufficient evidence that: (1) the defendant's convictions for malice murder and other related crimes were supported by the evidence; (2) the jury properly decided against a voluntary manslaughter verdict based on that evidence; (3) evidentiary issues did not warrant a mistrial; (4) the state did not act in bad faith in failing to preserve potentially exculpatory evidence; and (5) no due process violation occurred by the admission of cumulative evidence. Lonergan v. State, 281 Ga. 637, 641 S.E.2d 792 (2007).

Trial court did not err in denying the defendant's motion for a new trial, as sufficient evidence supported the rape, aggravated sodomy, and incest convictions, similar transaction evidence was admitted for a proper purpose, and the imposition of a life imprisonment sentence as a recidivist child molester did not render O.C.G.A. § 16-6-4(b) an unconstitutional ex post facto law. Williams v. State, 284 Ga. App. 255, 643 S.E.2d 749 (2007).

Because: (1) the defendant's convictions were supported by evidence of the defendant's confession to a friend and expert medical testimony as to how the victim died; (2) the defendant received ample notice of the specific deadly weapon allegedly used for purposes of the felony murder charge; and (3) the defendant failed to show that trial counsel was ineffective and a presumption of prejudice did not apply, the defendant was not entitled to a new trial. Jones v. State, 282 Ga. 47, 644 S.E.2d 853 (2007).

Trial court properly denied the defendant a new trial, as the state's commentary during opening and closing argument on the connection between illegal drugs and crime in the community was proper, no abuse of discretion resulted from the admission of the defendant's booking mug shot, and the state's identification witnesses could testify about their level of certainty in identifying the defendant. Clark v. State, 285 Ga. App. 182, 645 S.E.2d 671 (2007).

Because: (1) the defendant failed to support a defense of self-defense, given evidence that any imminent threat posed against the defendant had passed, the victim was shot in the head after a confrontation had ended, and the victim had retreated to the victim's car and was being driven away at the time the fatal shot was dealt; (2) severance of the offense of aggravated assault on a police officer and felony murder of the victim was not warranted; and (3) the defendant failed to prove that the state committed a Batson violation in

peremptorily striking two jurors, the defendant's motion and amended motion for a new trial were properly denied. Woolfolk v. State, 282 Ga. 139, 644 S.E.2d 828 (2007).

Because sufficient evidence was supplied via the testimony from the child victim, and the witnesses who corroborated that testimony, to support the defendant's aggravated sexual battery and child molestation convictions, despite any alleged inconsistencies, the convictions were upheld as was the denial of the defendant's motions for an acquittal and a new trial. Lilly v. State, 285 Ga. App. 427, 646 S.E.2d 512 (2007).

Given sufficient evidence presented by the state of the defendant's involvement in the armed robbery and murder of the victim as a party to the crimes, no errors in the content and order of the jury charges, and the lack of evidence supporting the defendant's ineffective assistance of counsel claims, the trial court properly denied the defendant a new trial. Pruitt v. State, 282 Ga. 30, 644 S.E.2d 837 (2007).

Affirmance of the juvenile court's order terminating a parent's parental rights was ordered, as the parent failed to comply with the case plan outlined, and the parent's failure to obtain stable housing, continued financial instability, and prolonged unwillingness to address mental health issues showed that the parent's lack of parental care or control caused the children's deprivation; hence, the parent's motion for a new trial was properly denied. In the Interest of J.M.N., 285 Ga. App. 203, 645 S.E.2d 685 (2007).

Because the jury was presented with sufficient evidence via a husband's deposition and trial testimony supporting the jury's determination of the husband's monthly gross income, which included income from two landscaping businesses and a salary from the sheriff's department, which in turn supported a finding of special circumstances warranting an upward modification of child support, the husband was not entitled to a new trial; moreover, to the extent that any error in admitting the husband's landscaping business bank statements could have resulted from the marks or highlights that were on pages sent with the jury, the husband's counsel induced such error by approving the pages beforehand. Dyals v. Dyals, 281 Ga. 894, 644 S.E.2d 138 (2007).

In a prosecution for statutory rape, the trial court properly denied the defendant a new trial as: (1) the indictment adequately set forth a charge of felony statutory rape; (2) the evidence showed the defendant to be over 21 years old and more than three years older than the victim; (3) the trial court was not required to sentence the defendant for misdemeanor statutory rape, and in fact was precluded from doing so; and (4) the defendant failed to make a written request that the jury be charged on the law under former O.C.G.A. § 24-4-6 (see now O.C.G.A. § 24-14-6). Attaway v. State, 284 Ga. App. 855, 644 S.E.2d 919 (2007).

Because sufficient evidence was presented that the defendant physically assaulted an off-duty sheriff's officer prior to arrest and continued to resist and obstruct the officer's official duties thereafter, the defendant was properly denied an acquittal and a new trial; moreover, given that the trial court properly charged the jury on the obstruction offense, explaining that a person committed the offense by knowingly and willfully obstructing or hindering a law enforcement officer in the lawful discharge of that officer's official duties, nothing beyond such was required. Helton v. State, 284 Ga. App. 777, 644 S.E.2d 896 (2007).

Because the overwhelming evidence presented against the defendant supported the convictions, and the defendant failed to assert a timely and contemporaneous objection to the prosecutor's opening statement comments, the trial court did not err in denying the defendant's motions for a new trial and a mistrial. Brooks v. State, 284 Ga. App. 762, 644 S.E.2d 891 (2007).

Rape, incest, child molestation, aggravated child molestation, and aggravated sodomy convictions were all upheld on appeal, given that: (1) the elements of child molestation and aggravated child molestation, including venue, were supported by the female victim's testimony; (2) the trial court's charge on the mandatory presumption of consent was proper; as a result, the defendant was not entitled

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to a new trial. Forbes v. State, 284 Ga. App. 520, 644 S.E.2d 345 (2007).

Because no reversible error resulted from excepting a prosecution witness from sequestration, the admission of certain recorded out-of-court statements by three witnesses and one of the codefendants, and the jury charge on impeachment, the defendant's felony murder and possession of a firearm during the commission of a felony convictions were upheld on appeal; hence, the trial court properly denied the defendant a new trial. Warner v. State, 281 Ga. 763, 642 S.E.2d 821 (2007).

In a premises liability action arising from a customer's slip and fall on a restaurant's premises, the trial court did not err in denying the customer's motion for a new trial, as: (1) a trash can did not obstruct the sidewalk the customer was walking on at the time of the fall, and there was no basis in the record to find that the restaurant negligently failed to keep the restaurant's premises safe; (2) the customer had knowledge of the hazard equal or superior to the restaurant; (3) the customer could have discovered and avoided the hazard in the exercise of ordinary care; (4) there was no evidence that the restaurant had either actual or constructive knowledge of the hazard; (5) the trial court properly instructed the jury on the issue of constructive knowledge; and (6) there was at least some evidence to support a comparative negligence charge. Compton v. Huddle House, Inc., 284 Ga. App. 367, 644 S.E.2d 182 (2007), cert. denied, 2007 Ga. LEXIS 515 (Ga. 2007).

Given the arresting officer's observations, the defendant's failure to maintain a lane of driving, the evidence presented surrounding the defendant's arrest, and the defendant's failed field sobriety and breath tests, sufficient evidence was presented to support the DUI convictions; thus, a new trial based on the insufficiency of the evidence was properly denied. Trull v. State, 286 Ga. App. 441, 649 S.E.2d 571 (2007).

Because sufficient evidence supported the defendant's convictions, a voluntary statement given to police did not violate Miranda, the trial court properly charged the jury, the defendant waived error regarding a sequestration issue, and the imposition of a maximum sentence against the defendant as a recidivist was warranted, the trial court did not err in denying the defendant a new trial. Bryant v. State, 286 Ga. App. 493, 649 S.E.2d 597 (2007).

Trial court did not err in denying the defendant's amended motion for a new trial, as defense counsel's trial strategy did not amount to ineffective assistance, the victim's testimony and surrounding evidence supported an aggravated sexual battery conviction, and any error resulting from the trial court's instruction on prior consistent statements was harmless. Boyt v. State, 286 Ga. App. 460, 649 S.E.2d 589 (2007).

On appeal from a conviction for two counts of aggravated child molestation, the trial court did not err in denying the defendant a new trial, as no abuse of discretion resulted in excluding evidence that one of the victims made prior false accusations of sexual abuse against an older cousin, because the evidence presented a credibility issue for the trial court to resolve in analyzing whether there was a reasonable probability of falsity. Roberts v. State, 286 Ga. App. 346, 648 S.E.2d 783 (2007).

Defendant's aggravated assault and robbery convictions were upheld on appeal, as evidence including the defendant's admission and flight from the scene authorized the jury to conclude that the defendant went to an apartment complex intending to participate in the robbery, and in fact participated in the robbery by acting as a lookout and an additional show of force; hence, the defendant's motion for a new trial was properly denied. Millender v. State, 286 Ga. App. 331, 648 S.E.2d 777 (2007), cert. denied, No. S07C1717, 2008 Ga. LEXIS 80 (Ga. 2008).

Because: (1) the defendant's statement was admissible; (2) probable cause supported the issuance of a search warrant; (3) the indictment was sufficient; (4) jury selection was non-discriminatory; (5) relevant evidence was properly admitted; (6) the best evidence rule was not violated;

and (7) instructions on voluntary manslaughter, involuntary manslaughter, and accident were unwarranted, the defendant's murder conviction was supported by the evidence; thus, a new trial was properly denied. Roberts v. State, 282 Ga. 548, 651 S.E.2d 689 (2007).

Trial court did not err in denying the defendant's motion for a new trial on grounds that a refusal to submit to voluntary field sobriety tests was testimonial in nature, and thus subject to the Fifth Amendment protection against self-incrimination, as a refusal to submit to the tests was not testimonial in nature, and the mere fact that the defendant refused to submit to a blood test was not subject to the privilege against self-incrimination since no impermissible coercion was involved, regardless of the form of refusal. Ferega v. State, 286 Ga. App. 808, 650 S.E.2d 286 (2007), cert. denied, 129 S. Ct. 195, 172 L.Ed.2d 140 (2008).

Trial court properly denied the defendant's motion for a new trial, and an aggravated assault conviction was upheld on appeal, as the state was not required to show that the defendant expressed an intent to rob or declared a purpose to carry that intent into effect, for the jury to arrive at the conclusion that such was the defendant's intent; moreover, the defendant's intention could be gathered from the circumstances of the case as proved, and in seeking the motives of human conduct, inferences and deductions could properly be considered when the inferences and deductions flowed naturally from the facts proved. Squires v. State, 286 Ga. App. 141, 648 S.E.2d 696 (2007).

Given the evidence supporting the defendant's aggravated child molestation conviction, including that: (1) the defendant sodomized the victim; (2) witnesses knew that the defendant had an interest in performing oral sex; and (3) the trial court properly limited the defendant's cross-examination to only relevant matters, the conviction was upheld on appeal and the trial court did not err in denying the defendant a new trial. Gaines v. State, 285 Ga. App. 654, 647 S.E.2d 357 (2007).

In the court's order denying the defendant a new trial, the trial court correctly ruled that the defendant's motion to suppress was moot because no tangible physical evidence was admitted at trial. Maxwell v. State, 285 Ga. App. 685, 647 S.E.2d 374 (2007).

Because the "direct sequencing" method of the mitochondrial DNA analysis used by the crime lab was properly used in prosecuting the defendant for murder, and a spontaneous outburst was admissible as a non-custodial and voluntary statement, a conviction for malice murder, and resulting sentence, were affirmed on appeal; hence, the defendant was properly denied a new trial. Vaughn v. State, 282 Ga. 99, 646 S.E.2d 212 (2007).

Because: (1) the defendant's noncustodial and spontaneous remark to an officer was admissible; (2) the defendant's mug shot did not erroneously place character in issue; and (3) the victim was conscious of the crime as the crime was being committed, a jury charge on theft by taking as a lesser-included offense of robbery by sudden snatching was not required, and a new trial was unwarranted. Bettis v. State, 285 Ga. App. 643, 647 S.E.2d 340 (2007), cert. denied, No. S07C1535, 2007 Ga. LEXIS 862 (Ga. 2007).

Given that both parties to a property dispute involving a house testified as to the home's value, including the appraisals, probative and non-hearsay evidence as to the value existed to support the jury's damages award such that the trial court erred in concluding otherwise and awarding a new trial on this basis. Perry v. Perry, 285 Ga. App. 892, 648 S.E.2d 193 (2007).

Because the state presented sufficient identification and circumstantial evidence linking the defendant to a burglary, including similar transaction evidence of a prior burglary, and in response to trial counsel's objection to the state's comment that the defendant was under the influence of drugs or alcohol at the time of the offense, the defendant did not object to the curative instruction given, thus, the defendant's motion for a new trial was properly denied. Bryant v. State, 285 Ga. App. 508, 646 S.E.2d 717 (2007).

Because: (1) the trial court did not err in giving the defendant's requested jury

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charge containing "level of certainty" language; (2) the defendant's spontaneous outbursts were properly admitted; and (3) a mistrial based on comments made regarding the defendant's decision to remain silent was not warranted, a felony murder conviction and resulting sentence were upheld on appeal; thus, the defendant was not entitled to a new trial. Tennyson v. State, 282 Ga. 92, 646 S.E.2d 219 (2007).

Based on trial counsel's testimony at a hearing on the defendant's motion for a new trial, and evidence that both counsel and the defendant extensively discussed the pros and cons of having a jury hear the case, sufficient extrinsic evidence showed that the defendant knowingly, voluntarily, and intelligently waived any right to a trial by jury. Whitaker v. State, 286 Ga. App. 143, 648 S.E.2d 396 (2007).

In a negligence action seeking damages for a disabling injury filed against a property owner by a friend who assisted the owner in building a fence, because the evidence supported a verdict against the friend, and the trial court's various evidentiary rulings regarding: (1) the admission of evidence under both the medical records and business records exceptions to the hearsay rule; (2) the admission of evidence regarding the parties' friendship; (3) the impeachment of the friend's credibility; (4) the opening statement presented by the owner's counsel; and (5) the use of a leading question regarding the friend's use of Oxycontin, did not support a different result, the friend was not entitled to a new trial or judgment notwithstanding the verdict. Imm v. Chaney, 287 Ga. App. 606, 651 S.E.2d 855 (2007).

The fact that one of the victims was told that the first defendant had a gun, believed such, became frightened as a result, and hurriedly gave the first defendant the cash demanded, amounted to sufficient circumstantial evidence from which the jury could find that the victim reasonably believed an offensive weapon was being used in the robbery; hence, the evidence was sufficient to sustain the armed robbery convictions of both defendants and uphold the denial of the defendant's motion for a new trial on this ground. Richard v. State, 287 Ga. App. 399, 651 S.E.2d 514 (2007).

While the state conceded that the state violated the Bruton rule by referring to the codefendant's comment in the state's opening statement, because neither of the defendants showed any harm by the error, that error was deemed harmless; moreover, given that the evidence, including eyewitness identification, was overwhelming, the trial court did not err in denying a new trial on this ground. Richard v. State, 287 Ga. App. 399, 651 S.E.2d 514 (2007).

Because: (1) an indictment adequately charged the defendant with aggravated assault; (2) sufficient evidence supported the charge; (3) similar transaction evidence was admitted for a proper purpose; and (4) defense counsel's alleged omissions would not have affected the outcome and therefore did not amount to the ineffective assistance of counsel, the trial court properly denied the defendant a new trial. May v. State, 287 Ga. App. 407, 651 S.E.2d 510 (2007).

Because the trial judge took the appropriate curative steps in denying an opposing driver's motions for both a mistrial and a new trial after the suing driver made an inadvertent reference to insurance, including rebuking the suing driver and issuing a curative instruction, the court did not abuse the court's discretion in denying the opposing driver's motions; moreover, the appeals court could not conclude that the opposing driver suffered any wrong or oppression as a result of the trial court's orders. Defusco v. Free, 287 Ga. App. 313, 651 S.E.2d 458 (2007).

Because sufficient evidence was presented via the testimony of the victim regarding the defendant's attack with a screwdriver, which was corroborated by the defendant's own admissions at trial, the defendant's simple battery conviction was upheld on appeal and a new trial was unwarranted; moreover, the defendant's characterization of the incident as one involving mutual argument did not in and of itself justify the actions. Rainey v. State, 286 Ga. App. 682, 649 S.E.2d 871 (2007).

In a boundary line dispute filed pursuant to O.C.G.A. § 23-3-61, the trial court properly entered judgment on a jury verdict in favor of the plaintiffs, two landowners, and against their neighbor, and then denied the neighbor a new trial, or alternatively a judgment notwithstanding the verdict, as: (1) the boundary line indicated on a plat reflecting the locations of monuments on the parcel owned by two landowners complied with the monuments referenced in the original warranty deed; and (2) the neighbor agreed to a special verdict form allowing the jury to find that the plat submitted by the two landowners accurately and sufficiently showed the true boundary line. Dover v. Higgins, 287 Ga. App. 861, 652 S.E.2d 829 (2007), cert. denied, No. S08C0402, 2008 Ga. LEXIS 237 (Ga. 2008).

Because the state's evidence sufficiently showed the first defendant's joint constructive possession of methamphetamine beyond mere spatial proximity, and the first defendant's act of testifying for the state without a promise of leniency or immunity did not unfairly prejudice the second defendant at the expense of that defendant's constitutional right not to testify, the trial court did not err in denying both defendants a new trial. Herberman v. State, 287 Ga. App. 635, 653 S.E.2d 74 (2007).

Despite the defendant's claim that the state failed to disprove a claim of self-defense, the appeals court upheld the defendant's aggravated assault conviction, because sufficient evidence was presented by the state to allow the jury to decide that the defendant's act of stabbing the weaponless victim amounted to excessive force. Thus, the defendant's motion for a new trial on the issue was properly denied. Richards v. State, 288 Ga. App. 814, 655 S.E.2d 690 (2007).

Given the overwhelming evidence of the defendant's guilt, including identification evidence from the victim and five other eyewitnesses, and the fact that none of the defendant's 21 ineffective assistance of counsel claims were sufficient enough to have led to a different outcome at trial, the defendant's convictions were upheld on appeal. Thus, an acquittal and a new trial were properly denied. Ruffin v. State, 283 Ga. 87, 656 S.E.2d 140 (2008).

Trial court properly denied the defendant a new trial because: (1) the trial court's admission of cash invoices and a jail inventory list was not improper; (2) the alleged misidentification evidence was irrelevant, given the overwhelming evidence of the defendant's positive identification; and (3) an ineffective assistance of counsel claim was abandoned, and otherwise, even if it was not abandoned, the appeals court held that the claim lacked merit. Bennett v. State, 289 Ga. App. 110, 657 S.E.2d 6 (2008).

Because: (1) the testimony of two witnesses, as well as that of the defendant, sufficiently established the element of venue; and (2) the trial court gave complete instructions on the defendant's defense of justification and self-defense, and thus, a charge on mistake of fact was not warranted, there was no reason to reverse the defendant's convictions of aggravated assault and possession of a firearm during the commission of a felony. Thus, the defendant's motion for a new trial was properly denied. Gaines v. State, 289 Ga. App. 339, 656 S.E.2d 871 (2008), cert. denied, 2008 Ga. LEXIS 379 (Ga. 2008).

In a contract dispute between a homeowner and a construction contractor hired to finish the homeowner's unfinished basement, the Court of Appeals of Georgia erred by reversing the trial court's denial of the homeowner's motion for a new trial because there was some evidence supporting the jury's finding that the contract between the parties was not so uncertain as to be unenforceable. Reebaa Constr. Co. v. Chong, 283 Ga. 222, 657 S.E.2d 826 (2008).

Despite waiving error regarding a show up identification, because: (1) a victim's identification of the defendant as one of the perpetrators of a burglary, robbery, and battery was sufficient and non-suggestive; and (2) the corroborating testimony from the defendant's two accomplices was admissible to support the defendant's convictions, as both accomplices testified as to the defendant's involvement in the crimes, those convictions were upheld on appeal; thus, new trial was properly denied. Carr v. State, 289 Ga. App. 875, 658 S.E.2d 419 (2008).

In light of the needs of the parent's two

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4. Grounds Insufficient to Warrant New Trial (Cont'd)

children, the need for a secure and stable home, and the children's physical, mental, emotional, and moral condition, the juvenile court was authorized to infer from that parent's past conduct that improvements made were insufficient to overcome reasons in support of the court's termination of parental rights order, and that this was in the best interest of the children involved; thus, that parent was properly denied a new trial. In the Interest of P.K.V.G., 289 Ga. App. 799, 658 S.E.2d 416 (2008).

While defendant made out a prima facie case of racial discrimination regarding the state's use of three peremptory strikes, sufficient race-neutral reasons existed for those strikes; thus, given the court's jury charges and recharge to the jury, the court's responses to questions from the jury, and waiver of improper bolstering objection on appeal, the defendant's aggravated assault and armed robbery convictions were upheld on appeal, as was court's denial of motion for a new trial. LeMon v. State, 290 Ga. App. 527, 660 S.E.2d 11 (2008).

Trial court did not abuse the court's discretion in denying the defendant's motion for a mistrial because an officer's hearsay statement that the defendant was a narcotics distributor was in response to a question, and there was nothing in the record to suggest that the statement was intentionally elicited by the state; other properly admitted evidence of similar transactions showed that the defendant had two prior convictions for selling crack cocaine to the same undercover agent involved in the case, essentially rendering the hearsay statement cumulative. Robertson v. State, 306 Ga. App. 721, 703 S.E.2d 343 (2010).

Trial court did not abuse the court's broad discretion in denying the defendant's motion for a mistrial because the trial court carefully considered the motion, offered to give a curative instruction, which the defendant declined, and determined that the testimony of the defendant's girlfriend was not harmful enough to warrant a mistrial. Fox v. State, 289 Ga. 34, 709 S.E.2d 202 (2011).

Trial court did not err in denying the defendant's motion for new trial, which was based upon the defendant's claim that the prosecutor's admonishment of the sole defense witness deprived the defendant of due process because the defendant did not show that the prosecutor's conduct dissuaded a defense witness from testifying or that the prosecutor induced materially less favorable testimony; the witness testified and did so in the defendant's favor, when the witness took the stand the witness did not invoke the Fifth Amendment and did not otherwise refuse to answer any question posed to the witness, and the defendant's lawyer made no attempt to show that the defense witness had made the purported prior inconsistent statement, that the cocaine at issue, in fact, had belonged to the witness, acknowledging at the new trial hearing that counsel simply had made a strategic decision not to ask the witness that question. Terry v. State, 308 Ga. App. 424, 707 S.E.2d 623 (2011).

Trial court did not abuse the court's discretion by refusing to declare a mistrial because the prosecutor's remarks during closing argument did not deprive the defendant of a fair trial since the prosecutor's remarks did not insinuate that the defendant had attempted to kill any of the officers involved in the case, but instead, the remarks related, in part, to the defendant's obviously precarious situation given the investigator's response to the investigator's encounter with the defendant, namely, drawing the investigator's gun; after being cautioned by the trial court that the wide latitude afforded counsel during closing argument was not boundless, the prosecutor did not revisit the point concerning police officers but turned to the more narrow encounter between the defendant and the victim, which gave rise to the aggravated assault count. Davis v. State, 308 Ga. App. 7, 706 S.E.2d 710 (2011).

Trial court did not err in denying the defendant's motion for mistrial on the ground that certain testimony was beyond the scope of the state's pre-trial notice because the evidence was essentially cu-

mulative of the witness's testimony that the defendant pointed a pistol at the witness, and it was highly probable that the testimony did not contribute to the verdicts given the weight of the evidence implicating the defendant; it was not clear from the witness's testimony whether the defendant's display of the defendant's pistol and the defendant's query whether the witness was "still brave" was so closely tied to the defendant's act of pointing the defendant's pistol at the witness that the notice provided sufficient particulars of the incident such that the defendant's defense could not have been harmed by the failure to provide more specific information. Pineda v. State, 288 Ga. 612, 706 S.E.2d 407 (2011).

Trial court did not err when the court denied the defendant's motion for mistrial or for new trial following the testimony of an eyewitness to the shooting because a curative instruction preserved the defendant's right to a fair trial and, along with the witness's subsequent admission that the witness had never seen the defendant dealing drugs, was sufficient to counter any alleged harm caused by the witness's comment. Rafi v. State, 289 Ga. 716, 715 S.E.2d 113 (2011).

Trial court did not err in denying the defendant's motion for mistrial because the prosecutor's opening statement, which informed the jury that although the jury could hear a claim that the defendant and the codefendant were carjacked and forced to try to elude the police, the evidence would show that there were only two occupants in the vehicle that led police on the high-speed chase, referred to a statement by the defendant and not the codefendant and did not inculpate either the defendant or the codefendant; therefore, the defendant's Sixth Amendment right to confront witnesses was not violated. Anderson v. State, 311 Ga. App. 732, 716 S.E.2d 813 (2011).

Trial court did not err in denying a patient's motion for a new trial after a jury returned a verdict in favor of a doctor in the patient's medical malpractice action because neither the doctor nor the doctor's expert attempted to establish the applicable standard of care through their personal practices in violation of a motion in limine that prohibited the parties from using the personal practices of expert witnesses to establish the applicable standard of care. Dendy v. Wells, 312 Ga. App. 309, 718 S.E.2d 140 (2011).

Trial court did not err in denying motions for mistrial due to an investigator's reference to gang signs because the defendant and the codefendant were not denied the right to a fair trial; the investigator's statement did not implicate the defendant or the codefendant in gang activity, and the trial court instructed the jurors to disregard the investigator's reference to gang signs. Hawkins v. State, 316 Ga. App. 415, 729 S.E.2d 549 (2012).

Considering the nature of the state's improper reference, the other evidence in the case, and the trial court's and counsel's actions in dealing with the impropriety, the trial court did not abuse the court's discretion by denying the defendant's motion for a mistrial; O.C.G.A. § 17-8-75 did not apply because the state did not state prejudicial facts that were not in evidence and did not inject into the case illegal elements but simply made an inadvertent reference to the nature of a hearing at which the victim's statement differed from the victim's testimony at trial. Lewis v. State, 317 Ga. App. 218, 735 S.E.2d 1 (2012).

Slides shown during prosecutor's opening argument. — Trial court did not deprive the defendant of a fair trial by failing to declare a mistrial sua sponte after the prosecutor showed the jury slides during the prosecutor's opening statement because when the defendant objected, the trial court took immediate corrective action, ordering that the slides be taken down, and the defendant did not seek additional relief in the form of a curative instruction or a mistrial; the trial court did not abuse the court's discretion in concluding that the slides were inappropriately argumentative for opening statement, and the trial court instructed the jury before opening statements and again after the close of the evidence that the prosecutor's opening statements were not evidence. Dolphy v. State, 288 Ga. 705, 707 S.E.2d 56 (2011).

Issue of witness credibility did not warrant a new trial. — Despite the

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4. Grounds Insufficient to Warrant New Trial (Cont'd)

defendant's challenge to the sufficiency of the evidence as dependent on the trustworthiness of the principal state witness, who was a recidivist drug offender, as lacking in credibility, because the appeals court did not decide issues of witness credibility, this allegation did not warrant a new trial. Head v. State, 288 Ga. App. 205, 653 S.E.2d 540 (2007).

Because: (1) the defendant was not in custody when the challenged statements to a polygraph examiner were made; (2) the intent element of simple battery or simple assault was not inconsistent with the mens rea required for a charge of aggravated assault; and (3) a sufficiency challenge posed against a conviction for involuntary manslaughter was rendered moot, as such merged with an aggravated assault conviction for the purposes of sentencing, a new trial was properly denied. Ramirez v. State, 288 Ga. App. 249, 653 S.E.2d 837 (2007).

Because: (1) the trial court did not err in denying a patient's requested charge on the exercise of the requisite skill and care required of a physician, as the charge given by the court gave a full and correct statement of the law regarding the care and skill required of a physician and the proof required to support a medical malpractice claim; and (2) no abuse of discretion resulted from the trial court's refusal to strike a challenged defense expert's testimony, as a question of fact existed as to whether the expert applied the appropriate standard, and it was up to the jury to weigh this testimony and determine if the testimony met the standard under the court's charge, the patient was properly denied a new trial. West v. Breast Care Specialists, LLC, 290 Ga. App. 521, 659 S.E.2d 895 (2008).

Defendant's new trial motion based on insufficient evidence lacked merit as the evidence was sufficient to support the defendant's convictions for aggravated assault and a weapons possession charge under O.C.G.A. §§ 16-5-21(a)(2) and 16-11-106(b)(1); issues of credibility regarding the witnesses' identification of the defendant as the shooter were within the jury's province pursuant to former O.C.G.A. § 24-9-80 (see now O.C.G.A. § 24-6-620). Williams v. State, 317 Ga. App. 248, 730 S.E.2d 726 (2012).

Nonresponsive answer by accomplice did not amount to mistrial. — Trial court did not err by denying the defendant's motion for mistrial with respect to a nonresponsive answer by an accomplice when the accomplice was asked on direct examination whether the accomplice had a conversation with the defendant about a pistol in the defendant's possession on the day of the shooting because a nonresponsive answer that impacted negatively on the defendant's character did not improperly place the defendant's character in issue; moreover, the defendant declined the trial court's offer to give a curative instruction with regard to the statement. Lewis v. State, 287 Ga. 210, 695 S.E.2d 224 (2010).

Waiver of Fourth Amendment rights due to parole status. — Trial court erred in granting the defendant's motion for a new trial, and then granting a motion to suppress the evidence seized after an automobile search, given that law enforcement had reliable information that the defendant was transporting drugs as: (1) the defendant was on parole, and that as a condition thereof, had specifically consented to a warrantless search; (2) the information received from the informant about the defendant's actions was reliable; and (3) no evidence was presented that the officers acted in bad faith or to harass the defendant. State v. Cauley, 282 Ga. App. 191, 638 S.E.2d 351 (2006), cert. denied, 2007 Ga. LEXIS 148 (Ga. 2007).

Effect on motion for new trial of vacation of prior judgment. — While sufficient evidence of the defendant's criminal intent supported both an aggravated battery and reckless conduct conviction, and the latter was vacated based on the doctrine of merger, because no other evidence was presented supporting the defendant's amended motion for a new trial, such was properly denied. Collins v. State, 283 Ga. App. 188, 641 S.E.2d 208 (2007).

Motion for new trial properly denied. — Trial court properly denied the

defendant's amended motion for a new trial, as: (1) the defendant waited too long to assert a constitutional speedy trial violation and failed to show prejudice from any delay; (2) similar transaction evidence was properly admitted; and (3) two counts of child molestation did not merge for the purposes of sentencing. Parker v. State, 283 Ga. App. 714, 642 S.E.2d 111, cert. denied, 552 U.S. 995, 128 S. Ct. 496, 169 L.Ed.2d 347 (2007).

It was not error for the trial court to deny the defendant's motion for new trial on the ground of inordinate appellate delay because the defendant provided no evidence of prejudice arising from the delay but only speculated that if a new trial were granted, some witnesses would not be available; in addition to the defendant's failure to introduce evidence regarding any such witnesses, the defendant did not advance any argument that the appeal had been hampered by the delay in any way. Pineda v. State, 288 Ga. 612, 706 S.E.2d 407 (2011).

Intent element established. — Trial court properly denied the defendant's motion for a new trial on grounds that the state failed to prove that the defendant intentionally threatened two deputies the defendant forced off the road with a car, given evidence that prior to driving directly at the deputies, the car was being used offensively toward others by forcing those individuals off the road, and thereafter, in driving toward the two deputies at 90 miles per hour, a jury could infer that the defendant intended to threaten the deputies in hopes of forcing the deputies from the road. Adams v. State, 280 Ga. App. 779, 634 S.E.2d 868 (2006).

Evidence sufficient. — Jury was entitled to find the defendant guilty of aggravated assault, charged in the indictment "with the intent to rob," based on the corroboration of the defendant's admission to going on a "lick," which meant to go find someone to rob, and that the defendant knew what a passenger was going to do when that passenger reached out of the car window in an attempt to snatch the elderly victim's purse, resulting in the victim being struck by the car and falling to the ground; hence, the trial court did not err in denying the defendant's amended motion for a new trial. Jackson v. State, 281 Ga. App. 506, 636 S.E.2d 694 (2006).

Because the defendant's admission to possessing MDMA was direct evidence supporting guilt, and the admission served as a direct connection to the contraband, the trial court did not err in denying the defendant's motion for a new trial based on the insufficiency of the evidence. Barrino v. State, 282 Ga. App. 496, 639 S.E.2d 489 (2006).

Because: (1) the evidence presented by the state against the defendant was sufficient to support the charges of armed robbery, hijacking a motor vehicle, possession of a firearm during commission of a felony, and aggravated assault with a deadly weapon; (2) separate convictions for armed robbery and hijacking a motor vehicle did not violate double jeopardy; (3) the state properly asked leading questions of the state's witness; and (4) counsel was not ineffective in failing to file a futile suppression motion, the trial court properly denied the defendant's motion for a new trial. Dumas v. State, 283 Ga. App. 279, 641 S.E.2d 271 (2007).

Because evidence existed that the defendant was present when the crimes charged were committed, and the jury could infer a shared criminal intent with that of the actual perpetrator from the defendant's conduct before and after the crimes were committed, the evidence was sufficient to authorize the defendant's convictions as a party to those crimes. Hill v. State, 281 Ga. 795, 642 S.E.2d 64 (2007).

Officer's description of the defendant's speech, behavior, bloodshot eyes, odor, performance on the field sobriety tests, and the result of the alco-sensor test, when coupled with the defendant's own testimony, were sufficient to authorize a jury to convict the defendant of driving under the influence of alcohol to the extent of being a less safe driver; thus, the trial court properly denied the defendant a new trial. Renkiewicz v. State, 283 Ga. App. 692, 642 S.E.2d 384 (2007).

Evidence was sufficient to support the defendant's convictions for armed robbery, aggravated assault with a deadly weapon, possession of a firearm during the commission of a felony, and possession of a

Application (Cont'd)
4. Grounds Insufficient to Warrant New Trial (Cont'd)

firearm by a convicted felon beyond a reasonable doubt, and the trial court properly denied the defendant's motions for directed verdict and new trial because the jury could have determined that a witness's testimony provided corroboration for the codefendant's identification of the defendant; further corroboration for the testimony of the witness and the codefendant was provided by a neighbors' description of the robbery and shooting, by the description of the codefendant's wife of the codefendant's demeanor and behavior that day, and by physical evidence found at the scene. Williamson v. State, 308 Ga. App. 473, 708 S.E.2d 57 (2011).

Jury instructions proper. — As the jury was properly instructed as to the charged offense of criminal attempt to obtain possession of a controlled substance by forgery, the defendant did not request that the word "forgery" be defined, and the defendant did not take the position that forgery was a lesser-included offense of the crime of attempting to obtain possession of a controlled substance by forgery, a new trial was properly denied; further, the term "forgery," was not so obscure or technical that the term required the court to sua sponte define the term for the jury. Sosebee v. State, 282 Ga. App. 905, 640 S.E.2d 379 (2006).

Because the jury instructions issued by the trial court were neither confusing nor misleading, and provided full and fair instruction on the issues in the case, specifically, as to the value of the stolen property the defendant possessed, the trial court did not err in denying the defendant's motion for new trial on this ground. Price v. State, 283 Ga. App. 564, 642 S.E.2d 191 (2007).

Trial counsel was not ineffective for failing to request in writing a jury instruction that excluded a statement that witnesses were presumed to speak the truth unless impeached, and the trial court did not clearly err in denying the defendant's motion for new trial on this ground. The court charged the jury that the jury could consider a number of factors, including a witness's manner of testifying, the witnesses' means and opportunity for knowing the facts to which the witnesses testified, and the probability or improbability of the witnesses' testimony. Stanford v. State, 288 Ga. App. 463, 654 S.E.2d 173 (2007), cert. denied, 2008 Ga. LEXIS 461 (Ga. 2008).

Because the trial court properly instructed the jury on the law regarding the use of prior consistent statements and on the defense of accident, the appeals court lacked any reason to reverse the defendant's aggravated battery and cruelty to children convictions; thus, the trial court properly denied the defendant's motion for a new trial. Watkins v. State, 290 Ga. App. 41, 658 S.E.2d 812 (2008).

Instruction cured reading of wrong indictment. — Because the state presented sufficient evidence showing the defendant's involvement in the sale of cocaine and the sale of cocaine within 1,000 feet of public housing project as party to the crimes, and because the judge's instruction and explanation after reading the wrong indictment to the jury at the trial cured any error, the defendant's convictions were upheld on appeal, and a mistrial based on the latter was properly denied; moreover, the defendant was properly denied a new trial. Walker v. State, 290 Ga. App. 749, 660 S.E.2d 844 (2008), cert. dismissed, 2008 Ga. LEXIS 776 (Ga. 2008).

Due process rights for chemical testing. — Trial court properly denied the defendant's amended motion for a new trial, holding that the administration of breath tests pursuant to Ga. Comp. R. & Regs. 92-3-.06(12)(b) did not violate the due process clause under both U.S. Const., amend. 5 or Ga. Const. 1983, Art. I, Sec. I, Para. I, given that: (1) the claim was raised for the first time within the new trial motion, and was thus untimely; (2) the defendant had an alternative remedy under the Georgia Administrative Procedure Act, O.C.G.A. § 50-13-1; (3) the defendant failed to show that the Division of Forensic Sciences (DFS) eliminated meaningful procedures for conducting breath tests when it promulgated the rule; and (4) the techniques and methods approved by DFS were sufficient to ensure fair and

accurate testing. Palmaka v. State, 280 Ga. App. 761, 634 S.E.2d 883 (2006).

Denial of motion to strike testimony on cross-examination as hearsay. — When a trial court overrules a motion to strike testimony on cross-examination as being hearsay because counsel had an opportunity previously to object to that testimony, had let it become evidence, and had called it to the attention of the witness, thus being the party going into the matter and allowing the opposing party to cross-examine the party with reference thereto, the admission of this evidence over a party's objection will, in no event, require the grant of a new trial when that party had substantially the same evidence admitted without objection. Hill Aircraft & Leasing Corp. v. Tyler, 161 Ga. App. 267, 291 S.E.2d 6 (1982).

No prosecutorial misconduct during closing. — Prosecutor's statements during closing argument were within the wide leeway granted to counsel to argue all reasonable inferences from the evidence pursuant to O.C.G.A. § 17-8-75(c), including that a former girlfriend whom the defendant forced to purchase a gun was fearful of the surroundings and that another girlfriend was a battered woman, such that there was no cause to grant a new trial. Varner v. State, 285 Ga. 300, 676 S.E.2d 189 (2009).

Trial court did not err in denying the defendant's motion for mistrial on the ground that the state made improper arguments in closing because the challenged comments referred to evidence in the case, which was the defendant's refusal to submit to testing and other manifestations of impairment, and, thus, were not improper under O.C.G.A. § 17-8-75; considering the strength of the state's evidence, it was highly unlikely that the prosecutor's closing argument contributed to the guilty verdict. Crusselle v. State, 303 Ga. App. 879, 694 S.E.2d 707 (2010).

Defendant was not entitled to a new trial based upon the prosecutor's misstatement of the evidence during closing arguments because the defendant did not seek a ruling on the defendant's objection nor any court action to remedy the alleged error. Williams v. State, 303 Ga. App. 222, 692 S.E.2d 820 (2010).

Trial court did not err by refusing to declare a mistrial after the prosecutor stated in the course of making an objection during the defense's closing argument that the state had never furnished the accomplice's custodial statement to another accomplice because the trial court properly noted at the time the statement was made that the jury had to consider the evidence adduced on that point, and the court had also previously instructed the jury that statements of counsel did not constitute evidence. Lewis v. State, 287 Ga. 210, 695 S.E.2d 224 (2010).

Trial court did not abuse the court's discretion in denying the codefendant's motion for new trial because when viewed in the context in which it was made the prosecutor's argument referencing magic and misdirection and request that the jury focus on the evidence did not exceed the wide latitude permitted in closing argument. Rainly v. State, 307 Ga. App. 467, 705 S.E.2d 246 (2010).

Trial court did not abuse the court's discretion in denying the defendant's motion for a mistrial on the ground that the prosecutor misled the jury during closing argument because the trial court took action sufficient to prevent the prosecutor's misstatement from misleading the jury; the prosecutor immediately restated the principle of law using the proper language, and the trial court gave complete and correct instructions to the jury. Long v. State, 307 Ga. App. 669, 705 S.E.2d 889 (2011).

Trial court did not err by denying the defendant's motion for mistrial based on the prosecutor's use of the term "confessed" during closing argument because the prosecutor's characterization of the defendant's statement to a detective was not an extraneous matter outside the facts legitimately produced during trial; the trial court instructed the jury that the evidence did not include opening and closing statements of the attorneys, and the defendant failed to show that the defendant was prejudiced or harmed by the prosecution's characterization of the statement. Arnett v. State, 311 Ga. App. 811, 717 S.E.2d 312 (2011).

Trial court did not abuse the court's discretion in denying the defendant a mis-

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trial because there was no indication that either the jury or the trial court heard the prosecutor's remark that the defendant was "swaying" during the defendant's horizontal gaze nystagmus test nor was the remark recorded; the trial court explained to the jury, both in the court's preliminary and closing instructions, that evidence consisted only of witness testimony and exhibits and that the jurors were to decide the case for themselves, based solely on the testimony heard from the witness stand and any exhibits admitted into evidence. Travis v. State, 314 Ga. App. 280, 724 S.E.2d 15 (2012).

Trial court did not err in denying the defendant's motion for mistrial on the ground that the state made improper statements to the jury during closing arguments because the state properly argued that the defendant did not rebut or explain the state's evidence; the trial court sustained the defendant's objections to the state's remarks and repeatedly instructed the jury that the burden of proof was upon the state and that the burden never shifted to the defendant. Lipscomb v. State, 315 Ga. App. 437, 727 S.E.2d 221 (2012).

Trial court was not required to declare a mistrial sua sponte because the defendant did not show that there was a manifest necessity for a mistrial; the trial court instructed the jury to disregard the prosecutor's improper statement and confirmed that the jury understood the instruction and would follow the instruction. Davenport v. State, 316 Ga. App. 234, 729 S.E.2d 442 (2012).

No prosecutorial misconduct in monitoring telephone calls. — Trial court did not err when the court denied the defendant's motion for new trial on the basis of prosecutorial misconduct because the trial court determined that while there was prosecutorial misconduct since the county district attorney's office had access to the jail's telephone monitoring system without ensuring the blockage of inmate communications with their attorneys, the court also determined that the extent of misconduct was not sufficient to warrant granting a new trial to the defendant specifically; the prosecutor assured the defendant's trial counsel that no one working on the defendant's case had listened to any of appellant's telephone calls. Kitchens v. State, 289 Ga. 242, 710 S.E.2d 551 (2011).

Claims of juror misconduct. — Because the jurors testified at the motion for new trial hearing that deliberations did not begin before the close of the evidence, and even a dismissed juror, who allegedly communicated to trial counsel's paralegal that such had occurred, denied making such a statement, the defendant was not entitled to a new trial based on juror misconduct. Meeker v. State, 282 Ga. App. 77, 637 S.E.2d 806 (2006).

Trial court properly denied the defendant a new trial because: (1) a mistrial based on an allegation of juror misconduct was unwarranted, given the lack of evidence that a dismissed juror impermissibly influenced other jurors by discussing a conversation that the dismissed juror had with the victim; and (2) the trial court dismissed the juror within minutes after the alleged inappropriate contact. Lawrence v. State, 289 Ga. App. 163, 657 S.E.2d 250 (2008).

Trial court did not abuse the court's discretion by refusing to declare a mistrial on the ground that an alternate juror made improper comments about the defendant's guilt because the record disclosed no basis upon which to conclude that the misconduct was so prejudicial as to deny the defendant due process; the trial court thoroughly questioned each individual juror under oath about what he or she had heard and whether he or she had the ability to remain fair and impartial and found that each juror could remain impartial. Gresham v. State, 303 Ga. App. 682, 695 S.E.2d 73 (2010).

Jurors as convicted felons. — Although the state notified the defendant and the trial court soon after trial that two jurors were convicted felons, because there was no evidence establishing the identity of either juror, documenting the convictions, or showing that either had not had their rights restored, the defendant's due process rights were not vio-

lated; thus, denial of a motion for new trial on this ground was proper. Jones v. State, 289 Ga. App. 767, 658 S.E.2d 386 (2008).

Conversation between victim and juror. — There was no need for a new trial when the victim, while sitting down outside the courtroom awaiting the start of the day's proceedings, was joined by a juror who sat down next to the victim and made a casual remark concerning the weather; the victim made a noncommittal response and the juror upon recognizing the victim as a witness, left the side of the witness and engaged in no further conversation. Kennedy v. State, 179 Ga. App. 587, 347 S.E.2d 604 (1986).

Juror investigated accident scene. — Trial court could not grant a new trial to plaintiff after a jury held for defendant, based on a juror's testimony that the jury foreperson personally investigated the scene of the accident; the testimony impeached the verdict which the jury had returned and the trial court had no power to receive, hear, or consider such evidence. Newson v. Foster, 261 Ga. App. 16, 581 S.E.2d 666 (2003).

Effect of waiver of objections. — Because a father waived any objections concerning the form of the verdict, the trial court did not abuse the court's discretion when the court denied a motion for new trial on claims for tortious interference and misappropriation of trade secrets asserted against the father's son. Lou Robustelli Mktg. Servs. v. Robustelli, 286 Ga. App. 816, 650 S.E.2d 326 (2007).

Ineffective assistance of counsel not found. — Trial court properly denied the defendant's motion for a new trial as defense counsel did not give ineffective assistance of counsel by failing to request a Jackson-Denno hearing as there was no basis to object to the introduction of defendant's statement to an investigator as: (1) the defendant was not under arrest at the time of the statement, nor would a reasonable person have understood that the person was under arrest; (2) there was no evidence that the officer sent to insure that the defendant did not leave the hospital before the investigator arrived had any contact with the defendant; (3) that the defendant was in pain or taking pain medication did not render defendant's statement involuntary; and (4) the defendant failed to show that the defendant was prejudiced by the failure to request the hearing. Alwin v. State, 267 Ga. App. 236, 599 S.E.2d 216 (2004).

Trial court's denial of the defendant's motion for a new trial based on ineffective assistance of counsel was not clearly erroneous as defense counsel was not ineffective in failing to preserve an objection to a slip of the tongue in the jury charge that did not mislead the jury and as the decision not to request a jury charge on alibi and mere association was a matter of trial strategy. Brantley v. State, 271 Ga. App. 733, 611 S.E.2d 71 (2005).

Trial court properly denied the defendant's motion for a new trial as defense counsel did not provide ineffective assistance of counsel in failing to preserve an objection to the denial of a motion for a mistrial; the motion was based on a deadlocked jury and it was not error to fail to preserve a claim that the jury deliberated without one member present; further, the defendant failed to show that the jury deliberated with only 11 members present, so the motion would not have been successful. Brantley v. State, 271 Ga. App. 733, 611 S.E.2d 71 (2005).

Trial court did not abuse the court's discretion in denying the defendant's motion for a new trial because counsel was not ineffective; counsel was well-prepared, filed pretrial motions, thoroughly cross-examined witnesses, preserved counsel's objections, and successfully excluded hearsay testimony and physical evidence, it was counsel's practice to advise clients of the meaning of trial as a recidivist, of the possible sentences, and of the risks of going to trial, and counsel obtained an acquittal on the greater charge of possession of cocaine with intent to distribute. Allen v. State, 272 Ga. App. 23, 611 S.E.2d 697 (2005).

Claim of improper juror contact. — Trial court properly denied the defendant's motion for a new trial because: (1) a juror alleged that an unknown person entered the jury room during deliberations and answered a question regarding an issue about which the jury was confused; (2) the juror recalled that the per-

Application (Cont'd)
4. Grounds Insufficient to Warrant New Trial (Cont'd)

son was male, but could not recall any other details, including whether or not the person was a representative of the prosecutor's office or the exact nature of the question that was supposedly answered; (3) eight other members of the jury panel and the alternate contradicted the testimony; and (4) one of the jurors not present at the new trial hearing submitted a sworn affidavit stating that the juror did not recall any person entering the jury room during deliberations. Cook v. State, 276 Ga. App. 803, 625 S.E.2d 83 (2005).

Defense strategy not to allow defendant to testify. — Defendant failed to show that counsel was deficient and that any alleged deficiency prejudiced the defense because counsel's decision not to call the defendant as a witness at a trial for malice murder was based on sound trial strategy in that counsel balanced the damage to the defendant's justification defense with the risk that defendant's criminal record would have been introduced if the defendant took the stand. Nixon v. State, 279 Ga. 164, 611 S.E.2d 9 (2005).

To facilitate becoming naturalized citizen. — It was not an abuse of discretion to deny the defendant's motion for a new trial, requested to facilitate the defendant's efforts to become a naturalized citizen because the trial court considered that the defendant's sentence for giving a false name to an officer had long since been served, that six years had passed since sentencing, and that the sentence was within the statutory guidelines for misdemeanors; claims the defendant's guilty plea was not voluntary were of no avail as the defendant failed to move to withdraw the plea or to appeal, and the times for doing so had expired. Elias v. State, 272 Ga. App. 506, 613 S.E.2d 157 (2005).

No error in finding foreign speaking defendants understood proceedings. — Trial court did not err in denying the defendants' motions for new trial on the ground that the defendants could not understand the proceedings. Defendants' claim lacked credibility because at no point during the pre-trial motions hearing or trial did the defendants object or in any way indicate that the defendants could not understand the Spanish translation of the proceedings; during the sentencing hearing, all three defendants responded affirmatively when the trial court specifically asked each of the defendants, through the Spanish interpreter, if the defendants had understood their interpreters and everything the interpreters had explained to the defendants about the trial. Cruz v. State, 305 Ga. App. 805, 700 S.E.2d 631 (2010).

Batson claim unsupported. — Because the record did not support the defendant's Batson claim, the trial court did not err in denying the defendant's motion for a new trial. Quillian v. State, 279 Ga. 698, 620 S.E.2d 376 (2005).

Because: (1) the record did not demonstrate that the defendant's sanity or competency was or should have been a significant issue at trial; and (2) the defendant failed to support an assertion that competency should have been raised, the defendant failed to prove the prejudice prong of an ineffective assistance of counsel claim due to counsel's failure to request an independent psychiatric examination. Thus, a new trial on this ground was unwarranted. Jennings v. State, 282 Ga. 679, 653 S.E.2d 17 (2007).

Services with no value to the client. — Trial court did not err in denying a former employee benefits plan administrator's motion for new trial on the ground that the jury verdict on the administrator's counterclaims were inconsistent because the verdict could be reasonably interpreted to mean that although the administrator did perform work on a client's behalf, the work had no value to the client; the client presented evidence that the administrator's software platform was of no value to the client, and there was evidence that the client had to expend funds to correct errors made by the administrator. Hewitt Assocs., LLC v. Rollins, Inc., 308 Ga. App. 848, 708 S.E.2d 697 (2011).

Divorce action. — In a divorce action, the trial court did not err in denying a wife's motion for a new trial as: (1) the

court did not err in splitting the federal income tax dependency exemption; and (2) no error resulted from establishing the schedule of physical custody between the parents, the distribution of the parties' marital property, and excepting the custody provisions from supersedeas. Frazier v. Frazier, 280 Ga. 687, 631 S.E.2d 666 (2006).

Trial court was not required to grant a new trial based on evidence that the husband and the wife lived together and engaged in sexual relations after the petition for divorce was filed and before the final judgment was entered. McCoy v. McCoy, 281 Ga. 604, 642 S.E.2d 18 (2007).

Parent surrendering parental rights not entitled to new trial. — Because a parent validly executed a written surrender of parental rights, that parent lacked any right to notice of the proceedings regarding the custody the three children involved and was no longer a "party" to those proceedings; as a result, the parent's extraordinary motion for a new trial seeking to set the custody orders entered after the surrender was accepted was properly denied. In the Interest of A.C., 283 Ga. App. 743, 642 S.E.2d 418 (2007).

No violation of bribery statute warranting new trial. — Trial court did not err in denying the defendant's motion for new trial because there was no violation of the bribery statute, O.C.G.A. § 16-10-2(a)(1), when the record contained no evidence that the state made payments or promised benefits in exchange for testimony at the defendant's trial with the purpose of influencing informants in the performance of such testimony, and it was up to the jury to weigh the evidence of the state's arrangements with the informants in assessing their credibility; the informants were offered leniency, and one of the informants was paid cash, in exchange for their assistance in drug investigations by the police, only a portion of which involved the controlled buys with the defendant, and although the parties could have contemplated that the informants would testify upon the completion of the investigation, there was no evidence that the informants were paid in exchange for their testimony. Moreland v. State, 304 Ga. App. 468, 696 S.E.2d 448 (2010).

Because the trial court's grant of a new trial stemmed from trial error, the defendant could not be retried on an offense of per se DUI, given that the defendant was adjudged not guilty of that charge based upon the insufficiency of the evidence; thus, the trial court erred in denying the plea in bar. Shah v. State, 288 Ga. App. 788, 655 S.E.2d 347 (2007).

No inconsistent verdict in criminal case. — Defendant's argument that the jury rendered an unlawful inconsistent verdict presented no basis for reversal of the defendant's convictions for armed robbery, O.C.G.A. § 16-8-41, hijacking a motor vehicle, O.C.G.A. § 16-5-44.1(b), and aggravated assault, O.C.G.A. § 16-5-21, because the appellate record did not make clear the jury's reasoning; the jury was authorized to find the defendant guilty even if the jury found that the defendant used a replica or device having the appearance of a weapon to commit armed robbery. Smith v. State, 304 Ga. App. 708, 699 S.E.2d 742 (2010), overruled on other grounds, Reed v. State, 291 Ga. 10, 727 S.E.2d 112 (2012).

Attorney fees awarded were reasonable. — Trial court did not err in denying a law firm's motion for new trial after the court awarded the firm fees under a contingency fee contract because the jury found that the reasonable fee for the work the firm performed for a former client before the firm was discharged was $20,750; the city called as witnesses the attorney who represented the city in the client's lawsuit against the city, the firm's managing partner, and the firm's remaining partner, and the client called no witnesses and introduced no evidence but argued that the firm's own evidence presented at the trial showed the firm had performed 90 to 180 hours of work on the case, and suggested that a fee of 100 hours times $200 per hour was a reasonable fee under the contract. Jones, Martin, Parriz & Tessener Law Offices, PLLC v. Westrex Corp., 310 Ga. App. 192, 712 S.E.2d 603 (2011).

Application (Cont'd)

5. Improper Subject Matter for Motion for New Trial

Order overruling motion to dismiss. — Order overruling a demurrer (now motion to dismiss) is not proper ground of motion for new trial. Dixon v. Evans, 56 Ga. App. 583, 193 S.E. 470 (1937).

Overruling of demurrer (now motion to dismiss) to dispossessory warrant was reviewable by exceptions either direct or pendente lite, but not by motion for a new trial. Hinton v. Jackson, 78 Ga. App. 62, 50 S.E.2d 254 (1948).

Rulings upon sufficiency of pleadings are not a proper subject-matter for a motion for new trial. McJenkin Ins. & Realty Co. v. Burton, 92 Ga. App. 832, 90 S.E.2d 27 (1955).

Rulings on pleadings cannot be made a ground of a motion for new trial. Davis v. Buie, 197 Ga. 835, 30 S.E.2d 861 (1944); Southeastern Air Serv., Inc. v. Carter, 78 Ga. App. 8, 50 S.E.2d 156 (1948).

Ruling of court in striking plea cannot be made ground of motion for new trial. Finance Serv. Co. v. Rich, 41 Ga. App. 831, 155 S.E. 60 (1930).

Exception to allowance of amendment allegedly changing cause of action from one on breach of express warranty to one for breach of implied warranty cannot be made in motion for new trial. Watkins v. Muse, 78 Ga. App. 17, 50 S.E.2d 90 (1948).

Objection to ruling on motion to strike amendment to defendant's answer is not proper ground of motion for new trial. Cantrell v. Kaylor, 203 Ga. 157, 45 S.E.2d 646 (1947).

Exception to denial of motion to quash indictment cannot be properly made ground of motion for new trial. Frady v. State, 212 Ga. 84, 90 S.E.2d 664 (1955).

Trial court's judgment overruling challenge to array cannot be brought into review by motion for new trial. Ivey v. State, 84 Ga. App. 72, 65 S.E.2d 282 (1951).

Objection that sentence imposed in criminal case is for any reason illegal or irregular cannot be made ground of motion for new trial. Wilson v. State, 84 Ga. App. 703, 67 S.E.2d 164 (1951).

Similar transaction witness's recantation. — Trial court did not err in refusing to grant the defendant a new trial when a similar transaction witness recanted prior claims of molestation during the hearing on the motion, as evidence of a witness's recantation merely went to impeach the witness's testimony. Chauncey v. State, 283 Ga. App. 217, 641 S.E.2d 229 (2007).

Constitutional questions cannot be raised for the first time by motion for new trial. Tucker v. City of Atlanta, 211 Ga. 157, 84 S.E.2d 362 (1954).

One who has filed a plea of guilty in a criminal case cannot move for a new trial. Welch v. State, 63 Ga. App. 277, 11 S.E.2d 42 (1940).

Motion for new trial cannot be employed to withdraw guilty plea. — Plea of guilty may, as a matter of right, be withdrawn before sentence, and after sentence judge may permit the plea to be withdrawn upon meritorious grounds, addressed to the judge's discretion, but neither before nor after sentence can a motion for new trial be employed as a means of withdrawing a plea of guilty. Welch v. State, 63 Ga. App. 277, 11 S.E.2d 42 (1940).

Objections which go to judgment only. — Movant cannot in motion for new trial properly assign error on judgment entered upon verdict. Kinsey v. Avans, 196 Ga. 428, 26 S.E.2d 787 (1943).

Objections which go to judgment only, and do not extend to verdict, cannot properly be made grounds of motion for new trial; no new trial is necessary to correct judgment or decree. If judgment or decree is erroneous or illegal, direct exception should be taken to it at proper time. Smith v. Wood, 189 Ga. 695, 7 S.E.2d 255 (1940).

Violation of rule of sequestration. — Trial court did not err by denying the codefendant's motion for mistrial when

the assistant district attorney violated the rule of sequestration because a violation of the rule went only to credibility, not admissibility, and the proper remedy was not a mistrial. Hawkins v. State, 316 Ga. App. 415, 729 S.E.2d 549 (2012).

RESEARCH REFERENCES

Am. Jur. 2d. — 58 Am. Jur. 2d, New Trial, § 13 et seq.

Am. Jur. Proof of Facts. — Ineffective Assistance of Counsel, 5 POF2d 267.

C.J.S. — 23A C.J.S., Criminal Law, § 1928 et seq. 66 C.J.S., New Trial, § 1 et seq.

ALR. — Contract between juror and party or attorney during trial of civil case as ground for new trial, 55 ALR 750; 62 ALR2d 298.

Duty of attorney to call witness or to procure or aid in procuring his attendance, 56 ALR 174.

Conduct of party in court room tending improperly to influence jury as ground for reversal or new trial, 57 ALR 62.

Incompetency, negligence, illness, or the like, of counsel, as a ground for new trial or reversal in criminal case, 64 ALR 436.

Comments by judge during examination or cross-examination of defendant in criminal trial as ground for new trial or reversal, 65 ALR 1270.

Instruction or evidence as to conspiracy where there is no charge of conspiracy in indictment or information, 66 ALR 1311.

Statement by witness after criminal trial tending to show that his testimony was perjured as ground for new trial, 74 ALR 757, 158 ALR 1062.

Counsel's appeal to racial, religious, social, or political prejudices or prejudice against corporations as ground for a new trial or reversal, 78 ALR 1438.

Right of court to instruct or to communicate with jury in civil case in absence of counsel, 84 ALR 220.

Irregularity in drawing names for a jury panel as ground of complaint by defendant in criminal prosecution, 92 ALR 1109.

Excusing qualified juror drawn in criminal case as ground of complaint by defendant, 96 ALR 508.

Knowledge by defendant or his attorney, before return of verdict in criminal case, of misconduct in connection with jury after their retirement as affecting right to new trial or reversal, 96 ALR 530.

Furnishing or reading instructions to jury, in jury room, after retirement, as error, 96 ALR 899.

Brief voluntary absence of defendant from court room during trial of criminal case as ground of error, 100 ALR 478.

Inability to perfect record for appeal as ground for new trial, 107 ALR 603.

Failure to comply with statute, constitutional provision, or court rule providing for giving instructions to jury in writing as prejudicial or reversible error, 115 ALR 1332.

Disqualifying relationship unknown to juror as ground of new trial in criminal case, 116 ALR 679.

Remedy of one convicted of crime while insane, 121 ALR 267.

Impersonation or false statement by juror as to his identity as ground for new trial, 127 ALR 717.

Statements, comments, or conduct of court or counsel regarding perjury, as ground for new trial or reversal in civil action or criminal prosecution other than for perjury, 127 ALR 1385.

Physical condition or conduct of party, his family, friends, or witnesses during trial, tending to arouse sympathy of jury, as ground for continuance or mistrial, 131 ALR 323.

Statements by a witness after criminal trial tending to show that his testimony was perjured, as ground for new trial, 158 ALR 1062.

Reversal upon appeal by, or grant of new trial to, one coparty defendant against whom judgment was rendered, as affecting judgment in favor of other coparty defendants, 166 ALR 563.

Contact or communication between juror and party or counsel during trial of civil case as ground for mistrial, new trial, or reversal, 62 ALR2d 298.

Statements of witness in civil action secured after trial, inconsistent with his testimony, as basis for new trial on ground of newly discovered evidence, 10 ALR2d 381.

Conditioning the setting aside of judgment or grant of new trial on payment of opposing attorney's fees, 21 ALR2d 863.

Prejudicial effect of argument or remark that adversary was attempting to suppress facts, 29 ALR2d 996.

Absence of judge from courtroom during criminal trial prior to time of reception of verdict, 34 ALR2d 683.

Grant of new trial on issue of liability alone, without retrial of issue of damages, 34 ALR2d 988.

New trial in criminal case because of newly discovered evidence as to sanity of prosecution witness, 49 ALR2d 1247.

Remarks or acts of trial judge criticizing, rebuking, or punishing defense counsel in criminal case, as requiring new trial or reversal, 62 ALR2d 166.

Contact or communication between juror and party or counsel during trial of civil case as ground for mistrial, new trial, or reversal, 62 ALR2d 298.

Contact or communication between juror and outsider during trial of civil case as ground for mistrial, new trial, or reversal, 64 ALR2d 158.

Propriety, and effect as double jeopardy, of court's grant of new trial on own motion in criminal case, 85 ALR2d 486.

Consent as ground of vacating judgment, or granting new trial, in civil case, after expiration of term or time prescribed by statute or rules of court, 3 ALR3d 1191.

Prejudicial effect of statement of prosecutor that if jury makes mistake in convicting it can be corrected by other authorities, 3 ALR3d 1448.

Absence of judge from courtroom during trial of civil case, 25 ALR3d 637.

Counsel's reference in criminal case to wealth, poverty, or financial status of defendant or victim as ground for mistrial, new trial, or reversal, 36 ALR3d 839.

Discussion, during jury deliberation, of possible insurance coverage as prejudicial misconduct, 47 ALR3d 1299.

Propriety and prejudicial effect of prosecutor's remarks as to victim's age, family circumstances, or the like, 50 ALR3d 8.

Counsel's appeal in civil case to self-interest or prejudice of jurors as taxpayers, as ground for mistrial, new trial, or reversal, 93 ALR3d 556.

Emotional manifestations by victim or family of victim during criminal trial as ground for reversal, new trial, or mistrial, 31 ALR4th 229.

Prejudicial effect of jury's procurement or use of book during deliberations in civil cases, 31 ALR4th 623.

Prejudicial effect of jury's procurement or use of book during deliberations in criminal cases, 35 ALR4th 626.

Communication between court officials or attendants and jurors in criminal trial as ground for mistrial or reversal — Post-Parker cases, 35 ALR4th 890.

Deafness of juror as ground for impeaching verdict, or securing new trial or reversal on appeal, 38 ALR4th 1170.

Juror's reading of newspaper account of trial in state criminal case during its progress as ground for mistrial, new trial, or reversal, 46 ALR4th 11.

Court reporter's death or disability prior to transcribing notes as grounds for reversal or new trial, 57 ALR4th 1049.

Prosecutor's appeal in criminal case to self-interest or prejudice of jurors as taxpayers as ground for reversal, new trial, or mistrial, 60 ALR4th 1063.

Modern status of sudden emergency doctrine, 10 ALR5th 680.

Prejudicial effect of statement by prosecutor that verdict, recommendation of punishment, or other finding by jury is subject to review or correction by other authorities, 10 ALR5th 700.

Prejudicial effect, in civil case, of communications between court officials or attendants and jurors, 31 ALR5th 572.

Excessiveness or adequacy of damages awarded for injuries causing mental or psychological damage, 52 ALR 5th 1.

Nature and determination of prejudice caused by remarks or acts of state trial judge criticizing, rebuking, or punishing defense counsel in criminal case as requiring new trial or reversal — Individualized determinations, 104 ALR5th 357.

ARTICLE 3

PROCEDURE

Cross references. — Disqualification of judge from presiding over new trial if judge expresses approval or disapproval of jury verdict, § 9-10-8. Joining of motion for new trial with motion for directed verdict, §§ 9-11-50, 17-9-22.

JUDICIAL DECISIONS

Single motion for new trial improper when different judgments entered as to parties tried together. — In suit between different parties tried together wherein different verdicts and judgments were entered, it is not proper for single motion for new trial to be filed in name of both plaintiffs. Allen v. Woods, 44 Ga. App. 430, 161 S.E. 655 (1931) (decided under former Code 1933, § 70-301).

RESEARCH REFERENCES

ALR. — Inability to perfect record for appeal as ground for new trial, 16 ALR 1158; 107 ALR 603.

Motion for new trial as suspension or stay of execution or judgment, 121 ALR 686.

Right of trial court to grant new trial as affected by appellate proceedings, 139 ALR 340.

Propriety of limiting to issue of damages alone new trial granted on ground of inadequacy of damages awarded, 29 ALR2d 1199.

Propriety of increased punishment on new trial for same offense, 12 ALR3d 978.

Propriety of limiting to issue of damages alone new trial granted on ground of inadequacy of damages—modern cases, 5 ALR5th 875.

5-5-40. Time of motion for new trial generally; amendments; extension of time for filing transcript; time of hearing; priority to cases in which death penalty imposed; appeal not limited to grounds urged; new trial on court's own motion.

(a) All motions for new trial, except in extraordinary cases, shall be made within 30 days of the entry of the judgment on the verdict or entry of the judgment where the case was tried without a jury.

(b) The motion may be amended any time on or before the ruling thereon.

(c) Where the grounds of the motion require consideration of the transcript of evidence or proceedings, the court may in its discretion grant an extension of time, except in cases where the death penalty is imposed, for the preparation and filing of the transcript, which may be done any time on or before the hearing; or the court may in its discretion hear and determine the motion before the transcript of evidence and proceedings is prepared and filed.

(d) The grounds of the motion need not be approved by the court.

(e) The motion may be heard at any time; but, where it is not heard at the time specified in the order, it shall stand for hearing at such time as the court by order at any time may prescribe, unless sooner disposed of.

(f) Motions for new trial in cases in which the death penalty is imposed shall be given priority.

(g) On appeal, a party shall not be limited to the grounds urged in the motion or any amendment thereof.

(h) The court also shall be empowered to grant a new trial on its own motion within 30 days from entry of the judgment, except in criminal cases where the defendant was acquitted. (Orig. Code 1863, § 3643; Code 1868, § 3668; Code 1873, § 3719; Code 1882, § 3719; Ga. L. 1889, p. 83, § 1; Civil Code 1895, § 5484; Penal Code 1895, § 1063; Civil Code 1910, § 6089; Penal Code 1910, § 1090; Code 1933, § 70-301; Ga. L. 1965, p. 18, § 16; Ga. L. 1973, p. 159, § 5.)

Cross references. — Death penalty generally, § 17-10-30 et seq.

Law reviews. — For article outlining proposed revisions of appellate procedure rules with comments, prior to the adoption of the Appellate Practice Act, see 19 Ga. B.J. 145 (1956). For article, "A Discussion of the 1957 Amendments to Rules of Practice and Procedure in Georgia," see 19 Ga. B.J. 395 (1957). For article discussing results of legislative changes in appellate procedure, prior to the enactment of the Appellate Practice Act, see 20 Ga. B.J. 38 (1957). For article discussing the preparation of an amended motion for new trial and facts concerning appellate practice in general, prior to the adoption of the Appellate Practice Act, see 21 Ga. B.J. 424 (1959). For article, "The Appellate Procedure Act of 1965," see 1 Ga. St. B.J. 451 (1965). For article, "1966 Amendments to the Appellate Procedure Act of 1965," see 2 Ga. St. B.J. 433 (1966). For annual survey of law of domestic relations, see 38 Mercer L. Rev. 179 (1986). For survey of 1995 Eleventh Circuit cases on trial practice and procedure, see 47 Mercer L. Rev. 907 (1996). For annual survey of trial practice and procedure, see 58 Mercer L. Rev. 405 (2006).

For note, "Ineffective Assistance of Counsel Blues: Navigating the Muddy Waters of Georgia Law After 2010 State Supreme Court Decisions," see 45 Ga. L. Rev. 1199 (2011). For note, "Seen But Not Heard: An Argument for Granting Evidentiary Hearings to Weigh the Credibility of Recanted Testimony," see 46 Ga. L. Rev. 213 (2011).

JUDICIAL DECISIONS

Analysis

General Consideration
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Motion
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Application

General Consideration

Section clearly imports that movant for new trial is entitled to hearing. Shockley v. State, 230 Ga. 869, 199 S.E.2d 791 (1973).

Motion for new trial made more than 30 days after entry of judgment is an "extraordinary" motion. Dyal v. State, 121 Ga. App. 50, 172 S.E.2d 326 (1970).

Extraordinary motions are authorized indirectly by O.C.G.A. §§ 5-5-40 and 5-5-41. Dick v. State, 248 Ga. 898, 287 S.E.2d 11 (1982).

Hearing on motion required. — Under O.C.G.A. §§ 5-5-40 and 5-5-41, the trial court is required to hold a hearing on a motion for new trial. Dick v. State, 248 Ga. 898, 287 S.E.2d 11 (1982).

Distinguished from motion for mistrial. — Trial court's grant of a defendant's motion for a mistrial over two months after a guilty verdict had been returned was void as a mistrial could not be entered after the verdict was returned; motions for mistrial were not to be confused with motions for a new trial, which were appropriate after the verdict was returned, and Ga. Const. 1983, Art. I, Sec. I, Para. XVIII, provided for double jeopardy protection except when a new trial had been granted after the conviction or in the case of a mistrial. State v. Sumlin, 281 Ga. 183, 637 S.E.2d 36 (2006).

Date for hearing on motion for new trial. — When the date for the hearing on a motion for new trial is left blank, the time of the hearing is "indefinite" and the hearing may be heard at any succeeding term. Whitton v. State, 174 Ga. App. 634, 331 S.E.2d 10 (1985).

No law requires that motion for new trial be set down for a hearing. McClure v. State, 163 Ga. App. 236, 293 S.E.2d 496 (1982).

There is no law that a motion cannot be summarily heard instanter. McClure v. State, 163 Ga. App. 236, 293 S.E.2d 496 (1982).

Trial court did not err in hearing motion for new trial immediately after the motion was filed and prior to preparation of transcript and proceedings since the evidence at trial was fresh in the court's memory at that particular point in time. McClure v. State, 163 Ga. App. 236, 293 S.E.2d 496 (1982).

No hearing as to extraordinary motion showing no merit. — Extraordinary motion for new trial which fails to show any merit may be denied without the necessity of a hearing. Dick v. State, 248 Ga. 898, 287 S.E.2d 11 (1982).

Summary denial when movant fails to follow procedure. — Due process and equal protection rights are not violated by a trial court's summary denial of a movant's extraordinary motion for new trial when the movant fails to comply with the procedural requirements of state law. Dick v. State, 248 Ga. 898, 287 S.E.2d 11 (1982).

Continuance properly denied. — When defense counsel had approximately four months to prepare for the hearing on the defendant's motion for new trial and during this time, counsel had access to the entire trial transcript and all matters of record filed with the superior court clerk's office, even though the defendant's counsel may not have had access to the transcripts of the pre-trial hearings, counsel did have ample time to consult with counsel's client, study the evidence presented at trial, and review all of defendant's written pre-trial motions, so the trial court did not abuse the court's discretion in denying the defendant's motion to continue. Isbell v. State, 179 Ga. App. 363, 346 S.E.2d 857 (1986), cert. denied, 479 U.S. 1098, 107 S. Ct. 1319, 94 L. Ed. 2d 172 (1987).

Cited in Mobley v. State, 221 Ga. 716, 146 S.E.2d 735 (1966); Munday v. Brissette, 113 Ga. App. 147, 148 S.E.2d 55, rev'd on other grounds, 222 Ga. 162, 149 S.E.2d 110 (1966); Cloer v. Vulcan Elec. Co., 113 Ga. App. 766, 149 S.E.2d 722 (1966); White Oak Acres, Inc. v. Campbell, 113 Ga. App. 833, 149 S.E.2d 870 (1966); Wright v. Wright, 222 Ga. 777, 152 S.E.2d 363 (1966); McRae v. State, 116 Ga. App. 407, 157 S.E.2d 646 (1967); A.M. Kidder & Co. v. Clement A. Evans & Co., 117 Ga. App. 346, 160 S.E.2d 869 (1968); Gibson Prods. Co. v. Addison, 120 Ga. App. 37, 169 S.E.2d 374 (1969); Whiteway Laundry & Dry Cleaners, Inc. v. Childs, 126 Ga. App. 617, 191 S.E.2d 454 (1972); Berman v. Berman, 231 Ga. 216, 200

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S.E.2d 870 (1973); Lenny v. Lenny, 235 Ga. 358, 220 S.E.2d 1 (1975); Barfield v. McEntyre, 136 Ga. App. 294, 221 S.E.2d 58 (1975); Peyton v. Peyton, 236 Ga. 119, 223 S.E.2d 96 (1976); Adair v. Adair, 236 Ga. 443, 224 S.E.2d 21 (1976); Davis v. Davis, 139 Ga. App. 599, 229 S.E.2d 81 (1976); Watts v. Six Flags Over Ga., Inc., 140 Ga. App. 106, 230 S.E.2d 34 (1976); Venable v. Block, 141 Ga. App. 523, 233 S.E.2d 878 (1977); Williams v. State, 144 Ga. App. 42, 240 S.E.2d 311 (1977); Martin v. State, 240 Ga. 488, 241 S.E.2d 246 (1978); Shoemaker v. Department of Transp., 240 Ga. 573, 241 S.E.2d 820 (1978); Stone v. State, 144 Ga. App. 843, 242 S.E.2d 749 (1978); Norman v. Allen, 148 Ga. App. 66, 251 S.E.2d 20 (1978); Mayo v. State, 148 Ga. App. 213, 251 S.E.2d 80 (1978); Parker v. State, 151 Ga. App. 139, 259 S.E.2d 145 (1979); Baxter v. Weiner, 246 Ga. 28, 268 S.E.2d 619 (1980); Bennett v. Caton, 154 Ga. App. 515, 268 S.E.2d 786 (1980); Randall & Blakely, Inc. v. Krantz, 155 Ga. App. 238, 270 S.E.2d 265 (1980); Herring v. Herring, 246 Ga. 462, 271 S.E.2d 857 (1980); Glennville Wood Preserving Co. v. Riddlespur, 156 Ga. App. 578, 276 S.E.2d 248 (1980); Grant v. State, 159 Ga. App. 2, 282 S.E.2d 668 (1981); Gates Rental, Inc. v. Perry, 164 Ga. App. 297, 297 S.E.2d 79 (1982); Hack v. State, 168 Ga. App. 927, 311 S.E.2d 211 (1983); Levitt v. State, 170 Ga. App. 32, 316 S.E.2d 6 (1984); Batson v. First Nat'l Bank, 170 Ga. App. 803, 318 S.E.2d 227 (1984); Neese v. Long, 178 Ga. App. 105, 341 S.E.2d 861 (1986); Appling v. State, 256 Ga. 36, 343 S.E.2d 684 (1986); Williams v. State, 178 Ga. App. 581, 344 S.E.2d 247 (1986); Gaskins v. State, 181 Ga. App. 849, 354 S.E.2d 27 (1987); Williamson v. State, 182 Ga. App. 49, 354 S.E.2d 868 (1987); Cunningham v. State, 182 Ga. App. 266, 355 S.E.2d 762 (1987); Louis v. State, 185 Ga. App. 472, 364 S.E.2d 607 (1988); Shirley v. State, 188 Ga. App. 357, 373 S.E.2d 257 (1988); Lane v. Taylor, 193 Ga. App. 777, 389 S.E.2d 26 (1989); United States Fid. & Guar. Co. v. State Farm Mut. Auto. Ins. Co., 195 Ga. App. 14, 392 S.E.2d 574 (1990); O'Kelly v. State, 196 Ga. App. 860, 397 S.E.2d 197 (1990); Walker v. State, 197 Ga. App. 265, 398 S.E.2d 217 (1990); Riggins v. State, 197 Ga. App. 612, 399 S.E.2d 96 (1990); Burke v. State, 201 Ga. App. 50, 410 S.E.2d 164 (1991); Trinity v. Applebee's Neighborhood Grill & Bar, 201 Ga. App. 404, 411 S.E.2d 131 (1991); Bean v. Landers, 215 Ga. App. 366, 450 S.E.2d 699 (1994); Andrews v. Rentz, 266 Ga. 782, 470 S.E.2d 669 (1996); Eisele v. State, 238 Ga. App. 289, 519 S.E.2d 9 (1999); Thomas v. Wiley, 240 Ga. App. 135, 522 S.E.2d 714 (1999); Washington v. State, 276 Ga. 655, 581 S.E.2d 518 (2003); Merritt v. State, 288 Ga. App. 89, 653 S.E.2d 368 (2007); State v. Jones, 284 Ga. 302, 667 S.E.2d 76 (2008).

Transcript

Transcript not required when alleged error stems from pleadings. — When error relied upon in motion for new trial is one that appears from pleadings no transcript or brief of evidence is required. Hill v. General Rediscount Corp., 116 Ga. App. 459, 157 S.E.2d 888 (1967).

Where evidence is familiar, court may hear motion without transcript. — In court's discretion, if court is familiar with evidence, motion may be heard and if proper granted, although transcript is not physically available at time. Castile v. Rich's, Inc., 131 Ga. App. 586, 206 S.E.2d 851 (1974).

No brief is required in connection with motion to set judgment aside since that goes to defects not amendable which appear on face of record or pleadings. Hill v. General Rediscount Corp., 116 Ga. App. 459, 157 S.E.2d 888 (1967).

Within discretion of trial judge to set time for filing of transcript of evidence. There is nothing in the statute to indicate that the judge must state the judge's reasons for granting whatever length of time the judge determines is necessary for filing of transcript. The judge knows the volume of litigation in his court, and must be assumed to know whether court reporter is promptly and efficiently discharging his or her duties. Diamond v. Liberty Nat'l Bank & Trust Co., 228 Ga. 533, 186 S.E.2d 741 (1972).

Movant's failure to make reasonable effort to secure transcript. — When it appears that transcript of evidence, or lawful substitute therefor is essential to consideration of grounds of motion for judgment n.o.v. or for new trial and neither was produced at time of hearing on motion, and judge found as a fact that movants had not made a reasonable effort to secure it, proper direction to give matter is to dismiss motion. Miller v. Sparks, 124 Ga. App. 4, 183 S.E.2d 88 (1971).

When the defendants' motion for a new trial was dismissed not because the court reporter took longer than planned to prepare the transcript, but because the defendants failed to either seek and obtain an extension of time for filing the transcript or ensure the transcript was filed there was no abuse of discretion by the court. Myers v. Myers, 195 Ga. App. 529, 394 S.E.2d 374 (1990).

Trial court has discretion to set the time for filing of the transcript of the evidence, and dismissal of a motion for new trial is appropriate when the transcript is necessary to consideration of the motion, and the movant has made no reasonable effort to secure it. Moore v. Sinclair, 196 Ga. App. 667, 396 S.E.2d 557 (1990).

Because the defendant failed to obtain a transcript of the trial proceedings within a reasonable time, the trial court properly dismissed the defendant's motion for a new trial without holding a hearing pursuant to O.C.G.A. § 5-5-40, as the defendant failed to offer a justification or excuse for the delay in securing the transcript; defendant had filed the motion and was initially granted a continuance by the trial court in order to allow the defendant to pay the court reporter for the transcript, but the defendant failed to secure the transcript one and one-half months later, whereupon the state filed the state's dismissal motion. Menefee v. State, 271 Ga. App. 364, 609 S.E.2d 714 (2005).

Duty upon court reporter not upon litigant. — There is no duty on litigant to take recordings of evidence from reporter and have the recordings transcribed by typists employed by the litigant. In fact, such practice cannot be allowed. Reporter has a duty to give a correct report of proceedings on trial, and must certify to correctness of such transcript under Ga. L. 1965, p. 18, § 10 (see O.C.G.A. § 5-6-41(e)). Diamond v. Liberty Nat'l Bank & Trust Co., 228 Ga. 533, 186 S.E.2d 741 (1972).

Motion

1. In General

Application for new trial is made only by filing motion for new trial. Smith v. Forrester, 145 Ga. App. 281, 243 S.E.2d 575, cert. denied, 439 U.S. 863, 99 S. Ct. 185, 58 L. Ed. 2d 172 (1978).

Proper, timely filing of notice of appeal is absolute requirement to confer jurisdiction upon appellate court. Smith v. Forrester, 145 Ga. App. 281, 243 S.E.2d 575, cert. denied, 439 U.S. 863, 99 S. Ct. 185, 58 L. Ed. 2d 172 (1978).

Place of filing. — When paper is required to be filed, without more, this means filing in clerk's office. Dukes v. Ralston Purina Co., 127 Ga. App. 696, 194 S.E.2d 630 (1972).

Merely sending motion to judge does not constitute making application within meaning of section. Smith v. Forrester, 145 Ga. App. 281, 243 S.E.2d 575, cert. denied, 439 U.S. 863, 99 S. Ct. 185, 58 L. Ed. 2d 172 (1978).

Although there is a right to a hearing on a motion for new trial upon a timely request, the court is not required to hold a hearing on a motion for new trial which fails to show any merit and which is made more than 30 days after the entry of judgment. Wright v. Barnes, 240 Ga. App. 684, 524 S.E.2d 758 (1999).

Strict pleading is required in extraordinary motions for new trial in order to postpone indefinitely the execution of the sentence and allow the judge to whom it is presented to ascertain readily if a new trial is warranted based on newly discovered evidence. Dick v. State, 248 Ga. 898, 287 S.E.2d 11 (1982).

Failure to state facts sufficient for grant of motion. — When the pleadings in an extraordinary motion for new trial in a criminal case do not contain a statement of facts sufficient to authorize that the motion be granted, if the facts developed at the hearing warrant such relief, it

Motion (Cont'd)
1. In General (Cont'd)

is not error for the trial court to refuse to conduct a hearing on the extraordinary motion. Dick v. State, 248 Ga. 898, 287 S.E.2d 11 (1982).

Delay in ruling on motion. — Trial court did not err in not vacating defendant's sentence merely because approximately two years passed between the jury verdict and the time the trial court overruled defendant's motion for new trial. Lowry v. State, 171 Ga. App. 118, 318 S.E.2d 744 (1984).

Court's own motion. — Trial court's order for a new trial made within 30 days of the entry of a judgment is valid under subsection (h) of O.C.G.A. § 5-5-40 notwithstanding a reference to a prematurely filed motion for a new trial made by one of the parties. Central of Ga. R.R. v. Hearn, 188 Ga. App. 277, 372 S.E.2d 834 (1988).

Post notice of appeal. — Trial court may, on the court's own motion, grant a new trial as provided in subsection (h) of O.C.G.A. § 5-5-40 within the time in which a motion for new trial may be filed even though a notice of appeal has been filed. Griffin v. Loper, 209 Ga. App. 504, 433 S.E.2d 653 (1993).

Concurrent pendency of appeal and new trial motion. — When party who filed appeal subsequently makes a motion for a new trial, pendency of new trial motion does not divest appellate court of jurisdiction to hear appeal. Atkinson v. State, 170 Ga. App. 260, 316 S.E.2d 592 (1984).

Notice of appeal divests the trial court of jurisdiction to hear motions for new trial or to grant a new trial on the court's own motion after the period in which a motion for new trial may be filed in accordance with O.C.G.A. § 5-5-40. Elrod v. State, 222 Ga. App. 704, 475 S.E.2d 710 (1996).

Filing requirement waived. — Although no motion for new trial was filed, the lack of any opportunity for a hearing before the trial court required remanding the case for an evidentiary hearing on the issue of the asserted ineffectiveness of defendant's trial counsel. Brady v. State, 207 Ga. App. 451, 428 S.E.2d 373 (1993).

Motion for new trial is indispensable means for testing sufficiency of evidence. — When case has been tried by jury and verdict rendered therein, and losing party desires to test sufficiency of evidence to support verdict, motion for new trial is indispensable. Nuckolls v. Jordan, 49 Ga. App. 79, 174 S.E. 250 (1934) (decided under former Code 1933, § 70-301, as it read prior to its repeal and reenactment by Ga. L. 1965, p. 18, § 16).

New trial is peculiar and appropriate remedy when losing party desires reexamination of facts. Durrence v. Cowart, 160 Ga. 671, 129 S.E. 26 (1925) (decided under former Civil Code 1910, § 6089).

Former Code 1873, § 3719 (see O.C.G.A. § 5-5-40) deals with ordinary motions only, leaving others to be treated under former Code 1873, § 6092 (see O.C.G.A. § 5-5-41). Brinkley v. Buchanan, 55 Ga. 342 (1875) (decided under former Code 1873, § 3719).

Word "made" as used in section is synonymous with "filed." Hilt v. Young, 116 Ga. 708, 43 S.E. 76 (1902) (decided under former Civil Code 1895, § 5484); Peavy v. Peavy, 167 Ga. 219, 145 S.E. 55 (1928) (decided under former Civil Code 1910, § 6089).

Certain motions to set aside judgment are treated as motions for new trial. — Motions to set aside judgment based on matters not appearing on face of record are governed by same rules of practice as motions for new trials. Perry v. Maryland Cas. Co., 102 Ga. App. 475, 116 S.E.2d 620 (1960) (decided under former Code 1933, § 70-301, as it read prior to its repeal and reenactment by Ga. L. 1965, p. 18, § 16).

Motion for new trial must be filed with clerk of trial court. Hilt v. Young, 116 Ga. 708, 43 S.E. 76 (1902) (decided under former Civil Code 1895, § 5484).

Leaving motion in office of judge, under care of special bailiff, does not constitute filing. New England Mtg. Sec. Co. v. Collins, 115 Ga. 104, 41 S.E. 270 (1902) (decided under former Civil Code 1895, § 5484).

Special ground in motion for new trial must be complete within itself. — Grounds of motions for new trial not

sufficiently complete within themselves, will not be passed upon. Gibson v. State, 77 Ga. App. 292, 48 S.E.2d 309 (1948) (decided under former Code 1933, § 70-301, as it read prior to its repeal and reenactment by Ga. L. 1965, p. 18, § 16).

Special grounds of motion for new trial must be complete and understandable within themselves without necessity of reference to other special grounds of motion, brief of evidence, or other parts of record to understand them. Stanley v. Chitwood, 87 Ga. App. 38, 73 S.E.2d 40 (1952) (decided under former Code 1933, § 70-301, as it read prior to its repeal and reenactment by Ga. L. 1965, p. 18, § 16); Fillingham v. Campbell, 87 Ga. App. 481, 74 S.E.2d 392 (1953); Hartsfield v. Hartsfield, 87 Ga. App. 707, 75 S.E.2d 276 (1953) (decided under former Code 1933, § 70-301, as it read prior to its repeal and reenactment by Ga. L. 1965, p. 18, § 16).

Ground of motion requiring reference to other grounds or portions of record. — Ground of motion for new trial which requires reference to other grounds of motion or to portions of record for understanding thereof or to enable court to ascertain whether error alleged was in fact error is too incomplete to be considered. Sutton v. Allen, 87 Ga. App. 25, 72 S.E.2d 921 (1952) (decided under former Code 1933, § 70-301, as it read prior to its repeal and reenactment by Ga. L. 1965, p. 18, § 16).

Special grounds of amended motion for new trial which are incomplete within themselves, in that they require reference to record, fail to set up substance of testimony and documentary evidence objected to or fact of timely objection and grounds of objection urged, will not be passed upon by Court of Appeals. Allison v. State, 84 Ga. App. 77, 65 S.E.2d 642 (1951) (decided under former Code 1933, § 70-301, as it read prior to its repeal and reenactment by Ga. L. 1965, p. 18, § 16).

Reference in one special ground to brief of evidence for facts necessary to understand errors assigned is not permitted, and ground not complete and understandable within itself will not be passed upon by Court of Appeals. Robertson v. Robertson, 90 Ga. App. 576, 83 S.E.2d 619 (1954) (decided under former Code 1933, § 70-301, as it read prior to its repeal and reenactment by Ga. L. 1965, p. 18, § 16).

When nonparty files motion in own name, name of real party cannot thereafter be substituted. — When one not party to case files a motion for a new trial in that party's own name, a motion cannot thereafter be amended so as to substitute the name of the real party to the case as the movant. Athens Truck & Tractor Co. v. Kennedy, 91 Ga. App. 49, 84 S.E.2d 608 (1954) (decided under former Code 1933, § 70-301, as it read prior to its repeal and reenactment by Ga. L. 1965, p. 18, § 16).

Suits tried together, with different verdicts rendered. — In suit between different parties tried together wherein different verdicts and judgments were entered, it is not proper for single motion for new trial to be filed in name of both plaintiffs. Allen v. Woods, 44 Ga. App. 430, 161 S.E. 655 (1931) (decided under former Civil Code 1910, § 6089).

Second motion not authorized when first motion complaining of same verdict is pending. — When motion for new trial is pending in superior court, there is no provision of law authorizing the movant to file a second separate original motion for new trial complaining of the same verdict. Perry v. Harper, 190 Ga. 235, 9 S.E.2d 162 (1940) (decided under former Code 1933, § 70-301, as it read prior to its repeal and reenactment by Ga. L. 1965, p. 18, § 16).

When motion for new trial permitted notwithstanding verdict has not been received or recorded. — Accused having procured decision that verdict which trial judge refused to receive was valid verdict and final determination of case, effect was that motion for new trial could have been filed, notwithstanding verdict had not been received and recorded. It was not error to refuse to entertain motion for new trial made a year after rendition of verdict. Register v. State, 12 Ga. App. 688, 78 S.E. 142 (1913) (decided under former Penal Code 1910, § 6089).

2. Time for Filing

Applications for new trial must be filed within 30 days from entry of judg-

Motion (Cont'd)
2. Time for Filing (Cont'd)

ment on verdict. Joiner v. Perkerson, 160 Ga. App. 343, 287 S.E.2d 327 (1981).

Trial court erred in denying the landlord's motion for a new trial as the landlord filed the motion within 30 days of the dismissal of the complaint, O.C.G.A. § 5-5-40(a). SBP Mgmt., LLC v. Price, 277 Ga. App. 130, 625 S.E.2d 523 (2006).

From entry of sentence upon convicted defendant. — When trial court entered an order on August 29, 1985, the day the jury returned the jury's verdicts, in which order the court "considered, ordered, and adjudged that the defendant is guilty," but sentence was entered on October 21, 1985, and the defendant filed a motion for new trial ten days later, it was held that the entry of sentence upon a convicted defendant is necessary for a final judgment, from which an appeal may be taken, to be entered, and inasmuch as the defendant's motion for new trial was filed within 30 days after the defendant's sentence was entered, it was timely and extended the time within which the defendant had to file the defendant's appeal to the Court of Appeals. Howard v. State, 182 Ga. App. 403, 355 S.E.2d 772 (1987).

Burden is upon party desiring to take appeal to timely file motion. — Burden is upon party desiring to take appeal to file the party's motion for new trial or notice of appeal within the required 30-day period; a party does not satisfy this burden by receiving assurances of the clerk or by conferring with the clerk as to the speed of postal delivery. H.R. Lee Inv. Corp. v. Groover, 138 Ga. App. 231, 225 S.E.2d 742 (1976).

Good reason must be shown for failure to file motion within prescribed time. — In any case when motion for new trial is made more than 30 days after entry of judgment on verdict, some good reason must be shown why motion was not made within time allowed by law. Brawner v. Wilkins, 114 Ga. App. 263, 150 S.E.2d 721 (1966).

Date of entry of filing by clerk is presumed correct until rebutted. — Entry of filing by clerk is best evidence of date of filing and is presumed to be correct until contrary is shown. This presumption may be rebutted, however, by proof of delivery for filing to clerk on different day. H.R. Lee Inv. Corp. v. Groover, 138 Ga. App. 231, 225 S.E.2d 742 (1976).

Filing after time prescribed does not toll time for filing notice of appeal. — When purported motion for new trial was not filed within 30 days as required by former Code 1933, § 70-301 (see O.C.G.A. § 5-5-40), it was void and of no effect, and therefore did not toll time for filing notice of appeal under Ga. L. 1968, p. 1072, § 7 (see O.C.G.A. § 5-6-38). Johnson v. State, 227 Ga. 219, 180 S.E.2d 94 (1971).

Untimely motion for new trial is void and does not operate to toll the time for filing of the notice of appeal. Wright v. Rhodes, 198 Ga. App. 269, 401 S.E.2d 35 (1990).

Motion for new trial that was not filed within 30 days as required by O.C.G.A. § 5-5-40 was void, had no effect and did not toll the time for filing a notice of appeal under O.C.G.A. § 5-6-38. Peters v. State, 237 Ga. App. 625, 516 S.E.2d 331 (1999).

Invitation by court, before verdict returned, to file motion. — When, at the close of the defendant's evidence, the court volunteered that in the court's opinion there was a fatal variance between the allegata and probata on the criminal trespass charge and that if the jury returned a verdict of guilty, the court would either "set that judgment aside" or "grant a motion for new trial instantly" if defendant requested one on that basis and, immediately following return of the verdicts, the court stated that it was granting "a new trial" on the criminal trespass charge, the court effectively acquitted the defendant. Even if the order had been a proper grant of a new trial, it would not have been appealable by the state, as it was not encompassed in O.C.G.A. § 5-7-1. State v. Seignious, 197 Ga. App. 766, 399 S.E.2d 559 (1990).

Motion for new trial filed before judgment is entered, is premature and invalid. Fact that the trial judge announced orally that the judge would grant the motion for new trial is no judgment. Moore v. Moore, 229 Ga. 600, 193 S.E.2d 608 (1972).

Motion for new trial made before judgment is entered is premature and not timely filed. Deroller v. Powell, 144 Ga. App. 585, 241 S.E.2d 469 (1978).

Because the defendant's motion for new trial was filed prior to the entry of the judgment on the verdict, the motion was premature and invalid, and although the defendant subsequently filed an amended motion for new trial, no amendment could be filed to such void motion; if the court of appeals considered the defendant's amendment to the motion as a motion for new trial, that motion was filed long after the time allowed for filing the motion. Gomez-Oliva v. State, 312 Ga. App. 105, 717 S.E.2d 689 (2011).

Motion for new trial filed prior to entry of judgment is void. Joiner v. Perkerson, 160 Ga. App. 343, 287 S.E.2d 327 (1981).

After appeal. — When motion for new trial was filed after case was on appeal, any attempted action by trial court was a nullity. Jinks v. State, 163 Ga. App. 841, 296 S.E.2d 624 (1982).

Lower court may not grant new trial after appellate review. — When judgment was entered for the plaintiff, who then filed a notice of appeal, and the defendant then filed a cross appeal as well as a motion for new trial in the trial court, and the Court of Appeals then affirmed the trial court's judgment, the trial court could not reassert the court's jurisdiction and grant a new trial to the defendant. Housing Auth. v. Van Geeter, 252 Ga. 196, 312 S.E.2d 309 (1984).

After the Court of Appeals affirmed a lower court verdict and reversed the grant of a new trial by that court, a subsequent granting of a new trial by the lower court was error. Sharif v. Tidwell Homes, Inc., 252 Ga. 205, 312 S.E.2d 114 (1984).

Extending time to file notice of appeal. — Timely notice of appeal must be filed after obtaining a proper written order from the trial court, however, the trial court cannot enter an order purporting to extend the time to file until a notice of appeal has been filed. Watson v. State, 202 Ga. App. 667, 415 S.E.2d 306 (1992).

Motion for new trial may be made on same day as rendition of verdict. Durrence v. Cowart, 160 Ga. 671, 129 S.E. 26 (1925) (decided under former Civil Code 1910, § 6089).

Good reason must be shown to justify filing motion after time prescribed. — Motion for new trial made after time permitted by section may not be entertained unless some good reason be shown why motion was not made within time required, which reason shall be judged on by court. Union Life Ins. Co. v. Aaronson, 109 Ga. App. 384, 136 S.E.2d 142 (1964) (decided under former Code 1933, § 70-301, as it read prior to its repeal and reenactment by Ga. L. 1965, p. 18, § 16.).

Motion for new trial alleging ineffective assistance of trial counsel was raised at earliest practicable moment and not procedurally barred. — Because defendant's trial counsel filed a motion for new trial after the jury verdict was rendered, which motion was denied, and thereafter, appellate counsel was appointed for defendant and a notice of appeal was filed which raised the claim of ineffective assistance of trial counsel, that issue was not procedurally barred, as appellate counsel raised the issue at the earliest practicable moment; a second new trial motion was not required once appellate counsel was appointed, and the ruling had been made on the first motion for new trial prior to appellate counsel having been appointed, pursuant to O.C.G.A. § 5-5-40(b). Haggard v. State, 273 Ga. App. 295, 614 S.E.2d 903 (2005).

Defendant procedurally barred from raising ineffective assistance of counsel claim. — In a criminal case, because appellate counsel was appointed prior to the filing of the notice of appeal, the defendant was procedurally barred from raising for the first time on appeal the issue of ineffectiveness of counsel as neither trial counsel nor appellate counsel moved for a new trial asserting ineffective assistance of trial counsel, which motion was available when appellate counsel filed the notice of appeal. Cooper v. State, 287 Ga. App. 901, 652 S.E.2d 909 (2007).

Defendant not barred from raising ineffective assistance of counsel claim. — Postconviction court erred in denying the defendant's motion for a new trial without affording the defendant the

Motion (Cont'd)
2. Time for Filing (Cont'd)

opportunity to present evidence to support the defendant's ineffective assistance claim because the defendant had the right to representation by conflict-free counsel through which to raise claims of ineffective assistance of trial counsel in a motion for new trial and because the defendant could amend a motion for a new trial at any time before ruling thereon pursuant to O.C.G.A. § 5-5-40(b). Because the defendant raised the defendant's ineffective assistance claim through conflict-free counsel when counsel filed the amendment to the defendant's motion for a new trial, the defendant was entitled to a hearing on the merits on that claim. Lee v. State, 308 Ga. App. 711, 708 S.E.2d 633 (2011).

One failing to file motion in time cannot become party to motion filed by another. Hill v. O'Bryan Bros., 104 Ga. 137, 30 S.E. 996 (1898) (decided under former Civil Code 1895 § 5484).

Motion must be disposed of to extend time for filing notice of appeal. — Because the plaintiff filed a second application for discretionary appeal on June 28, 2010, after withdrawing the plaintiff's motion for new trial, the motion was untimely as the motion was filed 61 days after the entry of the judgment on April 28; pursuant to O.C.G.A. § 5-6-38, the trial court had to dispose of the motion for new trial to extend the time for filing a notice of appeal. Cooper v. Spotts, 309 Ga. App. 361, 710 S.E.2d 159 (2011).

3. Amendment

Amendments to motion must be filed before court's ruling thereon. — Statute clearly requires that amendments to motion for new trial must be filed prior to court's ruling thereon. Arnold v. DeKalb County, 141 Ga. App. 315, 233 S.E.2d 273 (1977).

Nunc pro tunc entry cannot be used to correct failure to make timely amendment. Arnold v. DeKalb County, 141 Ga. App. 315, 233 S.E.2d 273 (1977).

Party cannot amend motion after 30 days to move for judgment n.o.v. — When party after suffering an adverse judgment filed only a motion for new trial within 30-day period specified in O.C.G.A. § 9-11-50, then after the 30-day period expired party sought to file, in the form of an amendment to the new trial motion, a motion for judgment notwithstanding the verdict, the latter motion must be considered invalid. Preferred Risk Ins. Co. v. Boykin, 174 Ga. App. 269, 329 S.E.2d 900, cert. denied, 254 Ga. 349, 331 S.E.2d 879 (1985).

Amendment not allowed. — Motion for new trial may be amended any time before the ruling thereon; since appellate counsel had over four months to raise an ineffective assistance of trial counsel claim in an amended motion for new trial or in the hearing, but failed to do so, an appellate court declined to consider that claim raised for the first time on appeal. Swint v. State, 279 Ga. App. 777, 632 S.E.2d 712 (2006).

Application

Challenge to charge to jury may be made on motion for new trial. Thornton v. Stynchcombe, 323 F. Supp. 254 (N.D. Ga. 1971).

Statute applies when verdict and judgment based on testimony of witness subsequently found guilty of perjury. Windsor Forest, Inc. v. Rocker, 121 Ga. App. 773, 175 S.E.2d 65 (1970).

Motion improper after guilty plea. — In addition to being improper following the entry of a guilty plea to child molestation, a defendant's motion for new trial was untimely, having been filed more than a year after entry of judgment, O.C.G.A. § 5-5-40(a), and was therefore void and of no effect. Roseborough v. State, 311 Ga. App. 456, 716 S.E.2d 530 (2011).

Extraordinary motion for new trial still available remedy after dismissal. — After order of dismissal under Ga. L. 1966, p. 609, § 41 (see O.C.G.A. § 9-11-41(b)) extraordinary motions for new trial are still available procedures under former Code 1933, § 70-301 (see O.C.G.A. § 5-5-40) and Ga. L. 1974, p. 1138, § 1 (see O.C.G.A. § 9-11-60(c), (f)). Vaughan v. Car Tapes, Inc., 135 Ga. App. 178, 217 S.E.2d 436 (1975).

Motion for new trial is inappropriate vehicle to obtain re-examination

of grant of summary judgment and a motion so filed has no validity and will not extend filing date of notice of appeal. Shine v. Sportservice Corp., 140 Ga. App. 355, 231 S.E.2d 130 (1976).

Motion for new trial is not the proper vehicle to obtain a reexamination of the legal conclusions solely involved in a grant of summary judgment. Sands v. Lamar Properties, Inc., 159 Ga. App. 718, 285 S.E.2d 24 (1981).

Motion no longer prerequisite for trial court to set aside verdict and grant new trial. Florida E. Coast Properties, Inc. v. Davis, 133 Ga. App. 932, 213 S.E.2d 79 (1975).

Trial judge may grant new trial on own motion within prescribed time. — Trial judge is empowered on the judge's own volition to correct any error subsequently recognized as to rulings during trial as well as to exercise the judge's discretion as to the weight of evidence and grant a new trial on the judge's own motion within 30 days from entry of judgment. Hulsey v. Sears, Roebuck & Co., 138 Ga. App. 523, 226 S.E.2d 791 (1976).

Court granting own motion, on unspecified grounds, after time prescribed. — Court may not grant new trial on unspecified ground on the court's own motion after more than 30 days from entry of judgment and after the term had expired. Darby v. Commercial Bank, 135 Ga. App. 462, 218 S.E.2d 252 (1975), overruled on other grounds, Smith v. Telecable of Columbus, Inc., 140 Ga. App. 755, 232 S.E.2d 100 (1976).

Defendant must raise all issues on first and only appeal, for judgment on that appeal is conclusive of all issues raised or which could have been raised. Akins v. State, 237 Ga. 826, 229 S.E.2d 645 (1976).

Judge who cannot recollect evidence sufficiently to settle matter, shall enter order so stating. Hill v. General Rediscount Corp., 116 Ga. App. 459, 157 S.E.2d 888 (1967).

Error to grant new trial when not elicited. — When no reading of the defendant's motion could suggest an attempt by the defendant to elicit such an order, it was error for the trial court to grant a new trial to the plaintiff, especially when such an order could only benefit the plaintiff and work to the detriment of the defendant. Nelson & Budd, Inc. v. Brunson, 173 Ga. App. 856, 328 S.E.2d 746 (1985).

New trial motion proper means of attacking nominal damage award. — Award of $130,000.00 nominal damages, if palpably unreasonable, excessive, or the product of bias, may be set aside, but these are not the criteria for a directed verdict or judgment n.o.v.; the motion for a new trial is the proper means of attack. Miller & Meier & Assocs. v. Diedrich, 174 Ga. App. 249, 329 S.E.2d 918, aff'd in part, rev'd in part, 254 Ga. 734, 334 S.E.2d 308 (1985).

Requirements for motion based on newly discovered evidence. — Movant's extraordinary motion for a new trial based on recently discovered evidence must satisfy the court: (1) that newly discovered evidence has come to the movant's attention since the movant's trial; (2) that want of due diligence was not the reason that the movant's evidence was not acquired sooner; (3) that the evidence was so material that it would produce probably a different verdict; (4) that the evidence was not cumulative only; (5) that the affidavit of the witness is attached to the motion or the affidavit's absence is sufficiently explained; and (6) that the new evidence does not operate solely to impeach the credit of a witness. The motion must set forth facts to meet these requirements; conclusions of counsel will not suffice. Dick v. State, 248 Ga. 898, 287 S.E.2d 11 (1982).

Claim of innocence in habeas petition was not a constitutional claim. — Petitioner, a death row inmate, argued in a federal habeas petition as a separate claim for relief that the petitioner was actually innocent, but that claim failed because actual innocence was not itself a constitutional claim, and was instead a gateway through which a habeas petitioner had to pass to have the petitioner's otherwise barred constitutional claim considered on the merits; further, the claim was not properly before the federal court as the inmate could pursue a claim of actual innocence in state court by filing an extraordinary motion for new trial under O.C.G.A. §§ 5-5-23, 5-5-40, and 5-5-41.

Application (Cont'd)

Jefferson v. Terry, 490 F. Supp. 2d 1261 (N.D. Ga. 2007), aff'd in part and rev'd in part, 570 F.3d 1283 (11th Cir. Ga. 2009).

Failure to raise issues in criminal matter waived issues. — Defendant was not entitled to a new trial under O.C.G.A. § 5-5-40 on three kidnapping convictions on the basis that the defendant received ineffective assistance of counsel because while ineffective assistance was found on the basis that trial counsel failed to cross-examine the defendant's former girlfriend adequately, failed to argue cogently on behalf of a directed verdict motion on the kidnapping charges, and presented only a perfunctory closing argument, the defendant waived those issues as the defendant did not claim that trial counsel was ineffective on those particular grounds in the defendant's motion for new trial. State v. Jones, 284 Ga. 302, 667 S.E.2d 76 (2008).

As the defendant failed to assert in a new trial motion under O.C.G.A. § 5-5-40(a) that trial counsel was ineffective for various reasons, the defendant was thereafter procedurally barred from raising that issue on appeal. Hornsby v. State, 296 Ga. App. 483, 675 S.E.2d 502 (2009).

New trial motion based on new evidence directed first to trial court. — Supplemental brief on appeal containing an affidavit of a witness recanting the witness's trial testimony was in substance an extraordinary motion for new trial based on newly discovered evidence and should have been directed to the trial court in the first instance. Williams v. State, 254 Ga. 6, 326 S.E.2d 444 (1985).

Notice of appeal divested trial court of jurisdiction. — Trial court's denial of defendant's new trial motion was proper because the defendant did not raise the issue of the trial counsel's ineffectiveness at the first available opportunity as defendant's filing of a notice of appeal divested the trial court of jurisdiction over such a motion and, moreover, the motion was untimely filed pursuant to O.C.G.A. § 5-5-40(a); there was no evidence that overcame the presumption of effective assistance of counsel pursuant to U.S. Const., amend. VI, as the defendant could not substantiate the allegations solely from the record and the defendant declined the opportunity to have counsel testify. Carter v. State, 275 Ga. App. 846, 622 S.E.2d 60 (2005).

Filing of notice of appeal did not divest trial court of jurisdiction. — Because the defendant's pro se motion for a new trial was filed within the time allotted for an out-of-time appeal, the fact that the defendant filed a pro se notice of appeal did not divest the trial court of jurisdiction to consider the motion for a new trial; thus, the denial of the motion, which contained a claim of ineffective assistance of counsel claim, was not a nullity for purposes of consideration by the court of appeals of the denial of the ineffective assistance of counsel claim. Hood v. State, 282 Ga. 462, 651 S.E.2d 88 (2007).

Denial of parent's request for transcript of termination hearing. — Parent alleged the trial court erred in denying the parent a copy of the transcript of the hearing on the petition for termination of parental rights for use at a new trial hearing. However, under O.C.G.A. § 5-5-40(c), the trial court had discretion to hear and determine the new trial motion before the transcript of evidence and proceedings was prepared and filed. In re D. R., 298 Ga. App. 774, 681 S.E.2d 218 (2009), overruled on other grounds, In re A.C., 285 Ga. 829, 686 S.E.2d 635 (2009).

Motion for new trial should have raised issue of ineffective assistance of counsel. — Defendant's convictions for rape, incest, child molestation, and cruelty to children were proper because the defendant's ineffective assistance of counsel claim was procedurally barred. In order for the defendant's claim of ineffectiveness to have been heard by the appellate court, the defendant's new counsel should have amended the motion for new trial to include a claim for ineffective assistance, pursuant to O.C.G.A. § 5-5-40; having failed to do so, the defendant failed to preserve the issue for review. Harrison v. State, 299 Ga. App. 744, 683 S.E.2d 681 (2009).

Motion filed while defendant a fugitive. — Because the defendant was a fugitive when defense counsel filed the

defendant's motion for a new trial, the defendant waived the defendant's right to seek such relief, even though the defendant was no longer a fugitive at the time the motion was dismissed; accordingly, the trial court properly denied the defendant's motion to reinstate the motion for a new trial. Moreover, so long as the defendant remained a fugitive, the defendant's attorney was not entitled to assert the defendant's rights to postconviction relief on the defendant's behalf. Harper v. State, 300 Ga. App. 25, 684 S.E.2d 96 (2009), cert. denied, No. S10C0152, 2010 Ga. LEXIS 7 (Ga. 2010).

Creditor's claim was nondischargeable. — Creditor lost the creditor's bid for a grant of summary judgment on the creditor's claim that the judgment was nondischargeable per 11 U.S.C. § 523 based on the claimed collateral estoppel effect of a Georgia state court default judgment awarding damages for the creditor's father's death because the creditor did not establish that the judgment was final and nonappealable in that the creditor did not show that the judgment was not subject to review under the "extraordinary cases" exception to the 30-day period for filing a motion for a new trial established in O.C.G.A. § 5-5-40(a). Terhune v. Houser (In re Houser), 458 B.R. 771 (Bankr. N.D. Ga. 2011).

Litigant arguing same issue for tenth time. — In an action which represented the tenth time a litigant had made the same argument that summary disposition of a prior state court case deprived the litigant of the federal Seventh Amendment right to a jury trial, a motion for a new trial was properly dismissed, given that: (1) the claims therein had been previously addressed and rejected; (2) Ga. Const. 1983, Art. I, Sec. I, Para. XII was a right of choice provision, not a right of access provision; and (3) the motion was both untimely under O.C.G.A. § 5-5-40(a), and filed in the wrong county court in violation of O.C.G.A. § 9-11-60(b). Crane v. Poteat, 282 Ga. App. 182, 638 S.E.2d 335 (2006), cert. denied, 2007 Ga. LEXIS 54 (Ga. 2007); cert. dismissed, 551 U.S. 1101, 127 S. Ct. 2912, 168 L. Ed. 2d 241 (2007).

OPINIONS OF THE ATTORNEY GENERAL

Extraordinary motion for new trial may be filed at any time after conviction; extraordinary motion must show that there is some material matter which would have been beneficial to the defendant at the time of trial and that such matters were unknown to the defendant and could not have been discovered by the defendant or defense counsel by use of due diligence. 1957 Op. Att'y Gen. p. 69.

RESEARCH REFERENCES

Am. Jur. 2d. — 58 Am. Jur. 2d, New Trial, §§ 4, 69 et seq., 356 et seq., 384.

Am. Jur. Pleading and Practice Forms. — 18B Am. Jur. Pleading and Practice Forms, New Trial, § 14.

C.J.S. — 66 C.J.S., New Trial, § 188 et seq., 218, 265 et seq.

ALR. — Inability to perfect record for appeal as ground for new trial, 16 ALR 1158; 107 ALR 603.

Motion for new trial as suspension or stay of execution or judgment, 121 ALR 686.

Right of trial court to grant new trial as affected by appellate proceedings, 139 ALR 340.

Necessity that trial court give parties notice and opportunity to be heard before ordering new trial on its own motion, 23 ALR2d 852.

What constitutes final judgment within provision or rule limiting application for new trial to specified period thereafter, 34 ALR2d 1181.

New trial in criminal case because of newly discovered evidence as to sanity of prosecution witness, 49 ALR2d 1247.

Successive actions as within statutory provision fixing time within which new action may be commenced after nonsuit or judgment not on merits, 54 ALR2d 1229.

Delay as affecting right to coram nobis attacking criminal conviction, 62 ALR2d 432.

Time for filing motion for new trial based on jury conduct occurring before, but discovered after, verdict, 97 ALR2d 788.

Amendment, after expiration of time for filing motion for new trial in civil case, of motion made in due time, 69 ALR3d 845.

Amendment, after expiration of time for filing motion for new trial in criminal case, of motion made in due time, 69 ALR3d 933.

Appeal by state of order granting new trial in criminal case, 95 ALR3d 596.

Court reporter's death or disability prior to transcribing notes as grounds for reversal or new trial, 57 ALR4th 1049.

Prosecutor's appeal in criminal case to racial, national, or religious prejudice as ground for mistrial, new trial, reversal, or vacation of sentence — modern cases, 70 ALR4th 664.

Propriety of limiting to issue of damages alone new trial granted on ground of inadequacy of damages—modern cases, 5 ALR5th 875.

5-5-41. Requirements as to extraordinary motions for new trial generally; notice of filing of motion; limitations as to number of extraordinary motions in criminal cases; DNA testing.

(a) When a motion for a new trial is made after the expiration of a 30 day period from the entry of judgment, some good reason must be shown why the motion was not made during such period, which reason shall be judged by the court. In all such cases, 20 days' notice shall be given to the opposite party.

(b) Whenever a motion for a new trial has been made within the 30 day period in any criminal case and overruled or when a motion for a new trial has not been made during such period, no motion for a new trial from the same verdict or judgment shall be made or received unless the same is an extraordinary motion or case; and only one such extraordinary motion shall be made or allowed.

(c)(1) Subject to the provisions of subsections (a) and (b) of this Code section, a person convicted of a felony may file a written motion before the trial court that entered the judgment of conviction in his or her case for the performance of forensic deoxyribonucleic acid (DNA) testing.

(2) The filing of the motion as provided in paragraph (1) of this subsection shall not automatically stay an execution.

(3) The motion shall be verified by the petitioner and shall show or provide the following:

(A) Evidence that potentially contains deoxyribonucleic acid (DNA) was obtained in relation to the crime and subsequent indictment, which resulted in his or her conviction;

(B) The evidence was not subjected to the requested DNA testing because the existence of the evidence was unknown to the petitioner or to the petitioner's trial attorney prior to trial or because the technology for the testing was not available at the time of trial;

(C) The identity of the perpetrator was, or should have been, a significant issue in the case;

(D) The requested DNA testing would raise a reasonable probability that the petitioner would have been acquitted if the results of DNA testing had been available at the time of conviction, in light of all the evidence in the case;

(E) A description of the evidence to be tested and, if known, its present location, its origin and the date, time, and means of its original collection;

(F) The results of any DNA or other biological evidence testing that was conducted previously by either the prosecution or the defense, if known;

(G) If known, the names, addresses, and telephone numbers of all persons or entities who are known or believed to have possession of any evidence described by subparagraphs (A) through (F) of this paragraph, and any persons or entities who have provided any of the information contained in petitioner's motion, indicating which person or entity has which items of evidence or information; and

(H) The names, addresses, and telephone numbers of all persons or entities who may testify for the petitioner and a description of the subject matter and summary of the facts to which each person or entity may testify.

(4) The petitioner shall state:

(A) That the motion is not filed for the purpose of delay; and

(B) That the issue was not raised by the petitioner or the requested DNA testing was not ordered in a prior proceeding in the courts of this state or the United States.

(5) The motion shall be served upon the district attorney and the Attorney General. The state shall file its response, if any, within 60 days of being served with the motion. The state shall be given notice and an opportunity to respond at any hearing conducted pursuant to this subsection.

(6)(A) If, after the state files its response, if any, and the court determines that the motion complies with the requirements of paragraphs (3) and (4) of this subsection, the court shall order a hearing to occur after the state has filed its response, but not more than 90 days from the date the motion was filed.

(B) The motion shall be heard by the judge who conducted the trial that resulted in the petitioner's conviction unless the presiding judge determines that the trial judge is unavailable.

(C) Upon request of either party, the court may order, in the interest of justice, that the petitioner be at the hearing on the motion. The court may receive additional memoranda of law or evidence from the parties for up to 30 days after the hearing.

(D) The petitioner and the state may present evidence by sworn and notarized affidavits or testimony; provided, however, any affidavit shall be served on the opposing party at least 15 days prior to the hearing.

(E) The purpose of the hearing shall be to allow the parties to be heard on the issue of whether the petitioner's motion complies with the requirements of paragraphs (3) and (4) of this subsection, whether upon consideration of all of the evidence there is a reasonable probability that the verdict would have been different if the results of the requested DNA testing had been available at the time of trial, and whether the requirements of paragraph (7) of this subsection have been established.

(7) The court shall grant the motion for DNA testing if it determines that the petitioner has met the requirements set forth in paragraphs (3) and (4) of this subsection and that all of the following have been established:

(A) The evidence to be tested is available and in a condition that would permit the DNA testing requested in the motion;

(B) The evidence to be tested has been subject to a chain of custody sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material respect;

(C) The evidence was not tested previously or, if tested previously, the requested DNA test would provide results that are reasonably more discriminating or probative of the identity of the perpetrator than prior test results;

(D) The motion is not made for the purpose of delay;

(E) The identity of the perpetrator of the crime was a significant issue in the case;

(F) The testing requested employs a scientific method that has reached a scientific state of verifiable certainty such that the procedure rests upon the laws of nature; and

(G) The petitioner has made a prima facie showing that the evidence sought to be tested is material to the issue of the petitioner's identity as the perpetrator of, or accomplice to, the crime, aggravating circumstance, or similar transaction that resulted in the conviction.

(8) If the court orders testing pursuant to this subsection, the court shall determine the method of testing and responsibility for payment for the cost of testing, if necessary, and may require the petitioner to pay the costs of testing if the court determines that the petitioner has the ability to pay. If the petitioner is indigent, the cost shall be paid from the fine and forfeiture fund as provided in Article 3 of Chapter 5 of Title 15.

(9) If the court orders testing pursuant to this subsection, the court shall order that the evidence be tested by the Division of Forensic Sciences of the Georgia Bureau of Investigation. In addition, the court may also authorize the testing of the evidence by a laboratory that meets the standards of the DNA advisory board established pursuant to the DNA Identification Act of 1994, Section 14131 of Title 42 of the United States Code, to conduct the testing. The court shall order that a sample of the petitioner's DNA be submitted to the Division of Forensic Sciences of the Georgia Bureau of Investigation and that the DNA analysis be stored and maintained by the bureau in the DNA data bank.

(10) If a motion is filed pursuant to this subsection the court shall order the state to preserve during the pendency of the proceeding all evidence that contains biological material, including, but not limited to, stains, fluids, or hair samples in the state's possession or control.

(11) The result of any test ordered under this subsection shall be fully disclosed to the petitioner, the district attorney, and the Attorney General.

(12) The judge shall set forth by written order the rationale for the grant or denial of the motion for new trial filed pursuant to this subsection.

(13) The petitioner or the state may appeal an order, decision, or judgment rendered pursuant to this Code section. (Orig. Code 1863, § 3645; Code 1868, § 3670; Ga. L. 1873, p. 47, § 1; Code 1873, § 3721; Code 1882, § 3721; Civil Code 1895, § 5487; Penal Code 1895, § 1064; Civil Code 1910, § 6092; Penal Code 1910, § 1091; Code 1933, § 70-303; Ga. L. 2003, p. 247, § 1; Ga. L. 2011, p. 264, § 1-2/SB 80; Ga. L. 2012, p. 775, § 5/HB 942.)

The 2011 amendment, effective May 11, 2011, deleted "serious violent" and "as defined in Code Section 17-10-6.1" preceding and following "felony" in paragraph (c)(1).

The 2012 amendment, effective May 1, 2012, part of an Act to revise, modernize, and correct the Code, revised punctuation in paragraph (c)(1).

Cross references. — Granting of new trial based on newly discovered evidence, § 5-5-23. Extensions of time for filing of motions for new trial, § 9-11-6.

Editor's notes. — Ga. L. 2003, p. 247, § 5, not codified by the General Assembly, provides that: "This Act shall become effective upon its approval by the Governor or upon its becoming law without such

approval. Notwithstanding the provisions of subsection (b) of Code Section 5-5-41, any person convicted of a serious violent felony as defined in Code Section 17-10-6.1, which conviction was imposed prior to the effective date of this Act, who has, prior to the effective date of this Act, filed an extraordinary motion for new trial, may file an extraordinary motion for new trial pursuant to Section 1 of this Act if the issue of DNA testing was not raised or denied in the prior extraordinary motion for new trial. In any extraordinary motion for new trial allowed pursuant to Section 1 of this Act, the court shall not have jurisdiction to reconsider any other issue raised in the first extraordinary motion for new trial. Notwithstanding the provisions of subparagraph (c)(4)(B) of Code Section 5-5-41, any person convicted of a serious violent felony as defined in Code Section 17-10-6.1, which conviction was imposed prior to the effective date of this Act, who has, prior to the effective date of this Act, previously litigated in a court of this state or the United States the issue of postconviction DNA testing and who was denied DNA testing may file an extraordinary motion for new trial pursuant to Section 1 of this Act." This Act became effective May 27, 2003.

Ga. L. 2011, p. 264, § 1-1/SB 80, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Johnia Berry Act.'"

Law reviews. — For annual survey of death penalty decisions, see 57 Mercer L. Rev. 139 (2005).

For note on the 2003 amendment to this Code section, see 20 Ga. St. U.L. Rev. 119 (2003). For note, "Seen But Not Heard: An Argument for Granting Evidentiary Hearings to Weigh the Credibility of Recanted Testimony," see 46 Ga. L. Rev. 213 (2011).

For comment on Williams v. Georgia, 24 U.S.L.W. 3191 (Jan. 17, 1956), discussing whether a challenge to the entire panel could be raised by an extraordinary motion for new trial, see 18 Ga. B.J. 350 (1956).

JUDICIAL DECISIONS

Analysis

General Consideration
Trial Court's Discretion
Extraordinary Motions Based on Newly Discovered Evidence
Application
1. In General
2. When Extraordinary Motion Proper
3. When Extraordinary Motion Unavailable

General Consideration

Extraordinary motions are authorized indirectly by O.C.G.A. §§ 5-5-40 and 5-5-41. Dick v. State, 248 Ga. 898, 287 S.E.2d 11 (1982).

Motion for new trial made more than 30 days after entry of judgment is an extraordinary motion. Dyal v. State, 121 Ga. App. 50, 172 S.E.2d 326 (1970).

Common law right. — Right to grant new trials upon extraordinary grounds was recognized at common law. Hudgins v. Veal, 98 Ga. 137, 26 S.E. 479 (1896).

Extraordinary motion for new trial is in nature of a bill in equity. Bivins v. McDonald, 50 Ga. App. 299, 177 S.E. 829 (1934).

Right to grant new trials upon extraordinary grounds was intended to replace bills in equity for new trials, and motion must state grounds upon which it is based. East Tenn. v. & Ga. R.R. v. Whitlock, 75 Ga. 77 (1885); Cox v. State, 19 Ga. App. 283, 91 S.E. 422 (1917).

Probate court cannot entertain motion. — Only superior and city courts may grant new trials, and court of ordinary (now probate court) has no jurisdiction to entertain motion or extraordinary motion for new trial. Byrd v. Riggs, 210 Ga. 473, 80 S.E.2d 785 (1954).

Bases for granting an extraordinary motion are much stricter than a normal motion. Gordon v. State, 193 Ga. App. 94, 387 S.E.2d 40 (1989).

Good reason must be shown to justify motion made after time prescribed. — Motion for new trial made after time permitted by former Code 1933, § 70-301 (see O.C.G.A. § 5-5-40) could not be entertained unless some good reason be shown why motion was not made within time required, which reason shall be judged of by court. Union Life Ins. Co. v. Aaronson, 109 Ga. App. 384, 136 S.E.2d 142 (1964).

In any case when motion for new trial is made more than 30 days after entry of judgment on the verdict, some good reason must be shown why the motion was not made within time allowed by law. Brawner v. Wilkins, 114 Ga. App. 263, 150 S.E.2d 721 (1966).

Extraordinary motions for new trial are not favored by courts. Hays v. Westbrook, 96 Ga. 219, 22 S.E. 893 (1895); Baskin v. State, 43 Ga. App. 760, 160 S.E. 539 (1931); Allen v. State, 88 Ga. App. 200, 76 S.E.2d 531 (1953); Cade v. State, 107 Ga. App. 30, 129 S.E.2d 405 (1962); Patterson v. State, 228 Ga. 389, 185 S.E.2d 762 (1971).

Extraordinary motion for new trial is not favored, and stands upon different footing from original motion for new trial. Loomis v. Edwards, 80 Ga. App. 396, 56 S.E.2d 183 (1949), cert. denied, 339 U.S. 970, 70 S. Ct. 989, 94 L. Ed. 1377 (1950).

Motions for new trial after verdict are not favored, and extraordinary motions for new trial after final judgment are favored even less. Williams v. Georgia, 349 U.S. 375, 75 S. Ct. 814, 99 L. Ed. 1161 (1955), cert. denied, 350 U.S. 950, 76 S. Ct. 326, 100 L. Ed. 828 (1956).

Extraordinary motion for new trial institutes an entirely new case, requiring discretionary action on the part of the judge having jurisdiction thereof to bring the motion into actual existence as a cause in the courts. Bivins v. McDonald, 50 Ga. App. 299, 177 S.E. 829 (1934).

Motion does not lie to correct errors in judgments or decrees. — If plaintiff in error relies on so-called extraordinary motion for new trial as proper procedure to vacate and set aside existing judgments, the plaintiff is confronted with the rule that motion for new trial is not proper remedy to correct alleged error in any judgment or decree entered by the trial court and the plaintiff's motion will be denied. Ballard v. Harmon, 202 Ga. 603, 44 S.E.2d 260 (1947).

Right to extraordinary motion not affected by appellate court decision on grounds of previous motion. — Any rights that movant has to proceed in trial of extraordinary motion for new trial are not lost by decision of appellate court as to grounds set forth in previous motion for new trial. Williams v. Pilcher & Dillon, 31 Ga. App. 591, 121 S.E. 581 (1924).

Exceptions to rule barring second appeal when conviction affirmed. — Two exceptions to the general rule that when a judgment of conviction is affirmed by an appellate court, no ordinary second appeal will be allowed are an extraordinary motion for new trial and habeas corpus. Grant v. State, 159 Ga. App. 2, 282 S.E.2d 668 (1981).

Strict pleading is required in extraordinary motions for new trial in order to postpone indefinitely the execution of the sentence and allow the judge to whom it is presented to ascertain readily if a new trial is warranted based on newly discovered evidence. Dick v. State, 248 Ga. 898, 287 S.E.2d 11 (1982).

Hearing required. — Under O.C.G.A. §§ 5-5-40 and 5-5-41, the trial court is required to hold a hearing on a motion for new trial. Dick v. State, 248 Ga. 898, 287 S.E.2d 11 (1982).

No hearing when motion shows no merit. — Extraordinary motion for new trial which fails to show any merit may be denied without the necessity of a hearing. Dick v. State, 248 Ga. 898, 287 S.E.2d 11 (1982).

Failure to state facts sufficient for grant of motion. — When the pleadings in an extraordinary motion for new trial in a criminal case do not contain a statement of facts sufficient to authorize that the motion be granted if the facts developed at the hearing warrant such relief, it is not error for the trial court to refuse to conduct a hearing on the extraordinary motion. Dick v. State, 248 Ga. 898, 287 S.E.2d 11 (1982).

Although defendant was not entitled to a hearing on a motion for DNA testing unless the motion complied with the re-

General Consideration (Cont'd)

quirements set forth in O.C.G.A. § 5-5-41(c)(3), (4), the trial court erred in simply denying the motion without explanation, and in failing to determine whether the defendant was entitled to a hearing on the motion, or to otherwise set forth any rationale or basis for denying the motion. Johnson v. State, 272 Ga. App. 294, 612 S.E.2d 29 (2005).

Motions for DNA testing. — Trial court properly denied the inmate's pro se motion for DNA testing, which was filed 20 years after that inmate was convicted of aggravated sodomy and rape, as the identity of the perpetrator of the rape was not a significant issue in the case, and the inmate failed to satisfy all elements under O.C.G.A. § 5-5-41(c) to warrant that relief. Williams v. State, 289 Ga. App. 856, 658 S.E.2d 446 (2008).

"Good reason" for motion. — Normally, the "good reason" necessary to permit the filing of an extraordinary motion for a new trial consists of newly discovered evidence, but the late filing of a motion for a new trial may also be predicated on circumstances other than newly discovered evidence. Martin v. Children's Sesame, Inc., 188 Ga. App. 242, 372 S.E.2d 648 (1988).

Trial court did not abuse the court's discretion in concluding that the late filing of a motion was supported by "good reason" when the clerk's office incorrectly informed the movants of the filing date on two occasions and where the motion would have been timely had the clerk's representations been correct. Martin v. Children's Sesame, Inc., 188 Ga. App. 242, 372 S.E.2d 648 (1988).

Showing of good defense required. — Both an extraordinary motion for new trial and a complaint in equity require the petitioner's showing that the petitioner has a good defense to the action at law. Saxon v. Covington, 178 Ga. App. 271, 342 S.E.2d 754 (1986).

Summary denial of motion constitutional when movant fails to follow procedure. — Due process and equal protection rights are not violated by a trial court's summary denial of a movant's extraordinary motion for new trial when the movant fails to comply with the procedural requirements of state law. Dick v. State, 248 Ga. 898, 287 S.E.2d 11 (1982).

Appeal from decision rendered on merits following granting of out-of-time motion. — Even though the defendant did not timely file a motion for a new trial because the defendant did not file such a motion within 30 days of the entry of conviction and the imposition of sentence, the state supreme court had jurisdiction to hear the defendant's appeal as the trial court granted permission to the defendant to file an out-of-time motion for a new trial and denied that motion on the motion's merits following a hearing, and, thus, the defendant was entitled to file a direct appeal to the appropriate reviewing court. Washington v. State, 276 Ga. 655, 581 S.E.2d 518 (2003).

Appellate jurisdiction. — When the plaintiff filed an extraordinary motion for new trial, which the trial court denied, appellate jurisdiction existed; although no ruling on the motion was contained in the record on appeal or requested in the notice of appeal, the trial court implicitly granted permission to file the motion by expressly recognizing the plaintiff's pleading as both a request to file an out-of-time motion for new trial and as a motion for new trial, by holding an evidentiary hearing on the merits of the motion for new trial, and by denying the motion for new trial on the motion's merits. Fowler Props. v. Dowland, 282 Ga. 76, 646 S.E.2d 197 (2007).

State has right to direct appeal. — State could directly appeal from an order granting defendant's post-conviction motion for deoxyribonucleic acid (DNA) testing by an uncertified laboratory because the defendant filed only a post-conviction motion and did not file an extraordinary motion for new trial; the trial court had ruled on the merits of the only pending motion, there was no issue remaining, and a direct appeal would not create absurd results. State v. Clark, 273 Ga. App. 411, 615 S.E.2d 143 (2005).

Cited in Doyal v. State, 73 Ga. 72 (1884); Fambles v. State, 97 Ga. 625, 25 S.E. 365 (1896); Collier v. State, 115 Ga. 17, 41 S.E. 261 (1902); Perkins v. State, 126 Ga. 578, 55 S.E. 501 (1906); Brown v.

State, 141 Ga. 783, 82 S.E. 238 (1914); Crawley v. State, 151 Ga. 818, 108 S.E. 238, 18 A.L.R. 368 (1921); Donalson v. Bank of Jakin, 33 Ga. App. 428, 127 S.E. 229 (1925); Coggeshall v. Park, 162 Ga. 78, 132 S.E. 632 (1926); Federal Inv. Co. v. Ewing, 166 Ga. 246, 142 S.E. 890 (1928); Hiott v. Hiott, 173 Ga. 392, 160 S.E. 500 (1931); State Bd. of Penal Cors. v. Johnson, 190 Ga. 246, 9 S.E.2d 251 (1940); Miles v. Johnson, 193 Ga. 492, 18 S.E.2d 831 (1942); Crenshaw v. Crenshaw, 198 Ga. 536, 32 S.E.2d 177 (1944); Randall v. Whitman, 88 Ga. App. 803, 78 S.E.2d 78 (1953); Fields v. Balkcom, 211 Ga. 797, 89 S.E.2d 189 (1955); Fulton v. Chattanooga Publishing Co., 100 Ga. App. 573, 112 S.E.2d 15 (1959); McRae v. State, 116 Ga. App. 407, 157 S.E.2d 646 (1967); Harris v. State, 225 Ga. 458, 169 S.E.2d 331 (1969); Hilliard v. State, 128 Ga. App. 157, 195 S.E.2d 772 (1973); Akins v. State, 237 Ga. 826, 229 S.E.2d 645 (1976); Martin v. State, 240 Ga. 488, 241 S.E.2d 246 (1978); Parker v. State, 151 Ga. App. 139, 259 S.E.2d 145 (1979); Collier v. State, 169 Ga. App. 69, 311 S.E.2d 242 (1983); Llewellyn v. State, 252 Ga. 426, 314 S.E.2d 227 (1984); Levitt v. State, 170 Ga. App. 32, 316 S.E.2d 6 (1984); Batson v. First Nat'l Bank, 170 Ga. App. 803, 318 S.E.2d 227 (1984); Knox v. State, 180 Ga. App. 564, 349 S.E.2d 753 (1986); Kindle v. State, 181 Ga. App. 52, 351 S.E.2d 461 (1986); Pittman v. State, 183 Ga. App. 12, 357 S.E.2d 855 (1987); Sharp v. State, 183 Ga. App. 641, 360 S.E.2d 50 (1987); White v. Fidelity Nat'l Bank, 188 Ga. App. 539, 373 S.E.2d 640 (1988); Cook v. Jordan Bradley Supply Co., 195 Ga. App. 604, 394 S.E.2d 400 (1990); Department of Human Resources v. Browning, 210 Ga. App. 546, 436 S.E.2d 742 (1993).

Trial Court's Discretion

Passing on extraordinary motion for new trial rests largely within discretion of trial judge. Pulliam v. State, 199 Ga. 709, 35 S.E.2d 250 (1945); Gilpin v. Swainsboro Ice & Fuel Co., 75 Ga. App. 574, 44 S.E.2d 168 (1947); Allen v. State, 88 Ga. App. 200, 76 S.E.2d 531 (1953); Williams v. Georgia, 349 U.S. 375, 75 S. Ct. 814, 99 L. Ed. 1161 (1955), cert. denied, 350 U.S. 950, 76 S. Ct. 326, 100 L. Ed. 828 (1956).

Discretion of judge was not unlike that exercised in motions under former Code 1933, § 70-301 (see O.C.G.A. § 5-5-40), and this discretion must be exercised as to whether good reason is shown why motion was not made during term. Slusser v. Williams, 100 Ga. App. 599, 112 S.E.2d 7 (1959).

Refusal of extraordinary motion for new trial not disturbed absent manifest abuse of discretion. Dixon v. Mutual Life Indus. Ass'n, 3 Ga. App. 524, 60 S.E. 207 (1908); Pulliam v. State, 199 Ga. 709, 35 S.E.2d 250 (1945); Gilpin v. Swainsboro Ice & Fuel Co., 75 Ga. App. 574, 44 S.E.2d 168 (1947); Allen v. State, 88 Ga. App. 200, 76 S.E.2d 531 (1953); Williams v. Georgia, 349 U.S. 375, 75 S. Ct. 814, 99 L. Ed. 1161 (1955), cert. denied, 350 U.S. 950, 76 S. Ct. 326, 100 L. Ed. 828 (1956); Cade v. State, 107 Ga. App. 30, 129 S.E.2d 405 (1962).

Appellate court will remand case where trial judge failed to exercise discretion regarding extraordinary motion. Central of Ga. Ry. v. O'Kelley, 16 Ga. App. 594, 85 S.E. 938 (1915).

Trial judge acts as trier of fact in passing upon grounds of motion. — When verdict is attacked in a motion for new trial because of the prejudice of a juror, and issue is formed by evidence introduced by parties upon motion, judge is trier, and, unless there is an abuse of discretion, the judge's finding against the movant and in favor of impartiality of the juror is to be treated as final. Baskin v. State, 43 Ga. App. 760, 160 S.E. 539 (1931).

Trial judge occupies position of trier when passing upon ground of extraordinary motion for new trial in criminal case, based upon alleged bias of a juror; the judge's finding that a juror was impartial will not be reversed, unless it is apparent that the judge has abused the discretion which the law vests in the judge in such cases. Allen v. State, 88 Ga. App. 200, 76 S.E.2d 531 (1953).

When trial judge passes upon grounds of extraordinary motion for new trial, the judge occupies the position of trier of fact. Cade v. State, 107 Ga. App. 30, 129 S.E.2d 405 (1962).

Trial Court's Discretion (Cont'd)

When the trial judge passes upon the grounds of an extraordinary motion for new trial, the judge occupies the position of a trier of fact, and the judge's discretion in refusing the motion will not be disturbed unless manifestly abused. Satterwhite v. State, 235 Ga. App. 687, 509 S.E.2d 97 (1998).

Whole record may be looked into in determining whether motion is meritorious. — While extraordinary motion is a new case, whole record, including extraordinary motion, may be looked into to determine whether extraordinary motion is meritorious; if from such examination of record trial judge as a matter of law determines that extraordinary motion is without merit, the judge may decline to entertain the motion and is not compelled, as a matter of law, to issue a rule nisi thereon. Loomis v. Edwards, 80 Ga. App. 396, 56 S.E.2d 183 (1949), cert. denied, 339 U.S. 970, 70 S. Ct. 989, 94 L. Ed. 1377 (1950).

Judge has discretion to hear affidavits or oral testimony. — In hearing on extraordinary motion for new trial, when witnesses are present, and do not object, presiding judge has discretion as to whether the judge will hear affidavits or oral testimony. Herrin v. State, 71 Ga. App. 384, 31 S.E.2d 124 (1944).

Judge may admit, over objection, pertinent evidence. — It is not error on hearing of extraordinary motion for new trial to admit, over objection, record of evidence taken at main trial bearing upon question to be decided. Herrin v. State, 71 Ga. App. 384, 31 S.E.2d 124 (1944).

No special need for independent test shown. — Trial court did not err in denying a defendant's post-conviction motion for funds to hire an expert of the defendant's choosing to conduct an independent DNA test since O.C.G.A. § 5-5-41 provided a method for the defendant to obtain additional testing; therefore, there was no special need for the trial court to fund an independent test. Palmer v. State, 286 Ga. App. 751, 650 S.E.2d 255 (2007), cert. denied, No. S07C1770, 2007 Ga. LEXIS 678 (Ga. 2007).

Trial court lacked discretion to ignore statutory mandate. — Trial court erred in ignoring the mandate of O.C.G.A. § 5-5-41(c)(9) by ordering the state to provide evidence to an uncertified laboratory for testing. State v. Clark, 273 Ga. App. 411, 615 S.E.2d 143 (2005).

Extraordinary Motions Based on Newly Discovered Evidence

Extraordinary motion for new trial may be based upon newly discovered evidence. Central of Ga. Ry. v. O'Kelley, 16 Ga. App. 594, 85 S.E. 938 (1915).

Statute provides for extraordinary motions for new trial based on newly discovered evidence. Stembridge v. State, 84 Ga. App. 413, 65 S.E.2d 819 (1951), cert. dismissed, 343 U.S. 541, 72 S. Ct. 834, 96 L. Ed. 1130 (1952).

Procedure for securing new trial because of newly discovered evidence is motion for new trial made according to statute. Evans v. Perkins, 225 Ga. 48, 165 S.E.2d 652 (1969).

Trial judge possesses wide discretion in passing on extraordinary motions based on newly discovered evidence. Frank v. State, 142 Ga. 617, 83 S.E. 233 (1914); Fulford v. State, 222 Ga. 846, 152 S.E.2d 845 (1967).

Standard of review. — Judgments on extraordinary motions based on newly discovered evidence are not disturbed absent abuse of discretion. Frank v. State, 142 Ga. 617, 83 S.E. 233 (1914); Fulford v. State, 222 Ga. 846, 152 S.E.2d 845 (1967).

Extraordinary motions for new trial based on newly discovered evidence are not favored by law. Dyal v. State, 121 Ga. App. 50, 172 S.E.2d 326 (1970).

Regarding newly discovered evidence, stricter rule is applied to extraordinary motions than to ordinary motions based upon such ground. Norman v. Goode, 121 Ga. 449, 49 S.E. 268 (1904); Jackson v. Williams, 149 Ga. 505, 101 S.E. 116 (1919); Reed Oil Co. v. Harrison, 26 Ga. App. 37, 105 S.E. 496 (1920); Baskin v. State, 43 Ga. App. 760, 160 S.E. 539 (1931); Gilpin v. Swainsboro Ice & Fuel Co., 75 Ga. App. 574, 44 S.E.2d 168 (1947).

Nature of new evidence. — Trial judge, in passing on extraordinary motion for new trial, must determine whether

evidence would likely produce different result upon another trial and whether facts could have been obtained before the verdict by the exercise of ordinary diligence. Bradley v. Bradley, 232 Ga. 717, 208 S.E.2d 817 (1974).

After one accused of a crime has been convicted, and has made a motion for new trial, and judgment denying the motion has been affirmed by the Supreme Court, when extraordinary motion for new trial is made, based on the ground of newly discovered evidence, it should be made to appear that such evidence is so material that it would probably produce a different verdict. Brannon v. State, 190 Ga. 203, 9 S.E.2d 152 (1940).

Will discovered subsequent to judgment probating another will. — Petition to court of ordinary (now probate court) to set aside the judgment probating a will in solemn form on the ground that the later will has been discovered since rendition of the judgment, is analogous to but is not an extraordinary motion for new trial upon the ground of newly discovered evidence. Byrd v. Riggs, 210 Ga. 473, 80 S.E.2d 785 (1954).

Hearing motion requires transcript or brief of evidence. — In order for extraordinary motion for new trial on ground of newly discovered evidence to be a valid motion, it must appear that newly discovered evidence is not merely cumulative or impeaching, and that it would likely produce a different result. None of these requirements can be determined without examination of evidence adduced upon original trial of case. Absent either transcript or brief of evidence adduced at original trial, court cannot make determination it is required to make by referring to only part of evidence. Dyal v. State, 121 Ga. App. 50, 172 S.E.2d 326 (1970).

Requirements for motion. — A movant's extraordinary motion for a new trial based on recently discovered evidence must satisfy the court: (1) that newly discovered evidence has come to the movant's attention since his trial; (2) that want of due diligence was not the reason that his evidence was not acquired sooner; (3) that the evidence was so material that it would produce probably a different verdict; (4) that it was not cumulative only; (5) that the affidavit of the witness is attached to the motion or its absence is sufficiently explained; and (6) that the new evidence does not operate solely to impeach the credit of a witness. The motion must set forth facts to meet these requirements; conclusions of counsel will not suffice. Dick v. State, 248 Ga. 898, 287 S.E.2d 11 (1982).

Denial of motion did not amount to abuse of discretion. — Trial court did not abuse the court's discretion in denying the defendant's extraordinary motion for new trial without a hearing as: (1) the alleged newly-discovered evidence was not so material that the evidence would likely result in a different verdict; (2) the affidavits presented lacked the type of materiality required to support a new trial as the affidavits did not show the witnesses's trial testimony to have been the purest fabrication; (3) the defendant failed to act diligently in presenting the affidavits alleged to have supported the motion; (4) the trial court favored the original testimony, and as such, could not disregard the jury's verdict; and (5) the defendant failed to present the facts necessary to warrant a hearing on the motion. Davis v. State, 283 Ga. 438, 660 S.E.2d 354 (2008), cert.denied, mot. granted, 129 S. Ct. 397, 172 L.Ed.2d 323 (2008).

Trial court did not err in denying the defendant's extraordinary motion for a new trial under O.C.G.A. § 5-5-41 because the codefendant's testimony at the hearing would probably not have produced a different result in the guilt/innocence phase if it had been presented at the defendant's trial; the defendant did not demonstrate that the defendant took diligent steps to ascertain what testimony the codefendant could have been willing to give during the more than 17 years since the codefendant's trial. Drane v. State, 291 Ga. 298, 728 S.E.2d 679 (2012), cert. denied, U.S. , 133 S. Ct. 663, 184 L. Ed. 2d 472 (2012).

Claim of innocence in habeas petition was not a constitutional claim. — Petitioner, a death row inmate, argued in a federal habeas petition as a separate claim for relief that the petitioner was actually innocent, but that claim failed

Extraordinary Motions Based on Newly Discovered Evidence (Cont'd)

because actual innocence was not itself a constitutional claim, and was instead a gateway through which a habeas petitioner had to pass to have the petitioner's otherwise barred constitutional claim considered on the merits; further, the claim was not properly before the federal court, as the inmate could pursue a claim of actual innocence in state court by filing an extraordinary motion for new trial under O.C.G.A. §§ 5-5-23, 5-5-40, and 5-5-41. Jefferson v. Terry, 490 F. Supp. 2d 1261 (N.D. Ga. 2007), aff'd in part and rev'd in part, 570 F.3d 1283 (11th Cir. Ga. 2009).

Application

1. In General

Extraordinary motions are contemplated for events not ordinarily occurring in transaction of human affairs. Cade v. State, 107 Ga. App. 30, 129 S.E.2d 405 (1962).

Extraordinary cases contemplated by statute are those arising from some providential cause. Cox v. Hillyer, 65 Ga. 57 (1880); Harris v. Roan, 119 Ga. 379, 46 S.E. 433 (1904).

Types of fact situations contemplated by statute. — Cases contemplated by statute are such as do not ordinarily occur in transaction of human affairs, as when a man has been convicted of murder, and it afterwards turns out that the man the defendant was charged with having killed is still alive, or when a man has been convicted on testimony of a witness who is afterwards found guilty of perjury in giving that testimony, or from some providential cause, and cases of like character. Patterson v. State, 228 Ga. 389, 185 S.E.2d 762 (1971).

DNA testing motion did not follow appointment of federal habeas counsel. — Deoxyribonucleic acid (DNA) motion and an extraordinary motion for a new trial did not ordinarily follow the appointment of counsel in a federal habeas petition and thus were not subject to funding under 18 U.S.C. § 3599; the filing of the inmate's DNA motion had nothing to do with exhausting a federal constitutional claim in state court so that the district court could consider the claim on the merits in adjudicating the inmate's 28 U.S.C. § 2254 petition. The inmate's claim that the inmate was entitled to DNA testing as a matter of Georgia law was not, and could not have been, included as a claim in the inmate's § 2254 petition. Gary v. Georgia Diagnostic Prison, 686 F.3d 1261 (11th Cir. 2012).

Defects which occur in trial of defendant should be taken advantage of by ordinary motion for new trial, timely filed, unless good cause is shown for failure to file motion within time provided by law. Cade v. State, 107 Ga. App. 30, 129 S.E.2d 405 (1962).

Witnesses present at trial cannot be basis of motion. — Extraordinary motion for new trial on ground of newly discovered evidence is properly refused, if it appears that witnesses whose evidence is alleged to have been newly discovered were subpoenaed by the defendant, were in attendance upon court, and were not sworn by the defendant. King v. State, 174 Ga. 432, 163 S.E. 168 (1932).

Statute does not authorize second motion when first motion complaining of same verdict is pending. — When motion for new trial is pending in superior court, there is no provision of law authorizing the movant to file a second separate original motion for new trial complaining of the same verdict, nor would instance of that character be comprehended by the statute. Harper v. Perry, 190 Ga. 233, 9 S.E.2d 160 (1940).

Showing required in extraordinary motion alleging invalidity of insurance policies used to establish homicide motive. — When irrespective of whether insurance policies, which were used by the state to establish a motive for murder, were valid or invalid, in an extraordinary motion for new trial based on newly discovered evidence, no new evidence is produced which would establish that accused was aware at time of homicide that policies were invalid, motion should be overruled. Pulliam v. State, 199 Ga. 709, 35 S.E.2d 250 (1945).

Denial of extraordinary motion to set aside divorce decree precludes

subsequent equitable petition on same grounds. — When, after final verdict and decree for divorce, extraordinary motion for new trial is denied on merits of grounds, under conflicting evidence, such judgment precludes movant from maintaining subsequent equitable petition between same parties to set aside decree, based on substantially same grounds as those contained in former motion. Sumner v. Sumner, 186 Ga. 390, 197 S.E. 833 (1938).

Motion will be dismissed when diligence of movant is not shown. Patterson v. Collier, 77 Ga. 292, 3 S.E. 119 (1886); Jackson v. Williams, 149 Ga. 505, 101 S.E. 116 (1919); Edenfield v. Youmans, 33 Ga. App. 430, 126 S.E. 908 (1925).

Statute provides for immediate quid pro quo. — Trial court erred by not requiring defendant to submit a sample of defendant's deoxyribonucleic acid (DNA) to the Georgia Bureau of Investigation for testing and for placement in the DNA data bank at the same time that the court granted the defendant testing of the slides; O.C.G.A. § 5-5-41(c)(9) provides for an immediate quid pro quo and if a defendant obtains an order for post-conviction DNA testing, a reference sample has to be provided simultaneously to the DNA data bank. State v. Clark, 273 Ga. App. 411, 615 S.E.2d 143 (2005).

Brady violation not found. — Trial court did not err in denying the defendant's motion for a new trial due to an alleged Brady violation when there was no evidence of a lack of diligence by the state in inquiring about the status of the latent prints on the victim's car 18 years after the murder, or of any deliberate falsehood regarding the fingerprints' existence. Wilson v. State, 277 Ga. 114, 587 S.E.2d 9 (2003).

Findings in first order need not be restated. — Trial court complied with O.C.G.A. § 5-5-41(c)(8) because the court determined in the court's first order that the defendant was indigent and that payment for any deoxyribonucleic acid (DNA) testing would be made from the fine and forfeiture fund. State v. Clark, 273 Ga. App. 411, 615 S.E.2d 143 (2005).

2. When Extraordinary Motion Proper

Relationship of juror to prosecutor within prohibited degree is ground for extraordinary motion. King v. State, 174 Ga. 432, 163 S.E. 168 (1932).

Disqualifying relationship of juror to party may justify extraordinary motion for new trial. Edenfield v. Youmans, 33 Ga. App. 430, 126 S.E. 908 (1925).

Improper communication with jury may serve as a ground for granting an extraordinary motion for a new trial. King v. State, 174 Ga. 432, 163 S.E. 168 (1932).

Withdrawal by state appointed attorney of motion for new trial justified subsequent extraordinary motion. Jackson v. Clark, 52 Ga. 53 (1874).

Defendant had excuse for delay in filing motion for new trial so as to authorize the trial court to entertain and hear such motion. See Jones v. Cooke, 169 Ga. App. 516, 313 S.E.2d 773 (1984).

Supplemental brief on appeal containing affidavit of a witness recanting the witness's trial testimony was in substance an extraordinary motion for new trial based on newly discovered evidence and should have been directed to the trial court in the first instance. Williams v. State, 254 Ga. 6, 326 S.E.2d 444 (1985).

Juror misconduct. — New trial pursuant to extraordinary motion was unavailable on the ground of juror misconduct when the motion was supported by the testimony of only one juror some four years after the defendant's conviction, and the alleged misconduct of two jurors was not so prejudicial that the verdict lacked due process. Satterwhite v. State, 235 Ga. App. 687, 509 S.E.2d 97 (1998).

Failure to disclose insurance providers necessitated new trial. — In a negligence and wrongful death action, the trial court did not abuse the court's discretion by granting the plaintiffs' extraordinary motion for new trial after it was discovered that the defendant had excess insurance that was not disclosed as it was determined that the defendant failed to disclose the insurance providers in the consolidated pre-trial order so that jurors

Application (Cont'd)
2. When Extraordinary Motion Proper (Cont'd)

could be fully qualified as to any relationship with the insurance providers. Reese v. Ford Motor Co., 320 Ga. App. 78, 738 S.E.2d 301 (2013).

After defendant's conviction has been affirmed on appeal, extraordinary motion for new trial is one of three available remedies. — Petitioner's motion to vacate the petitioner's conviction was not an appropriate remedy in a criminal case after petitioner's murder conviction had been affirmed on direct appeal. The court overruled Division 2 of Chester v. State, 284 Ga. 162 (2008), which had allowed such motions under O.C.G.A. § 17-9-4, and held that in order to challenge a conviction after the conviction had been affirmed on direct appeal, petitioner was required to file an extraordinary motion for new trial, O.C.G.A. § 5-5-41, a motion in arrest of judgment, O.C.G.A. § 17-9-61, or a petition for habeas corpus under O.C.G.A. § 9-14-40. Harper v. State, 286 Ga. 216, 686 S.E.2d 786 (2009).

3. When Extraordinary Motion Unavailable

Matters known or discoverable prior to original motion. — Extraordinary motions for new trial cannot be based upon matters that were known to movant in time to have had the matters stated in the original motion, or that could have been discovered in time by proper diligence. Allen v. State, 88 Ga. App. 200, 76 S.E.2d 531 (1953); Barfield v. McEntyre, 136 Ga. App. 294, 221 S.E.2d 58 (1975).

State of facts underlying extraordinary motion must have been unknown to movant or the movant's counsel at time when ordinary motion for new trial could have been filed, and must have been impossible to ascertain by exercise of proper diligence for that purpose. Gilpin v. Swainsboro Ice & Fuel Co., 75 Ga. App. 574, 44 S.E.2d 168 (1947); Cade v. State, 107 Ga. App. 30, 129 S.E.2d 405 (1962); Patterson v. State, 228 Ga. 389, 185 S.E.2d 762 (1971).

Matter which could have been subject of original motion cannot be subject of extraordinary motion. Barfield v. McEntyre, 136 Ga. App. 294, 221 S.E.2d 58 (1975).

Errors known at time of direct appeal. — When absence of transcript of prosecutor's closing arguments was a matter known to defense counsel at the time of the defendant's direct appeal, all alleged errors premised upon the absence of that transcript should have been enumerated in that appeal and cannot now be raised by an extraordinary motion for new trial. Blake v. State, 244 Ga. 466, 260 S.E.2d 876 (1979), cert. denied, 446 U.S. 988, 100 S. Ct. 2974, 64 L. Ed. 2d 846 (1980).

Any errors regarding defendant's competence to stand trial and relating to whether charge of court was impermissibly burden-shifting could and should have been raised in his direct appeal and cannot now be raised by vehicle of extraordinary motion for new trial. Dix v. State, 244 Ga. 464, 260 S.E.2d 863 (1979), cert. denied, 445 U.S. 946, 100 S. Ct. 1346, 63 L. Ed. 2d 781 (1980).

Reviewing grounds of ordinary motion filed after prescribed time. — When denial of motion for new trial is affirmed, either on merits or from lack of jurisdiction due to failure to file within time allowed by statute for review, extraordinary motion for new trial will not lie to review any grounds in original motion even though some such grounds may be meritorious. King v. State, 174 Ga. 432, 163 S.E. 168 (1932).

Motion based on sufficiency of evidence. — Sufficiency of the evidence is not a sufficiently good reason to grant an extraordinary motion for new trial. Franz v. State, 208 Ga. App. 677, 432 S.E.2d 554 (1993).

Mistake in naming parties in a motion is not grounds for extraordinary motion for new trial. Southwestern R.R. v. Craig, 62 Ga. 361 (1879).

No special circumstances were present justifying an extraordinary motion for a new trial based on proffered testimony of defendant's codefendant who had invoked the codefendant's Fifth Amendment right not to testify at the prior trial and who had pled guilty and

been sentenced in the interim because the substance of the testimony was not in fact new evidence since it was always known by the defendant, and the witness lacked credibility since the witness had nothing to lose by testifying untruthfully regarding the alleged innocence of the defendant. Hester v. State, 219 Ga. App. 256, 465 S.E.2d 288 (1995).

Prior motion for new trial. — Defendant's pleading, which sought an out-of-time appeal under circumstances where such an appeal was not permitted, could not be considered an extraordinary motion for new trial since the defendant had already filed such a motion in 1992 and was statutorily limited to filing one such motion under O.C.G.A. § 5-5-41(b). Richards v. State, 275 Ga. 190, 563 S.E.2d 856 (2002).

Defendant failed to show test results would have resulted in acquittal. — Trial court did not err when the court concluded that defendant's request for DNA testing failed to meet the requirements of O.C.G.A. § 5-5-41(c)(3) because the defendant did not show that, had DNA testing been performed during the defendant's trial on a charge of murder, there was a reasonable probability the results would have led to defendant's acquittal. Crawford v. State, 278 Ga. 95, 597 S.E.2d 403, cert. denied, stay denied, 542 U.S. 954, 125 S. Ct. 5, 159 L. Ed. 2d 837 (2004).

Post-conviction motion for DNA testing denied. — Trial court did not abuse the court's discretion in denying a defendant's post-conviction motion for deoxyribonucleic acid (DNA) testing because the defendant was barred from requesting DNA testing under O.C.G.A. § 5-5-41(c)(3) since the defendant's conviction for the crime of incest in violation of O.C.G.A. § 16-6-22(a)(3) was not defined as a serious violent felony under O.C.G.A. § 17-10-6.1(a). Hunter v. State, 294 Ga. App. 583, 669 S.E.2d 533 (2008).

Direct appeal to denial of semen sample not available. — Inmate could not bring a direct appeal of an order that denied the inmate's motion seeking testing of a semen sample; the inmate did not seek deoxyribonucleic acid (DNA) testing of the sample, rather, the inmate sought to have the semen tested for the presence of chemicals typically found in condom lubricants, which could be accomplished through non-DNA testing procedures. Bradberry v. State, 315 Ga. App. 434, 727 S.E.2d 208 (2012).

OPINIONS OF THE ATTORNEY GENERAL

Extraordinary motion for new trial may be filed at any time after conviction; extraordinary motion must show that there is some material matter which would have been beneficial to the defendant at the time of trial and that such matters were unknown to the defendant and could not have been discovered by the defendant or defense counsel by use of due diligence. 1957 Op. Att'y Gen. p. 69.

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Admissibility and Reliability of Hair Sample Testing to Prove Illegal Drug Use, 47 POF3d 203.

ALR. — Bill of review as the proper remedy where decree is entered after the death of a party, 6 ALR 1524.

Delay as affecting right to coram nobis attacking criminal conviction, 62 ALR2d 432.

Time for filing motion for new trial based on jury conduct occurring before, but discovered after, verdict, 97 ALR2d 788.

5-5-42. Form for motion for new trial.

(a) The form for motion for new trial in civil cases prescribed in subsection (b) of this Code section shall be sufficient, but any other form substantially complying therewith shall also be sufficient.

(b) Form for motion for new trial in civil cases:

IN THE _____ COURT OF _____ COUNTY

STATE OF GEORGIA

_____	)	
Plaintiff	)	
	)	
v.	)	Civil Action
	)	File no. _____
_____	)	
Defendant	)	
	)	

MOTION FOR NEW TRIAL

Defendant moves the court to set aside the verdict returned herein on _____(date)_____, _____, and the judgment entered thereon on _____(date)_____, _____, and to grant a new trial on the following grounds:

(1) The verdict is contrary to law.

(2) The verdict is contrary to the evidence.

(3) The verdict is strongly against the weight of the evidence.

(4) The court erred in permitting witness Smith to testify as follows: _____.

(5) The court erred in failing to charge the jury on unavoidable accident as requested in writing by defendant.

(6) The court erred in charging the jury as follows: _____.

Dated: _____.

_____
Attorney for defendant

_____
Address

(Here set forth rule nisi and certificate of service.)

(c) The form for motion for new trial in criminal cases in subsection (d) of this Code section is declared to be sufficient but any other form substantially complying therewith shall also be sufficient.

(d) Form for motion for new trial in criminal cases:

IN THE _____ COURT OF _____ COUNTY

STATE OF GEORGIA

_____	)	
The State	)	
	)	
v.	)	Indictment
	)	Accusation
_____	)	
Defendant	)	File no. _____

MOTION FOR NEW TRIAL

Defendant moves the court to set aside the verdict returned herein on _____(date)_____, _____, and the sentence entered thereon on _____(date)_____, _____, and to grant a new trial on the following grounds:

(1) The defendant should be acquitted and discharged due to the state's failure to prove guilt beyond a reasonable doubt.

(2) Although the state proved the defendant's guilt beyond a reasonable doubt, the evidence was sufficiently close to warrant the trial judge to exercise his discretion to grant the defendant a retrial.

(3) The court committed an error of law warranting a new trial.

Dated: _____.

_____
Attorney for defendant

_____
Address

(Here set forth rule nisi and certificate of service.)

(Ga. L. 1965, p. 18, § 20; Ga. L. 1983, p. 702, § 1; Ga. L. 1984, p. 22, § 5; Ga. L. 1999, p. 81, § 5.)

Cross references. — Form of motion to dismiss, presenting defense of failure to state a claim, § 9-11-119.

Law reviews. — For article, "1966 Amendments to the Appellate Procedure Act of 1965," see 2 Ga. St. B.J. 433 (1966).

JUDICIAL DECISIONS

Testimony objected to must be identified in motion. — While requirements for contents of amended ground of motion for new trial have been relaxed, statute still requires that testimony objected to be identified. Carroll v. Morrison, 116 Ga. App. 575, 158 S.E.2d 480 (1967).

Motion otherwise correct not void for failure to specify date of judgment. — Motion for new trial that shows

style and number of case, and court in which the case is pending is not void for not specifying date of judgment to be set aside. Berman v. Berman, 231 Ga. 216, 200 S.E.2d 870 (1973).

Subsection (d) not admission of guilt. — Trial court erred in denying the defendant's request for discharge and acquittal due to the state's failure to prove guilt beyond a reasonable doubt when the trial court perceived paragraph (d)(2) to be an admission that the state had proved guilt beyond a reasonable doubt, and under modern rules of alternative pleading the inconsistent grounds in defendant's motion should not have been used as admissions against the defendant. Hilson v. State, 204 Ga. App. 200, 418 S.E.2d 784 (1992).

Cited in Millhollan v. Watkins Motor Lines, 116 Ga. App. 452, 157 S.E.2d 901 (1967).

RESEARCH REFERENCES

Am. Jur. 2d. — 58 Am. Jur. 2d, New Trial, § 343.

Am. Jur. Pleading and Practice Forms. — 18B Am. Jur. Pleading and Practice Forms, New Trial, § 80.

ALR. — Necessity and propriety of counteraffidavits in opposition to motion for new trial in civil case, 7 ALR3d 1000.

5-5-43. Allowance of filing of motion by judge other than trial judge.

A judge who did not try the case may, if presented with a motion for new trial within 30 days from the date of the verdict or judgment sought to be set aside, allow the filing of, issue rule nisi thereon, and decide the motion either where he is presiding in the court in which the trial was had, or where he is named in the rule, or where he is otherwise authorized by law to do so. (Code 1863, § 3644; Code 1868, § 3669; Code 1873, § 3720; Code 1882, § 3720; Civil Code 1895, § 5486; Civil Code 1910, § 6091; Code 1933, § 70-103; Ga. L. 1957, p. 224, § 13.)

History of Code section. — This Code section is derived from the decision in Field v. Thornton, 1 Ga. 306 (1846).

Law reviews. — For article, "A Discussion of the 1957 Amendments to Rules of Practice and Procedure in Georgia," see 19 Ga. B.J. 395 (1957).

JUDICIAL DECISIONS

Death of presiding judge before motion is heard does not automatically require new trial. However, language used in overruling motion will be scrutinized to determine if successor shows that judge, in overruling the motion, did not exercise any discretion in reviewing the verdict. Town of Woodland v. Carter Constr. Co., 65 Ga. App. 547, 16 S.E.2d 129 (1941).

When presiding judge dies pending motion for new trial, the judge's successor must hear and determine the motion. Town of Woodland v. Carter Constr. Co., 65 Ga. App. 547, 16 S.E.2d 129 (1941).

Judge acting in another's place cannot grant continuance of motion ordered tried in another county. Brantley v. Hass, 69 Ga. 748 (1882).

As to approval of amendments. — See Watkins v. Paine, 57 Ga. 50 (1876); Central R.R. & Banking Co. v. Pool, 95 Ga. 410, 22 S.E. 631 (1895).

Cited in Fletcher v. Gillespie, 201 Ga. 377, 40 S.E.2d 45 (1946); Wallace v. Speed,

93 Ga. App. 120, 91 S.E.2d 53 (1955); Golden v. Credico, Inc., 124 Ga. App. 700, 185 S.E.2d 578 (1971).

RESEARCH REFERENCES

Am. Jur. 2d. — 58 Am. Jur. 2d, New Trial, § 379 et seq.

C.J.S. — 66 C.J.S., New Trial, §§ 52, 181, 182, 272.

ALR. — Power of successor or substituted judge, in civil case, to render decision or enter judgment on testimony heard by predecessor, 84 ALR5th 399.

5-5-44. Service of rule nisi; filing and recordation of motion.

In all motions for a new trial the opposite party shall be served with a copy of the rule nisi unless such copy is waived. The clerks of the courts shall not be required, except by order of the presiding judge, to enter upon the minutes of the courts motions for new trial in cases tried therein; but the motions shall be filed in the clerk's office as are other papers and shall be recorded together with the other pleadings in the cases when the same are finally disposed of as required by law. (Orig. Code 1863, § 3648; Code 1868, § 3673; Code 1873, § 3723; Ga. L. 1878-79, p. 138, § 1; Code 1882, § 3723; Civil Code 1895, § 5475; Penal Code 1895, § 1065; Civil Code 1910, § 6080; Penal Code 1910, § 1092; Code 1933, § 70-306.)

Law reviews. — For articles discussing the preparation of an amended motion for new trial and facts concerning appellate practice in general, prior to the adoption of the Appellate Practice Act, see 21 Ga. B.J. 424 (1959).

JUDICIAL DECISIONS

Analysis

General Consideration
Filing of Motion
Method of Service
Time for Service
Persons Entitled to Service
Waiver of Service
Dismissal of Motion

General Consideration

First sentence of statute changed common law rule, by requiring service of copy of rule nisi for new trial. Lee v. Cox, 15 Ga. App. 249, 82 S.E. 941 (1914).

When there is no service of process or waiver thereof, court is without jurisdiction and the court's judgment is void, not merely voidable, and may be attacked in any court where such judgment is attempted to be enforced. Dunn v. Dunn, 221 Ga. 368, 144 S.E.2d 758 (1965).

Service of rule nisi is required in criminal cases. Jackson v. State, 24 Ga. App. 594, 101 S.E. 710 (1919).

Presentation of motion, together with rule nisi issued thereon, is an ex parte hearing. King v. Sears, 91 Ga. 577, 18 S.E. 830 (1893); Gainesville Buggy & Wagon Co. v. Morrow, 23 Ga. App. 268, 98 S.E. 100 (1919).

Motion for continuance may be re-

General Consideration (Cont'd)

fused. Tyler & Tomlinson v. Arnett, 13 Ga. App. 595, 79 S.E. 482 (1913).

Cited in Smedley v. Williams, 112 Ga. 114, 37 S.E. 111 (1900); McMullen v. Citizens Bank, 123 Ga. 400, 51 S.E. 342 (1905); Gould v. C.B. Johnston & Co., 123 Ga. 765, 51 S.E. 608 (1905); Connor v. State, 7 Ga. App. 83, 66 S.E. 482 (1909); Whitaker v. State, 138 Ga. 139, 75 S.E. 254 (1912); Davis v. Harden, 143 Ga. 98, 84 S.E. 426 (1915); Harvey v. State, 16 Ga. App. 252, 85 S.E. 82 (1915); Louisville & N.R.R. v. Nelson, 145 Ga. 89, 88 S.E. 544 (1916); Automobile Ins. Co. v. Watson, 39 Ga. App. 244, 146 S.E. 922 (1929); Groves v. Groves, 177 Ga. 768, 171 S.E. 261 (1933); Petty v. Complete Auto Transit, Inc., 215 Ga. 66, 108 S.E.2d 697 (1959); Brown v. Brown, 233 Ga. 581, 212 S.E.2d 378 (1975); Vaughn v. State, 161 Ga. App. 265, 287 S.E.2d 728 (1982).

Filing of Motion

Filing in clerk's office required. — It is essential for validity of motion that the motion be filed in the clerk's office and until the motion is so filed the motion is a mere private paper. Acknowledgment of service of such private paper, purporting to be a motion for new trial, is a mere nullity, and service as required by statute is not perfected. Atlantic Coast Line R.R. v. McNair, 96 Ga. App. 519, 100 S.E.2d 639 (1957).

When motion has been delivered to clerk for filing, the motion is deemed filed, even though that officer fails to make proper entry of filing thereon. Brinson v. Georgia R.R. Bank & Trust Co., 45 Ga. App. 459, 165 S.E. 321 (1932).

Judge may hand papers to clerk to be filed. Sanders v. Williams, 73 Ga. 119 (1884).

Method of Service

Statute provides for necessity, not method, of service. Short v. Riles, 141 Ga. App. 881, 234 S.E.2d 710 (1977).

Statute contemplates personal service. Jones v. Fox, 49 Ga. App. 573, 176 S.E. 530 (1934).

Personal service is required when service of rule nisi in connection with motion for new trial is not waived. Braziel v. Hunter, 103 Ga. App. 854, 121 S.E.2d 39 (1961); Dunn v. Dunn, 221 Ga. 368, 144 S.E.2d 758 (1965).

Service by leaving copy of motion at residence of respondent is insufficient. Jones v. Fox, 49 Ga. App. 573, 176 S.E. 530 (1934).

Service upon attorney of copy of motion satisfies statute. — Although caption of motion for new trial does not name defendant as party, service upon the defendant's attorney of copy of the motion is compliance with service requirement of statute. Hughes v. Newell, 152 Ga. App. 618, 263 S.E.2d 505 (1979).

Service may be made by movant's attorney and entry of service verified by affidavit. Lee v. Cox, 15 Ga. App. 249, 82 S.E. 941 (1914).

Failure to perfect service of a motion for new trial in accordance with O.C.G.A. § 5-5-44 renders the motion void. Craig v. Holsey, 264 Ga. App. 344, 590 S.E.2d 742 (2003), cert. denied, 543 U.S. 820, 125 S. Ct. 59, 160 L. Ed. 2d 29 (2004).

When service is improper, fact that defendant actually receives notice is immaterial. — It is immaterial and does not provide proper service that the defendant actually receives motions for new trial sent through the mail or, in some way, learns of filing of motion for new trial. Dunn v. Dunn, 221 Ga. 368, 144 S.E.2d 758 (1965).

Service of amendments to motion for new trial, see Fleming v. Roberts, 114 Ga. 634, 40 S.E. 792 (1902); Robert Portner Brewing Co. v. Cooper, 116 Ga. 171, 42 S.E. 408 (1902).

Time for Service

Statute does not provide any time within which service of rule nisi must be perfected. Shirley v. Morgan, 170 Ga. 324, 152 S.E. 831 (1930).

Unless time is fixed, service should be in ample time for preparation for hearing. — When rule nisi granted upon application for new trial, or in any order passed continuing hearing upon motion for new trial, there is no limitation of period within which service of rule nisi or other order should be perfected, such ser-

vice as will give opposite party a reasonable opportunity to prepare for hearing upon motion for new trial and to resist the hearing is sufficient service. Connor v. State, 7 Ga. App. 83, 66 S.E. 482 (1909).

While no specific time is prescribed by statute within which respondent shall be served with copy of rule nisi issued upon application for new trial, it has been held that service must be had a reasonable time before hearing, and that such service is essential unless waived. Peavy v. Peavy, 167 Ga. 219, 145 S.E. 55 (1928).

When no time is fixed within which service of motion for new trial shall be effected, such service may be perfected even after the hearing of the motion for new trial has been continued, if there be service upon opposite party at such time before the date set for final hearing as will enable opposite party to prepare to resist grant of motion. Webb v. Nobles, 195 Ga. 287, 24 S.E.2d 27 (1943).

When no time for serving copy of rule nisi is fixed by presiding judge, it should be served in ample time for opposite party to prepare for hearing. Trammell v. Throgmorton, 210 Ga. 659, 82 S.E.2d 140 (1954).

Compliance prior to second hearing with order issued regarding first hearing was sufficient. — Rule nisi granted on motion for new trial set hearing for fixed date, and directed that motion be served on opposite party "five days prior to the hearing." On the date fixed for the hearing the trial judge granted an order postponing the hearing to a later date, making no other order as to service. The motion for a new trial was not served five days before the date fixed for the first hearing, but it was duly served five days prior to the date as fixed for the subsequent order of postponement. The court held this was sufficient. Johnson v. State, 4 Ga. App. 850, 62 S.E. 540 (1908).

Persons Entitled to Service

All persons interested in sustaining judgment, or who would be affected by reversal, are indispensable parties in motion for new trial, and shall be served with copy of rule nisi. State Hwy. Dep't v. Roquemore, 106 Ga. App. 217, 126 S.E.2d 549 (1962).

Term "opposite party" defined. — As regards applications for new trial, term "opposite party" will include all persons, if more than one, who were parties to case and who are interested in sustaining the verdict. Carmichael v. City of Jackson, 194 Ga. 664, 22 S.E.2d 470 (1942); Almon v. Citizens & S. Nat'l Bank, 108 Ga. App. 799, 134 S.E.2d 435 (1963).

Codefendant who has interest in sustaining verdict is entitled to notice. — When codefendant has an interest in sustaining the verdict of the jury and judgment of the court, the codefendant is a necessary party to a motion for new trial and must be served with a copy of the rule nisi. Almon v. Citizens & S. Nat'l Bank, 108 Ga. App. 799, 134 S.E.2d 435 (1963).

Waiver of Service

When waiver of service results. — Waiver results when party appears and pleads to merits, or when the party appears and argues matters collateral to motion in manner to indicate that party must have been served, or must have waived service. Dunn v. Dunn, 221 Ga. 368, 144 S.E.2d 758 (1965).

Waiver of service results when opposite party appears to argue motion. Baldwin v. Daniel, 69 Ga. 782 (1883); Hopkins v. Jackson, 147 Ga. 821, 95 S.E. 675 (1918).

When rule nisi, issued upon filing of motion for new trial, was not served on respondent, and service was not expressly waived, but agreement was made in open court by counsel for respondent, to passage of order setting hearing upon motion at designated time and place, which agreement was recited in order, and counsel for respondent afterwards appeared at time and place set for hearing on motion, these facts amount to waiver by respondent, through counsel, of service of rule nisi. Beeland v. Butler-Payne Lumber Co., 44 Ga. App. 603, 162 S.E. 303 (1932).

Waiver does not result by informing movant's counsel that certain day is suitable to respondent. Smedley v. Williams, 112 Ga. 114, 37 S.E. 111 (1900).

Acknowledgment of service of order merely continuing hearing of motion to another date is insufficient to dispense with service of copy of rule nisi.

Waiver of Service (Cont'd)

Thornton v. State, 16 Ga. App. 210, 84 S.E. 973 (1915).

Dismissal of Motion

Discretion of judge to dismiss untimely served motion. — When time fixed for hearing arrives, and no service has been effected, it is generally a matter in sound discretion of trial judge whether to dismiss motion or to continue final hearing until service is perfected. Webb v. Nobles, 195 Ga. 287, 24 S.E.2d 27 (1943); Trammell v. Throgmorton, 210 Ga. 659, 82 S.E.2d 140 (1954).

Judgment dismissing motion for new trial, on motion of respondent made at time set for hearing, is not an abuse of trial court's discretion when there has been no personal service on respondent or any waiver of such service. Braziel v. Hunter, 103 Ga. App. 854, 121 S.E.2d 39 (1961).

When there was neither service nor written waiver of service upon opposite party of rule nisi issued in connection with motion for new trial, and when, at first opportunity and before either expressly or impliedly consented to completion of motion or judicial consideration upon the motion's merits, the respondent moved to dismiss the proceeding for want of such service, court did not err in dismissing the motion. Jackson v. State, 24 Ga. App. 594, 101 S.E. 710 (1919).

Dismissal is proper when service is not proved. Strickland v. Bell, 144 Ga. 494, 87 S.E. 398 (1915).

Failure to attach rule nisi to motion for new trial does not demand dismissal of motion. Trial judge in the judge's discretion may dismiss the motion or continue matter until motion is perfected. Stoner v. McDougall, 235 Ga. 171, 219 S.E.2d 138 (1975); Craig v. Holsey, 264 Ga. App. 344, 590 S.E.2d 742 (2003), cert. denied, 543 U.S. 820, 125 S. Ct. 59, 160 L. Ed. 2d 29 (2004).

Dismissal when no rule nisi served, and requirement not waived. — When the defendant files a motion for new trial, but no rule nisi is attached nor copy of the rule nisi served upon the state, nor does the state waive this requirement, there is no abuse of discretion by the trial court in dismissing the defendant's motion for new trial. Griggs v. State, 167 Ga. App. 581, 307 S.E.2d 75 (1983).

RESEARCH REFERENCES

Am. Jur. 2d. — 58 Am. Jur. 2d, New Trial, §§ 322 et seq., 340 et seq.

5-5-45. Amendment of rule nisi.

A rule nisi for a new trial may be amended by adding new grounds not taken at the time the motion was filed. (Orig. Code 1863, § 3432; Code 1868, § 3452; Code 1873, § 3503; Code 1882, § 3503; Civil Code 1895, § 5121; Civil Code 1910, § 5705; Code 1933, § 70-309.)

JUDICIAL DECISIONS

Amendment may be made at any time before motion is finally disposed of. Tifton, T. & G. Ry. v. Chastain, 122 Ga. 250, 50 S.E. 105 (1905); Albritton v. Tygart, 9 Ga. App. 361, 71 S.E. 512 (1911).

Amendment cannot be made after affirmance of judgment by appellate court. Miller v. State, 121 Ga. 135, 48 S.E. 904 (1904); Benning v. Horkan, 123 Ga. 454, 51 S.E. 333 (1905).

Appellate court will not interfere when trial judge refuses further time to make amendment. Barge v. State, 9 Ga. App. 226, 70 S.E. 965 (1911).

Notice of amendment is not necessary. Page v. Blackshear, 75 Ga. 885

(1885); Thomas v. State, 95 Ga. 484, 22 S.E. 315 (1895).

Amendment may set up that verdict was excessive. McLeod v. Morris, 120 Ga. 756, 48 S.E. 188 (1904).

Amendment may insert name of claimant. Lunsford v. Sutton, 3 Ga. App. 94, 59 S.E. 334 (1907).

Brief of testimony may be amended. Vanover v. Turner, 41 Ga. 577 (1871).

Amendment cannot add ground which is without merit. Lester v. Savannah Guano Co., 94 Ga. 710, 20 S.E. 1 (1907).

5-5-46. Operation of rule nisi as supersedeas in criminal cases; superseding of sentence.

(a) The rule nisi on a motion for a new trial in a criminal case shall not operate as a supersedeas unless it is so ordered by the court.

(b) When requested to do so by the defendant or his counsel, the judge trying the case shall grant an order superseding the sentence until the motion for a new trial is heard and decided. (Orig. Code 1863, § 3649; Code 1868, § 3674; Code 1873, § 3724; Code 1882, § 3724; Ga. L. 1899, p. 77, § 1; Penal Code 1895, § 1066; Penal Code 1910, § 1093; Code 1933, § 70-308.)

Cross references. — Stay of proceedings for enforcement of civil judgment, § 9-11-62. Termination of appeal bonds in criminal cases, § 17-6-1.

Law reviews. — For article outlining proposed revisions of appellate procedure rules with comments, prior to the adoption of T. 5, C. 6, A. 2, see 19 Ga. B.J. 145 (1956).

JUDICIAL DECISIONS

When defendant is admitted to bail, forfeiture procedures of § 17-6-71 apply to bond. — Whether defendant was admitted to bail under former Code 1933, § 70-308 (see O.C.G.A. § 5-5-46), pending decision on motion for new trial, or under former Code 1933, § 6-1005 (see O.C.G.A. § 5-6-45), pending decision on appeal, forfeiture procedures of former Code 1933, § 27-906 (see O.C.G.A. § 17-6-71) applied to bond. Under either Code section, the trial judge exercises the judge's discretion in permitting release on bail. State v. Slaughter, 246 Ga. 174, 269 S.E.2d 446 (1980).

Delay in paying costs. — Delay of slightly more than 30 days in paying the bill of costs because of appellant's medical condition was properly found to be neither unreasonable nor inexcusable. Poythress v. Savannah Airport Comm'n, 229 Ga. App. 303, 494 S.E.2d 76 (1997).

Cited in Johnson v. Aldredge, 192 Ga. 209, 14 S.E.2d 757 (1941); Phillips v. State, 95 Ga. App. 277, 97 S.E.2d 707 (1957).

RESEARCH REFERENCES

C.J.S. — 66 C.J.S., New Trial, § 197.

5-5-47. Right to give supersedeas bond for bailable offense upon filing of new trial motion; assessment and approval of bond.

(a) It shall be the right of any person convicted of a crime which is bailable under the law, and in which case a motion for a new trial has been filed as provided by law, to give a supersedeas bond immediately upon the filing of the motion for new trial without having to wait for the filing of a notice of appeal.

(b) The judge of the court having jurisdiction of the case, immediately upon the approval and filing of a motion for new trial therein, shall assess the amount of the bond, which shall be approved in the manner provided by law.

(c) The provisions of Code Section 5-6-45, relating to supersedeas and supersedeas bonds when a notice of appeal is filed, shall apply equally to cases when a motion for a new trial is filed. (Ga. L. 1916, p. 157, §§ 1, 2; Code 1933, §§ 6-1006, 6-1007; Ga. L. 1984, p. 415, § 1.)

Cross references. — Termination of appeal bonds in criminal cases, § 17-6-1.

Law reviews. — For comment on Ingram v. Grimes, 213 Ga. 652, 100 S.E.2d 914 (1957), holding that the granting of bail after conviction rests on the discretion of the trial court even when a motion for new trial is pending, see 21 Ga. B.J. 235 (1958).

JUDICIAL DECISIONS

Statute authorizes trial judge to admit defendant to bail pending disposition of motion. — Proper construction of statute is not that it takes away discretion of trial judge in matter of granting bail after conviction, but that it authorizes trial judge, in the judge's discretion, to admit the defendant to bail pending disposition of the motion for new trial. Ingram v. Grimes, 213 Ga. 652, 100 S.E.2d 914 (1957), for comment, see 21 Ga. B.J. 235 (1958).

Excessive bail is equivalent of refusal to grant bail, and in such cases habeas corpus is available and appropriate remedy for relief. Jones v. Grimes, 219 Ga. 585, 134 S.E.2d 790 (1964).

RESEARCH REFERENCES

Am. Jur. 2d. — 5 Am. Jur. 2d, Appellate Review, §§ 402, 403, 421 et seq.

Am. Jur. Proof of Facts. — Excessive Bail, 18 POF2d 149.

ALR. — Review for excessiveness of sentence in narcotics case, 55 ALR3d 812.

5-5-48. Time of new trial generally.

When a new trial has been granted by the court, the case shall be placed on the docket for trial as though no trial had been had, subject to the rules for continuances provided in this Code. (Orig. Code 1863, § 3646; Code 1868, § 3671; Code 1873, § 3722; Code 1882, § 3722;

Civil Code 1895, § 5489; Civil Code 1910, § 6094; Code 1933, § 70-401.)

JUDICIAL DECISIONS

When new trial granted, case stands ready for trial as if there had been none. Leventhal v. Baumgartner, 209 Ga. 404, 73 S.E.2d 194 (1952).

Former Civil Code 1910, § 6094 (see O.C.G.A. § 5-5-48) and former Civil Code 1910, §§ 6095, 6096, 6097 (see O.C.G.A. § 5-5-49) must be construed together. — Former Civil Code 1910, § 6094 (see O.C.G.A. § 5-5-48) and former Civil Code 1910, §§ 6095, 6096, 6097 (see O.C.G.A. § 5-5-49) related to trial of cases in which new trials have been granted, and must be construed together. Henry v. State, 20 Ga. App. 742, 93 S.E. 311 (1917).

Effect of grant of new trial by Supreme Court is to require case to be heard de novo unless specific direction be given in regard thereto. Leventhal v. Baumgartner, 209 Ga. 404, 73 S.E.2d 194 (1952); Baker v. Decatur Lumber & Supply Co., 210 Ga. 805, 82 S.E.2d 820 (1954).

When issues tried by jury were upon exceptions to an auditor's fact findings. — When, after rendition of verdict and judgment, new trial is granted, case stands upon docket for trial as if there had been no trial. This applies when case which was one at law had been referred to auditor, and issues tried by jury were upon exceptions to auditor's findings on facts. Mayor of Monroe v. Fidelity & Deposit Co., 50 Ga. App. 865, 178 S.E. 767 (1935).

When evidence adduced at first trial entitled movant to recovery as matter of law. — Statute applies notwithstanding that, under law of case as laid down by appellate court when reversing judgment of trial court and granting new trial, party at whose instance new trial was granted is, under evidence adduced upon trial, entitled, as a matter of law, to recovery. Scott v. Powell Paving Co., 43 Ga. App. 705, 159 S.E. 895 (1931).

When case reversed, evidence sufficiency not addressed. — Enumerations of error relating to sufficiency of evidence will not be addressed on appeal when a case is reversed, since new or additional evidence may be presented at a new trial. Vitello v. Stott, 222 Ga. App. 134, 473 S.E.2d 504 (1996).

Testimony rendered at first trial cannot be ground for dismissal of second trial. — Testimony, by reason of rendition at one trial, does not operate as admission in judicio which would as a matter of law preclude recovery upon subsequent trial. Scott v. Powell Paving Co., 43 Ga. App. 705, 159 S.E. 895 (1931).

Even when a new trial has been granted on ground that, under testimony of plaintiff personally, plaintiff was as a matter of law not entitled to recover, case stands on docket for trial as though no trial had been had and it is error for court, on call of case for second trial, to dismiss the case upon motion of the defendant, on ground that testimony of the plaintiff as adduced on former trial of case operated to preclude recovery by the plaintiff. Cook v. Attapulgus Clay Co., 52 Ga. App. 610, 184 S.E. 334 (1936).

Although testimony of party to case may as a matter of law preclude recovery in the party's favor, it does so only as respects trial at which testimony is rendered and is not grounds for dismissal of new trial, because after new trial has been granted, case stands in posture of de novo proceeding as though no trial had been had. Napier v. Napier, 221 Ga. 813, 147 S.E.2d 422, appeal dismissed, 222 Ga. 681, 151 S.E.2d 712 (1966).

Grant of directed verdict authorized. — At a second trial following the grant of plaintiff's motion for a new trial, the trial court was authorized to dismiss the defendant's counterclaims and grant a directed verdict for the plaintiff. Tyson v. Cheek Mechanical & Elec. Serv., Inc., 218 Ga. App. 134, 460 S.E.2d 536 (1995).

Party's contradictory testimony from first trial is considered extrajudicial admission or impeaching testimony. — Party to case who has

testified on former trial of that case may, upon subsequent trial of same case, give testimony in contradiction of that party's testimony given upon former trial, and, when so testifying, that party's testimony upon former trial is, when introduced in evidence on subsequent trial, in nature of an extrajudicial admission or impeaching testimony, whose probative value is for the jury. Scott v. Powell Paving Co., 43 Ga. App. 705, 159 S.E. 895 (1931).

While party's testimony at first trial may have been different from the party's testimony at the second trial, and may be introduced as an admission or impeaching testimony, it will be for the jury to determine the testimony's probative value. Cook v. Attapulgus Clay Co., 52 Ga. App. 610, 184 S.E. 334 (1936).

Charge on second trial cannot be based on evidence or requests from first trial. — Notwithstanding plaintiff in error in first trial made written request for charge on law of undue influence, nevertheless upon second trial it was error for trial judge to charge on that subject when there was no evidence to authorize charge on undue influence. Leventhal v. Baumgartner, 209 Ga. 404, 73 S.E.2d 194 (1952).

Delay in paying costs. — Delay of slightly more than 30 days in paying the bill of costs because of appellant's medical condition was properly found to be neither unreasonable nor inexcusable. Poythress v. Savannah Airport Comm'n, 229 Ga. App. 303, 494 S.E.2d 76 (1997).

Failure to conduct new trial. — On remand, because the only relief sought by a distributor in a contract action with a buyer was a new trial, the trial court erred in entering judgment in favor of the distributor without conducting a new trial; moreover, the buyer was not foreclosed from presenting additional or different evidence in support of its claim for lost profits in the trial. Strickland & Smith, Inc. v. Williamson, 281 Ga. App. 784, 637 S.E.2d 170 (2006).

Cited in United States Fid. & Guar. Co. v. Clarke, 187 Ga. 774, 2 S.E.2d 608 (1939); Holton v. Lankford, 189 Ga. 506, 6 S.E.2d 304 (1939); Underwood v. D.C. Heath & Co., 64 Ga. App. 180, 12 S.E.2d 464 (1940); Weatherly v. Parr, 74 Ga. App. 526, 40 S.E.2d 445 (1946); Malcom v. Webb, 211 Ga. 449, 86 S.E.2d 489 (1955); Reagan v. Reagan, 221 Ga. 173, 143 S.E.2d 736 (1965).

RESEARCH REFERENCES

Am. Jur. 2d. — 58 Am. Jur. 2d, New Trial, § 356 et seq.

ALR. — Liability insurer's duty to pay injured person as affected by appeal or grant of new trial, or pendency of appeal or motion for new trial, from judgment against insured, or by the fact that time for appeal or motion for new trial has not expired, 31 ALR3d 899.

5-5-49. Trial of cases returned for new trial by appellate courts.

(a) A case decided by the Supreme Court or Court of Appeals which is not finally disposed of by the decision shall stand for further hearing at the term next ensuing after the decision by the appellate court unless the lower court is in session when the decision is made, in which event it shall stand for trial during such term of the lower court.

(b) The clerk of the lower court, upon receipt of the remittitur of the appellate court, shall docket the case for trial in accordance with subsection (a) of this Code section.

(c) The judge presiding may in his discretion postpone the hearing of any such case to a day in the term as to him may seem reasonable; or, if necessary to give proper time for preparation, he may continue the

case until the next term of the court. (Ga. L. 1892, p. 103, §§ 1-3; Civil Code 1895, §§ 5490, 5491, 5492; Civil Code 1910, §§ 6095, 6096, 6097; Code 1933, §§ 70-402, 70-403, 70-404.)

Cross references. — Provisions regarding continuance of cases returned by appellate courts for trial, §§ 9-10-162, 17-8-34.

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Construction with § 5-5-48. — Former Civil Code 1910, §§ 6094-6098 (see O.C.G.A. §§ 5-5-48 and 5-5-49) related relate to trial of cases in which new trials have been granted, and must be construed together. Henry v. State, 20 Ga. App. 742, 93 S.E. 311 (1917).

Effect of noncompliance. — Noncompliance with O.C.G.A. § 5-5-49 does not result in the automatic acquittal of a defendant in a criminal case. In the absence of language clearly evidencing a legislative intent to effectuate such a broad divestiture of jurisdiction, O.C.G.A. § 5-5-49 must be construed as merely directory. Butler v. State, 207 Ga. App. 824, 429 S.E.2d 280 (1993).

Filing of remittitur in clerk's office is prerequisite to reacquisition of jurisdiction by trial court. — If trial court does not acquire jurisdiction by filing of remittitur in clerk's office, the court is without authority to take any steps in the case, and has no more right to pass order formally making judgment of the Supreme Court its judgment than the Supreme Court had, without so doing, to proceed with trial. Hagan v. Robert & Co. Assocs., 222 Ga. 469, 150 S.E.2d 663 (1966).

Legislative intent is that entry of remittitur restores trial court's jurisdiction. — Unless filing of remittitur in office of trial court operates to restore at once to that court the court's former jurisdiction over cases, they ought not to be redocketed when remittitur is so filed, and requirement that they immediately be redocketed when remittitur is entered conclusively shows that it was intention of the legislature that trial court's jurisdiction over cases should be restored when mandate of reviewing court reached it through prescribed procedure. Hagan v. Robert & Co. Assocs., 222 Ga. 469, 150 S.E.2d 663 (1966).

Receipt of remittitur by clerk invests trial court with authority to enforce judgment of affirmance. Knox v. State, 113 Ga. 929, 39 S.E. 330 (1901).

Remittitur must be entered upon minutes of lower court before trial can proceed. Lyon v. Lyon, 103 Ga. 747, 30 S.E. 575 (1898); Hubbard v. McCrea, 103 Ga. 680, 30 S.E. 628 (1898).

Remittitur need not be made judgment of trial court before clerk redockets case. — Statute cannot possibly mean that remittitur must be made judgment of trial court and spread upon the court's minutes before the clerk of that court proceeds to redocket cases. On the contrary, it contemplates that cases shall be immediately entered upon docket of the trial court, in order that judge, on reaching cases in the cases' regular order, can dispose of the cases by carrying into effect the judgment rendered by reviewing court. Hagan v. Robert & Co. Assocs., 222 Ga. 469, 150 S.E.2d 663 (1966).

Effect of grant of new trial is to require a hearing de novo, wherein new facts may be shown. Anderson v. Clark, 70 Ga. 362 (1883).

Reversal neither serves as substitute for findings for appellant nor enlarges trial judge's powers. — Judgment of reversal, without more, operates only to vacate orders and decree as therein stated, and to reinvest trial court with jurisdiction on filing of remittitur in office of clerk of trial court. It neither serves as a substitute for findings for appellant, nor enlarges powers of trial judge in reference thereto. Holton v. Lankford, 189 Ga. 506, 6 S.E.2d 304 (1939).

Effect of reversal without express direction to lower court. — When on return of remittitur in case in which there was judgment of reversal but not express

direction of Supreme Court to lower court, the case stands as reversed, and a new trial must be had on issues therein raised since the case illegally terminated. Rawdin v. Conner, 211 Ga. 52, 84 S.E.2d 50 (1954).

Reversal for refusal of nonsuit (now dismissal) or new trial does not put case out of court. — When error assigned on overruling of demurrer (now motion to dismiss), refusal to grant nonsuit, and overruling motion for new trial, judgment of reversal will not put case out of court as on nonsuit. Louisville & N.R.R. v. Ramsay, 137 Ga. 573, 73 S.E. 847, 1913B Ann. Cas. 108 (1912).

Taxing costs in trial court before entry of judgment on remittitur. — Bartlett v. Taylor, 147 Ga. 85, 92 S.E. 940 (1917).

Failure to move to dismiss counterclaim. — Because a landlord chose not to move to dismiss a tenant's counterclaim at the first bench trial on the specific ground that the tenant failed to prove the amount of damages for its attorney-fees counterclaim, the tenant was not alerted to the need to reopen the tenant's case to cure the problem, and the landlord's decision meant that following reversal and remand, the trial court was required to allow the tenant to prove those fees at a second trial. Sugarloaf Mills Ltd. P'ship v. Record Town, Inc., 306 Ga. App. 263, 701 S.E.2d 881 (2010).

Cited in American Associated Cos. v. Vaughan, 210 Ga. 141, 78 S.E.2d 43 (1953); Malcom v. Webb, 211 Ga. 449, 86 S.E.2d 489 (1955); Baldwin v. State, 142 Ga. App. 758, 237 S.E.2d 3 (1977).

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Appellate Review, § 9172. 5 Am. Jur. 2d, Appellate Review, § 725 et seq.

ALR. — Propriety of limiting to issue of damages alone new trial granted on ground of inadequacy of damages awarded, 98 ALR 941; 29 ALR2d 1199.

Propriety of limiting to issue of damages alone new trial granted on ground of inadequacy of damages—modern cases, 5 ALR5th 875.

5-5-50. Standard for review by appellate court of first grant of new trial.

The first grant of a new trial shall not be disturbed by an appellate court unless the appellant shows that the judge abused his discretion in granting it and that the law and facts require the verdict notwithstanding the judgment of the presiding judge. (Civil Code 1895, § 5585; Civil Code 1910, § 6204; Code 1933, § 6-1608.)

History of Code section. — This Code section is derived from the decision in Sparks v. Noyes, 64 Ga. 437 (1879).

Law reviews. — For article comparing sections of Ch. 11, T. 9 with preexisting provisions of the Georgia Code, see 3 Ga. St. B.J. 295 (1967).

JUDICIAL DECISIONS

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General Consideration

Neither Ga. L. 1967, p. 226, §§ 22, 43, 48 (see O.C.G.A. § 9-11-50(c)) nor any other provision changes the law under former Code 1933, § 6-1608 (see O.C.G.A. § 5-5-50) prior to the Civil Practice Act, that first grant of new trial was not error unless evidence demanded the verdict for the party opposing the motion. Martin v. Denson, 117 Ga. App. 288, 160 S.E.2d 210 (1968).

Trial court was not authorized to grant a new trial on the issue of damages in a case involving comparative negligence. Head v. CSX Transp., Inc., 227 Ga. App. 818, 490 S.E.2d 497 (1997).

Court lacks jurisdiction to consider oral motion for new trial. — When motion for new trial is made orally, there is no legal motion for new trial before the court, and the court is without jurisdiction to entertain or consider the motion. Motor Contract Co. v. Wigington, 116 Ga. App. 398, 157 S.E.2d 321 (1967).

When reviewable judgment becomes final. — Reviewable judgment does not become final, however, until time prescribed by law for appealing the judgment has passed, or if appealed, until such judgment is affirmed by the appellate court and judgment of the appellate court is made the judgment of the trial court. Seaboard Air Line R.R. v. Whitman, 107 Ga. App. 375, 130 S.E.2d 272 (1963).

New trials on evidentiary grounds when no evidence supports verdict. — Discretion to grant or refuse motions for new trials because a verdict is strongly and decidedly against the weight of the evidence rests solely in the presiding judge, and while the appellate division of the Municipal Court of Atlanta may, as any other court of review, grant a new trial when there is no evidence to support the verdict, when there was some evidence on which the verdict could be based, and such verdict had the approval of the trial judge, the appellate division of the Municipal Court of Atlanta erred in granting a new trial. Turner v. Masonic Relief Ass'n, 52 Ga. App. 374, 183 S.E. 350 (1936).

Appellate courts will not interfere with first grant of new trial when there is any evidence at all upon which different verdict could be sustained. Maloy v. Planter's Whse. & Lumber Co., 142 Ga. App. 69, 234 S.E.2d 807 (1977).

After one grant of new trial, subsequent grant upon discretionary grounds will be closely examined to see that discretion of court below has been justly and wisely exercised, in view of the facts of the particular case, and with due regard to general consideration of fitness of juries to ascertain facts and of necessity that there must be some end to the litigation. Smith v. State Mut. Life Ins. Co., 45 Ga. App. 633, 165 S.E. 896 (1932).

When law and facts of the case do not demand verdict for either party, the first grant of a new trial will not be disturbed on appeal. Hicks v. American Interstate Ins. Co., 158 Ga. App. 220, 279 S.E.2d 517 (1981).

Special verdict form was not objectionable. — Trial court erred in granting a new trial, pursuant to the standard of review under O.C.G.A. §§ 5-5-50 and 5-5-51, to the second insurer in the first insurer's declaratory judgment action arising from a coverage dispute, after the jury rendered a verdict pursuant to a special verdict form in favor of the first insurer, since the form was not defective for including the words "coverage is excluded because" prior to the four potential fact-findings in favor of the first insurer; the wording of the form may have been inartful and had mixed questions of law with the factual assertions, but such did not constitute an abuse of the trial court's discretion, as no mandate forbade the use of the language, and the trial court acted within the court's discretion and authority pursuant to O.C.G.A. § 9-11-49(a). Gov't Emples. Ins. Co. v. Progressive Cas. Ins. Co., 275 Ga. App. 872, 622 S.E.2d 92 (2005).

Cited in Southern Ry. v. Higgins, 102 Ga. 586, 27 S.E. 785 (1897); Carolee v. Handelis, 103 Ga. 299, 29 S.E. 935 (1898); Knight v. Isom, 113 Ga. 613, 39 S.E. 103 (1901); Cordray v. Savannah, T. & I. of H. Ry., 117 Ga. 464, 43 S.E. 755 (1903); McCain v. Bonner, 122 Ga. 842, 51 S.E. 36 (1905); Bagley & Willet v. Shumate, 128 Ga. 78, 57 S.E. 99 (1907); Cox v. Grady, 132 Ga. 368, 64 S.E. 262 (1909); Schaufele v. Central of Ga. Ry., 6 Ga. App. 660, 65

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S.E. 708 (1909); New v. Southern Ry., 136 Ga. 778, 71 S.E. 1104 (1911); Castelen v. Stafford, 138 Ga. 419, 75 S.E. 418 (1912); Hudson v. Driver, 13 Ga. App. 174, 78 S.E. 1013 (1913); Massey v. Cleveland, 141 Ga. 774, 82 S.E. 136 (1914); Savage v. Atlantic C.L.R.R., 16 Ga. App. 537, 85 S.E. 675 (1915); Central of Ga. Ry. v. Morgan, 145 Ga. 656, 89 S.E. 760 (1916); Allen v. Gershon & Ruskin, 19 Ga. App. 500, 91 S.E. 893 (1917); Chafin v. Tumlin, 20 Ga. App. 433, 93 S.E. 50 (1917); Parks v. Stevens, 21 Ga. App. 180, 94 S.E. 60 (1917); Shingler v. Yeates, 147 Ga. 339, 94 S.E. 467 (1917); Duncan v. Shackelford, 22 Ga. App. 220, 95 S.E. 760 (1918); Bell v. Askins, 150 Ga. 635, 104 S.E. 421 (1920); Sampson v. Smith, 29 Ga. App. 683, 116 S.E. 652 (1923); Puckett v. Heaton, 157 Ga. 232, 121 S.E. 240 (1924); Maner v. Clark-Stewart Co., 33 Ga. App. 424, 126 S.E. 871 (1925); Nabors v. Nabors, 161 Ga. 382, 131 S.E. 45 (1925); Louisville & N.R.R. v. Barksdale, 34 Ga. App. 812, 131 S.E. 298 (1926); Riggins v. Scott, 35 Ga. App. 465, 133 S.E. 647 (1926); Douglas v. Hardin, 161 Ga. 838, 131 S.E. 896 (1926); Belcher v. Land, 37 Ga. App. 346, 140 S.E. 423 (1927); Brooks v. Jackins, 38 Ga. App. 57, 142 S.E. 574 (1928); Gunn v. Chapman, 166 Ga. 279, 142 S.E. 873 (1928); National Union Fire Ins. Co. v. Ozburn, 38 Ga. App. 276, 143 S.E. 623 (1928); Howell v. Booth, 39 Ga. App. 41, 145 S.E. 910 (1928); Dodgen v. Fowler, 39 Ga. App. 515, 147 S.E. 775 (1929); Whitworth v. Carter, 39 Ga. App. 625, 147 S.E. 904 (1929); Johnson v. Johnson, 169 Ga. 7, 149 S.E. 564 (1929); Finance Serv. Co. v. Rich, 41 Ga. App. 831, 155 S.E. 60 (1930); Tyus v. Collier, 171 Ga. 519, 156 S.E. 235 (1930); Murray v. Davidson, 174 Ga. 213, 162 S.E. 526 (1932); Smith v. Perry, 176 Ga. 775, 168 S.E. 770 (1933); Mobley v. Bell, 177 Ga. 876, 171 S.E. 701 (1933); Sturr v. Southern Grocery Stores, Inc., 48 Ga. App. 126, 172 S.E. 231 (1933); National Life & Accident Ins. Co. v. Cantrell, 49 Ga. App. 368, 175 S.E. 543 (1934); Piedmont Wagon & Mfg. Co. v. Bird, 49 Ga. App. 426, 176 S.E. 109 (1934); Blitch v. Wells, 180 Ga. 566, 179 S.E. 629 (1935); Belk v. Cook, 51 Ga. App. 163, 179 S.E. 870 (1935); International Harvester Co. of Am. v. Felton, 56 Ga. App. 290, 192 S.E. 464 (1937); Carter v. Powell, 57 Ga. App. 360, 195 S.E. 466 (1938); Walker v. McCallum, 59 Ga. App. 895, 2 S.E.2d 514 (1939); Lawson v. Lawson, 61 Ga. App. 787, 7 S.E.2d 603 (1940); Jacobs v. Rittenbaum, 193 Ga. 838, 20 S.E.2d 425 (1942); Tomlin v. Georgia Power Co., 68 Ga. App. 412, 23 S.E.2d 92 (1942); Suggs v. Suggs, 198 Ga. 18, 30 S.E.2d 927 (1944); Pope v. United States Fid. & Guar. Co., 198 Ga. 304, 31 S.E.2d 602 (1944); Veneer Mfg. Co. v. Hill, 72 Ga. App. 28, 32 S.E.2d 838 (1945); Sullivan v. Dixon, 72 Ga. App. 507, 34 S.E.2d 318 (1945); Jones v. J.S.H. Co., 201 Ga. 611, 40 S.E.2d 752 (1946); Ash v. Higgins, 74 Ga. App. 726, 41 S.E.2d 270 (1947); Bowman v. Bowman, 203 Ga. 206, 45 S.E.2d 415 (1947); Graves v. Carter, 78 Ga. App. 564, 51 S.E.2d 863 (1949); Fuller v. Cox, 81 Ga. App. 301, 58 S.E.2d 513 (1950); Williams v. Redd, 82 Ga. App. 135, 60 S.E.2d 528 (1950); Dorsey v. Georgia R.R. Bank & Trust Co., 82 Ga. App. 237, 60 S.E.2d 828 (1950); Schofield v. Langley, 207 Ga. 430, 61 S.E.2d 838 (1950); Community Hosp. v. Latimer, 83 Ga. App. 6, 62 S.E.2d 379 (1950); Seabolt v. Lewis, 207 Ga. 691, 63 S.E.2d 894 (1951); Sims Estates, Inc. v. Walker, 209 Ga. 534, 74 S.E.2d 465 (1953); James v. Perry, 90 Ga. App. 69, 81 S.E.2d 874 (1954); Robinson v. Modern Coach Corp., 91 Ga. App. 440, 85 S.E.2d 826 (1955); Tifton Prod. Credit Ass'n v. Burkhalter Chevrolet Co., 92 Ga. App. 571, 89 S.E.2d 210 (1955); Law v. State, 92 Ga. App. 604, 89 S.E.2d 550 (1955); Buchanan v. Nash, 211 Ga. 874, 89 S.E.2d 637 (1955); Horne v. Phillips, 92 Ga. App. 651, 89 S.E.2d 682 (1955); Plymouth Record Corp. v. Books, Inc., 92 Ga. App. 753, 90 S.E.2d 336 (1955); McCormick v. Denny, 212 Ga. 444, 93 S.E.2d 578 (1956); Taylor v. Taylor, 212 Ga. 637, 94 S.E.2d 744 (1956); Funderburk v. Funderburk, 212 Ga. 740, 95 S.E.2d 679 (1956); Hayes v. Dicks, 95 Ga. App. 11, 96 S.E.2d 627 (1957); Home Ins. Co. v. Cook, 96 Ga. App. 139, 99 S.E.2d 567 (1957); Chappell v. Clegg, 97 Ga. App. 752, 104 S.E.2d 541 (1958); Selman v. Manis, 100 Ga. App. 422, 111 S.E.2d 747 (1959); Service Cas. Co. v. Carr, 101 Ga. App. 70, 113 S.E.2d 175 (1960); Cox v. Independent Life &

Accident Ins. Co., 101 Ga. App. 211, 113 S.E.2d 228 (1960); Kroger Co. v. Perpall, 105 Ga. App. 682, 125 S.E.2d 511 (1962); Stone v. Carter, 218 Ga. 92, 126 S.E.2d 617 (1962); YMCA of Metro. Atlanta, Inc. v. Bailey, 107 Ga. App. 417, 130 S.E.2d 242 (1963); Bennett v. Overby, 107 Ga. App. 477, 130 S.E.2d 511 (1963); Willard v. Willard, 221 Ga. 2, 142 S.E.2d 849 (1965); Sims v. Georgia Power Co., 112 Ga. App. 41, 143 S.E.2d 652 (1965); Hambrick v. Nova, 112 Ga. App. 258, 144 S.E.2d 922 (1965); Holden v. CTC Fin. Corp., 113 Ga. App. 318, 147 S.E.2d 846 (1966); Harper v. Green, 113 Ga. App. 557, 149 S.E.2d 163 (1966); Peak v. Cody, 113 Ga. App. 674, 149 S.E.2d 519 (1966); Botero v. Botero, 223 Ga. 380, 155 S.E.2d 381 (1967); State Hwy. Dep't v. Smith, 117 Ga. App. 210, 160 S.E.2d 215 (1968); Howard v. Biles, 117 Ga. App. 384, 160 S.E.2d 620 (1968); Warren v. Mann, 117 Ga. App. 787, 161 S.E.2d 894 (1968); Smith v. Clark, 123 Ga. App. 458, 181 S.E.2d 551 (1971); Hammock v. Allstate Ins. Co., 124 Ga. App. 854, 186 S.E.2d 353 (1971); Wooten v. Nash, 126 Ga. App. 86, 190 S.E.2d 89 (1972); Hunt v. Denby, 128 Ga. App. 523, 197 S.E.2d 489 (1973); Edgeman v. Thomas, 132 Ga. App. 866, 209 S.E.2d 658 (1974); Blanchard v. Westview Cem., 133 Ga. App. 262, 211 S.E.2d 135 (1974); Davis v. Monroe County Hosp. Auth., 137 Ga. App. 214, 223 S.E.2d 255 (1976); Rasmussen v. Martin, 236 Ga. 267, 223 S.E.2d 663 (1976); Helton v. Zellmer, 238 Ga. 735, 235 S.E.2d 35 (1977); Cox v. K-Mart Enters. of Ga., Inc., 143 Ga. App. 30, 237 S.E.2d 432 (1977); Diamondhead Corp. v. Robinson, 144 Ga. App. 60, 240 S.E.2d 572 (1977); Hudgins v. Bacon, 171 Ga. App. 856, 321 S.E.2d 359 (1984); Green v. Jones, 254 Ga. 35, 326 S.E.2d 448 (1985); Davis v. Ramey, 174 Ga. App. 417, 330 S.E.2d 130 (1985); Schecter v. Strickland, 189 Ga. App. 82, 375 S.E.2d 93 (1988); Head v. CSX Transp., Inc., 271 Ga. 670, 524 S.E.2d 215 (1999); Action Sound, Inc. v. DOT, 265 Ga. App. 616, 594 S.E.2d 773 (2004).

Grant of New Trial on Certiorari

On certiorari, superior court has wide discretion in granting new trial in lower court, especially if it is the first grant of a new trial, when evidence is conflicting and error is assigned on judgment (or verdict and judgment where a jury is involved) as contrary to law and evidence, although judgment of lower court may be authorized. Deaton v. Taliaferro, 80 Ga. App. 685, 57 S.E.2d 215 (1950).

New trial granted on certiorari is equivalent to new trial granted by presiding judge. — Sustaining of certiorari and grant of new trial thereunder are on same basis as grant of new trial by presiding judge and rules applicable thereto, but in such event, the judge of the superior court does not have authority to sustain certiorari and then render final judgment. Deaton v. Taliaferro, 80 Ga. App. 685, 57 S.E.2d 215 (1950).

Grant of new trial on certiorari not disturbed when evidence did not demand verdict. — When action of judge of superior court in sustaining certiorari had effect of granting new trial, this being the first grant of a new trial, and evidence not having demanded the verdict, the grant of certiorari was not disturbed. Sunbeam Heating Co. v. Mason, 42 Ga. App. 265, 155 S.E. 769 (1930).

Rule that appellate court will not interfere with first grant of new trial unless the verdict was absolutely demanded applies to decisions on certiorari. Shirley v. Swafford, 119 Ga. 43, 45 S.E. 722 (1903).

Applicability

First grant of new trial refers only to first grant by trial court and does not include new trials granted by the appellate court when a new trial was refused below. Throgmorton v. Trammell, 90 Ga. App. 433, 83 S.E.2d 256 (1954).

Statute applies even though successor of judge presiding at trial passes on motion. — Statute applies even though judge who hears case ceases to hold office before hearing of motion for new trial, and the motion is passed on by the judge's successor. Berman v. Berman, 231 Ga. 216, 200 S.E.2d 870 (1973).

Statute applies to first grant of new trial by judge not presiding at whole trial. — First grant of new trial by judge who did not preside during the whole trial will not be disturbed, unless evidence demanded the verdict rendered. Brice & Co.

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v. Whitehurst & Hilliard, 8 Ga. App. 291, 68 S.E. 1075 (1910), later appeal, 14 Ga. App. 209, 80 S.E. 670 (1914); Throgmorton v. Trammell, 90 Ga. App. 433, 83 S.E.2d 256 (1954).

Statute applies to damage suits as well as to others. Holland v. Williams, 3 Ga. App. 636, 60 S.E. 331 (1908).

Statute applies when motion for new trial is based on directed verdict. — Statute applies as well when motion for new trial is based on directed verdict as when motion is based upon finding of jury upon issues submitted to the jury in instructions of the court. Cloud v. Hawkes Co., 18 Ga. App. 772, 90 S.E. 652 (1916).

It is error to grant first new trial when law and evidence demands verdict as rendered, whether the verdict was directed by court or returned at volition of jury. Jones Motor Co. v. W.R. Finch Motor Co., 34 Ga. App. 399, 129 S.E. 915 (1925).

Statute inapplicable to first grant of new trial based on denial of pretrial motion to sever. — Motion for new trial was granted on a special ground, namely that the trial court erred by denying the defendant's pretrial motion to sever two different counts of armed robbery committed against two different victims at different times; therefore, the standard set forth in O.C.G.A. § 5-5-50 is not applicable and the Court of Appeals properly considered the propriety of the trial court's ruling on the question of law regarding severance of the defendant's offenses. To the extent that State v. McMillon, 283 Ga. App. 671, 642 S.E.2d 343 (Ga. Ct. App. 2007), and State v. Lamb, 287 Ga. App. 389, 651 S.E.2d 504 (Ga. Ct. App. 2007), conflicted with the holding that the standard set forth in § 5-5-50 was not applicable in a case involving the first grant of a new trial on special grounds involving a question of law, those cases are overruled. O'Neal v. State, 285 Ga. 361, 677 S.E.2d 90 (2009).

Two successive verdicts rendered and new trials granted, one to each party. — Rule that first grant of new trial will not be disturbed except where verdict is demanded by evidence is applicable to case when two successive verdicts have been rendered, one for the plaintiff and the other for the defendant, and when in each instance a new trial was granted. Jordan v. Dooly, 129 Ga. 392, 58 S.E. 879 (1907); Owens v. Cocroft, 11 Ga. App. 235, 74 S.E. 1098 (1912); Butler v. Sansone, 138 Ga. 767, 76 S.E. 54 (1912); Elder v. Woodruff Hdwe. Co., 19 Ga. App. 626, 91 S.E. 942 (1917).

New trial granted because of conviction of material witness of perjury. — When trial court stated in an order that a new trial was granted because of the conviction of a material witness for the defendant of the offense of perjury committed in the giving of testimony to the jury rendering verdict complained of, this was not such ruling on question of law as would prevent operation of statute with respect to first grant of new trial. George A. Hormel & Co. v. Ramsey, 62 Ga. App. 343, 7 S.E.2d 789 (1940).

Statute is applicable when grant is conditional and condition is not complied with. Skipper v. Overall, 47 Ga. App. 691, 171 S.E. 310 (1933).

When grant of new trial does not specify ground on which granted. — When sole assignment of error is judgment of trial judge granting first new trial in favor of the defendant on the motion containing usual general and several special grounds, the judgment not specifying upon which grounds new trial is granted, and when verdict in favor of the plaintiff in stated sum in suit on open account is not demanded by the evidence, which was in conflict both as to the value of the work performed and authority to perform the work, discretion of the judge in granting a new trial will not be disturbed. Tri-State Augusta, Inc. v. Woodward Lumber Co., 88 Ga. App. 748, 77 S.E.2d 769 (1953).

Grant of motions both for new trial and for judgment n.o.v. — When a trial court grants separate motions for judgment notwithstanding the verdict and for new trial on the general grounds, the grant of the motion for new trial is conditional on the appellate court's vacating or reversing the judgment n.o.v. Hicks v. American Interstate Ins. Co., 158 Ga. App. 220, 279 S.E.2d 517 (1981).

New trial was error when evidence demanded verdict rendered. — Grant

of a new trial was an abuse of the trial court's discretion when the evidence demanded the verdict rendered. Builders Transp., Inc. v. Hall, 191 Ga. App. 889, 383 S.E.2d 341, cert. denied, 191 Ga. App. 921, 383 S.E.2d 341 (1989).

New trial when verdict could go either way. — Trial court's grant of a new trial was affirmed as the opposing party in that party's appellate brief failed to show that the law and the facts required the verdict rendered at trial and admitted that the jury could have ruled in favor of either party. Dryman v. Watts, 268 Ga. App. 710, 603 S.E.2d 51 (2004).

Because there was expert evidence that supported a finding of negligence and causation against physicians and their employers in a medical malpractice action by a patient, a verdict in the physicians' favor was not absolutely demanded, and the trial court did not abuse the court's discretion in granting the patient's motion for new trial, pursuant to O.C.G.A. §§ 5-5-20 and 5-5-50, after the jury rendered a verdict in favor of the physicians. Bhansali v. Moncada, 275 Ga. App. 221, 620 S.E.2d 404 (2005).

New trial proper following independent evaluations. — Grant of a new trial was affirmed because the successor judge thoroughly reviewed the case, and presided over a full hearing in the matter. The judge made independent evaluations not only about the defendant's involvement in the crimes but about the culpability of the codefendants, and concluded, that the defendant got "caught up" in the "neighborhood feud" and was "just a peripheral figure." State v. Harris, 292 Ga. 92, 734 S.E.2d 357 (2012).

New trial improper when party failed to exercise reasonable diligence. — Trial court erred in granting appellees new trials based on a Brady violation because the appellees had the medical examiner's report at issue in the appellees' possession before trial and had the appellees' exercised reasonable diligence, the appellees would have realized that the second page was missing based on the pagination and could have obtained that page for a co-indictee prior to the appellees' trial. State v. James, 292 Ga. 440, 738 S.E.2d 601 (2013).

Construction

In first grant of new trial, trial judge has broad discretion and having exercised that discretion appellate courts are powerless to interfere unless verdict was demanded. Garrett v. Garrett, 128 Ga. App. 594, 197 S.E.2d 739 (1973).

Appellate courts will not closely scrutinize facts with view to detecting abuses of discretion. — First grant of new trial will not be reversed unless it plainly and manifestly appears that there was an abuse of discretion by court below, and court will not closely scrutinize facts in evidence or endeavor to balance with great exactness the testimony on both sides, with view to detecting abuse of discretion by the trial judge. Exercise of discretion in favor of granting new trials should be encouraged. Baker v. McGarr, 187 Ga. 533, 1 S.E.2d 403 (1939).

Fact that it appears judge considers improper matter in considering motion, does not affect rule. Mays v. Mays, 33 Ga. App. 335, 126 S.E. 299 (1924).

Scope of discretion of judge not presiding at trial is narrower than presiding judge's discretion. — Scope within which discretion may be exercised, in consideration of evidence, by judge who did not preside at trial is not as extensive as in case of judge who heard and observed witnesses, and who, in a sense, is to be considered as thirteenth member of jury. Brice & Co. v. Whitehurst & Hilliard, 8 Ga. App. 291, 68 S.E. 1075 (1910), later appeal, 14 Ga. App. 209, 80 S.E. 670 (1914); Throgmorton v. Trammell, 90 Ga. App. 433, 83 S.E.2d 256 (1954).

Trial court, in the court's discretion, can grant extraordinary out-of-term motion for new trial when the circumstances warrant such relief. Tedoff v. B & L Serv. Co., 167 Ga. App. 452, 306 S.E.2d 719 (1983).

Setting aside judgment because of excessive verdict is in nature of grant of new trial on general grounds. Baxter v. Weiner, 246 Ga. 28, 268 S.E.2d 619 (1980).

When evidence is conflicting, first grant of new trial will not be reversed. Adams v. Hancock, 103 Ga. 561, 29 S.E. 715 (1897); Bluestein v. Amason, 49 Ga. App. 201, 174 S.E. 735 (1934); Queen v.

Construction (Cont'd)

State Hwy. Dep't, 100 Ga. App. 190, 110 S.E.2d 541 (1959).

When evidence on main question in case is in conflict, and when the jury would have been authorized to render a verdict for the movants, the judgment granting the first new trial will not be disturbed by the Supreme Court. Hopkins v. Brumbelow, 195 Ga. 388, 24 S.E.2d 318 (1943).

It is never an abuse of discretion to grant a new trial when the evidence conflicts. Chappell v. Clegg, 97 Ga. App. 752, 104 S.E.2d 541 (1958).

First grant of new trial not reversed unless law and facts require verdict. — First grant of new trial will not be reversed unless the record clearly makes it appear that the law and facts require the verdict. National Bellas-Hess Co. v. Patrick, 49 Ga. App. 280, 175 S.E. 255 (1934); George A. Hormel & Co. v. Ramsey, 62 Ga. App. 343, 7 S.E.2d 789 (1940); Noles v. Andalusia Casket Co., 74 Ga. App. 39, 38 S.E.2d 746 (1946); Tri-State Augusta, Inc. v. Woodward Lumber Co., 88 Ga. App. 748, 77 S.E.2d 769 (1953); Green v. Stafford, 214 Ga. 830, 108 S.E.2d 271 (1959).

When it does not appear that the verdict was demanded under the law and evidence, the first grant of a new trial will not be disturbed. Baker v. McGarr, 187 Ga. 533, 1 S.E.2d 403 (1939).

No language indicating first new trial is abuse of discretion. — Former Civil Code 1910, §§ 6088 and 6204 (see O.C.G.A. §§ 5-5-25 and 5-5-50) contain no language from which it can be inferred that grant of first new trial is ever an abuse of discretion, unless verdict set aside was demanded by evidence adduced upon trial. Georgia S. & F. Ry. v. Bryan, 15 Ga. App. 253, 82 S.E. 913 (1914); Williams v. State, 27 Ga. App. 224, 107 S.E. 620 (1921); Throgmorton v. Trammell, 90 Ga. App. 433, 83 S.E.2d 256 (1954).

When first new trial has been granted expressly upon ground that verdict is contrary to law and without evidence to support the verdict, the Court of Appeals will affirm the judgment when the verdict rendered was not as a matter of law demanded. Tanner v. Louisville & N.R.R., 45 Ga. App. 734, 165 S.E. 761 (1932).

When evidence on trial does not demand verdict for plaintiff it cannot be said that trial judge abuses the judge's discretion in granting defendant's motion for new trial. Anderson v. Interstate Life & Accident Ins. Co., 94 Ga. App. 411, 94 S.E.2d 758 (1956).

Only question appellate courts will consider on appeal of first grant of new trial is whether verdict as rendered was demanded as a matter of law. Bass v. Pharr, 98 Ga. App. 125, 105 S.E.2d 236 (1958).

If evidence demands verdict rendered, first grant of new trial will be reversed. Moody v. Moody, 194 Ga. 843, 22 S.E.2d 837 (1942).

When the conflict in evidence could have been resolved in favor of either party, and evidence did not demand a verdict for the defendant, in absence of showing of manifest abuse of discretion on part of the trial court in the court's first grant of new trial, the court's judgment will not be disturbed. Lanier v. Collins, 91 Ga. App. 486, 85 S.E.2d 788 (1955).

There is no error in granting new trial unless the trial judge abuses the judge's discretion and no other verdict than that rendered could have been returned. Maxwell v. Harrell, 115 Ga. App. 97, 153 S.E.2d 653 (1967).

The first grant of new trial to either party is not to be reversed by an appellate court unless the verdict set aside by the trial court was absolutely demanded. Holton v. Jones, 174 Ga. App. 654, 331 S.E.2d 26 (1985); Thomas v. Wiley, 240 Ga. App. 135, 522 S.E.2d 714 (1999).

Standard of review. — First grant of motion for new trial will not be disturbed when there is any evidence to support the movant, unless the verdict for the opposite party is demanded. Winn Dixie Stores, Inc. v. Whaley, 127 Ga. App. 381, 193 S.E.2d 279 (1972).

First grant of new trial on general grounds will not be disturbed by reviewing court, when the reviewing court cannot say that evidence demands finding that debt in question has been paid despite the jury finding that it had been, and when the movant specifically points out evidence and reasons why the movant

claimed the verdict is not supported by the evidence. Dunn v. Gilbert, 217 Ga. 358, 122 S.E.2d 93 (1961).

When facts do not require verdict in amount rendered. — When verdict is for unliquidated damages, it is not error to grant new trial even though verdict for the plaintiff in some amount may be demanded, since facts do not require the verdict in the amount rendered. Robinson v. Modern Coach Corp., 91 Ga. App. 440, 85 S.E.2d 826 (1955).

Fact that evidence as to damages is vague. — When there was abundant evidence to support a finding that the contract had been breached, which would have entitled the plaintiff to nominal damages at least the trial court did not abuse the court's discretion in first grant of a new trial, even though evidence was vague as to amount of damages resulting from breach. Robbins v. Hays, 107 Ga. App. 12, 128 S.E.2d 546 (1962).

Standard used in reviewing denial of judgment n.o.v. applies. — In determining whether the verdict was demanded, the reviewing court must measure issues by the same strict standard which would apply had the situation been reversed, and had plaintiff in error appealed from the denial of the motion for judgment notwithstanding the verdict following denial of the motion to direct a verdict in the plaintiff's favor. Robbins v. Hays, 107 Ga. App. 12, 128 S.E.2d 546 (1962).

Only in those cases when a motion for judgment n.o.v. would have been sustained if the litigant had lost the litigant's case will the grant of a first new trial be error when in fact the litigant won the case. Robbins v. Hays, 107 Ga. App. 12, 128 S.E.2d 546 (1962).

Constitutionality of Ga. L. 1959, p. 353, § 1, purporting to revise statute. — CTC Fin. Corp. v. Holden, 221 Ga. 809, 147 S.E.2d 427 (1966).

First grant of new trial on special grounds involving question of law is reviewable in proper appeal. Smith v. Telecable of Columbus, Inc., 238 Ga. 559, 234 S.E.2d 24 (1977).

Courts with power to review. — Court of Appeals and Supreme Court possess power to review grants of new trials when order is limited to special grounds. Durrett v. Farrar, 130 Ga. App. 298, 203 S.E.2d 265 (1973), overruled on other grounds, Smith v. Telecable of Columbus, Inc., 140 Ga. App. 755, 232 S.E.2d 100 (1976).

First grant of new trial, unless on general, discretionary grounds, is reviewable by Court of Appeals. Southern States, Inc. v. Thomason, 128 Ga. App. 667, 197 S.E.2d 429 (1973), overruled, Smith v. Telecable of Columbus, Inc., 140 Ga. App. 755, 232 S.E.2d 100 (1976), reversed, Smith v. Telecable of Columbus, Inc., 238 Ga. 559, 234 S.E.2d 24 (1977).

Amendment to motion designated as special ground but merely elaborating general grounds. — Though ground of amendment to motion for new trial is designated as a special ground, if it appears that it is no more than an elaboration of general grounds, or one of them, it is itself a general ground. L.F. Dommerich & Co. v. Phillips Sales Co., 112 Ga. App. 621, 145 S.E.2d 830 (1965).

RESEARCH REFERENCES

Am. Jur. 2d. — 58 Am. Jur. 2d, New Trial, §§ 13 et seq., 19 et seq.

ALR. — Absence of evidence supporting charge of lesser degree of homicide as affecting duty of court to instruct as to, or right of jury to convict of, lesser degree, 21 ALR 603; 27 ALR 1097; 102 ALR 1019.

5-5-51. Written basis for exercise of judicial discretion for new trial.

In all civil cases in which a new trial is granted, if the grant of a new trial is based on the discretion of the judge, the judge shall set forth by written order the reason or reasons for the exercise of his discretion.

Such order shall not be required to conform to the provisions of Code Section 9-11-52, relating to findings by the court. (Code 1981, § 5-5-51, enacted by Ga. L. 1985, p. 1312, § 1.)

JUDICIAL DECISIONS

Trial court's written order granting a new trial on the general grounds was in compliance with the requirements of O.C.G.A. § 5-5-51. Jackson Nat'l Life Ins. Co. v. Snead, 231 Ga. App. 406, 499 S.E.2d 173 (1998).

Special verdict form was not objectionable. — Trial court erred in granting a new trial, pursuant to the standard of review under O.C.G.A. §§ 5-5-50 and 5-5-51, to the second insurer in the first insurer's declaratory judgment action arising from a coverage dispute, after the jury rendered a verdict pursuant to a special verdict form in favor of the first insurer, since the form was not defective for including the words "coverage is excluded because" prior to the four potential fact-findings in favor of the first insurer; the wording of the form may have been inartful and had mixed questions of law with the factual assertions, but such did not constitute an abuse of the trial court's discretion, as no mandate forbade the use of the language, and the trial court acted within the court's discretion and authority pursuant to O.C.G.A. § 9-11-49(a). Gov't Emples. Ins. Co. v. Progressive Cas. Ins. Co., 275 Ga. App. 872, 622 S.E.2d 92 (2005).

Cited in Famiglietti v. Brevard Medical Investors, Ltd., 197 Ga. App. 164, 397 S.E.2d 720 (1990); O'Neal v. State, 285 Ga. 361, 677 S.E.2d 90 (2009).

CHAPTER 6

CERTIORARI AND APPEALS TO APPELLATE COURTS GENERALLY

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5-6-49. Bills of exceptions, exceptions pendente lite, assignments of error abolished; contents of motions for new trial and for j.n.o.v.
5-6-50. Procedure provided by article supersedes former appellate procedure.
5-6-51. Forms.

Law reviews. — For survey of 1995 Eleventh Circuit cases on trial practice and procedure, see 47 Mercer L. Rev. 907 (1996).

JUDICIAL DECISIONS

Findings or verdict not disturbed if supported by some evidence. — Findings of a judge acting as a jury will not be disturbed if there is any evidence to support the judgment. Adams v. Crowell, 157 Ga. App. 576, 278 S.E.2d 151 (1981).

On appeal of the judgment of a trial judge sitting without a jury, a judgment will not be disturbed if there is any evidence to sustain the judgment. Collins v. Brayson Supply Co., 157 Ga. App. 438, 278 S.E.2d 87 (1981).

In the absence of legal error, an appellate court is without jurisdiction to interfere with a verdict supported by some evidence, even when the verdict may be against the preponderance of the evidence. Pembrook Mgt., Inc. v. Cossaboon, 157 Ga. App. 675, 278 S.E.2d 100 (1981).

Jury determines witness credibility and conflicts in evidence. — It is the function of the jury, not the appellate court, to determine the credibility of witnesses and weigh any conflict in the evidence. Hudgins v. State, 159 Ga. App. 723, 285 S.E.2d 73 (1981).

Appellate court views evidence in light most favorable to the jury's verdict

after the verdict has been rendered. Hudgins v. State, 159 Ga. App. 723, 285 S.E.2d 73 (1981).

Court of Appeals will not consider questions raised for first time on appeal. Mosley v. State, 157 Ga. App. 578, 278 S.E.2d 154 (1981).

Failure to renew objection. — When the defendant initially objected to the introduction of the complained of evidence, the defendant's failure to renew the defendant's objection in the absence of an express waiver does not forbid consideration of the defendant's objection on appeal. Bryan v. State, 157 Ga. App. 635, 278 S.E.2d 177 (1981).

RESEARCH REFERENCES

ALR. — Availability of remedies other than direct appeal from or error to federal court under provision of federal statute denying appeal or writ of error from decision remanding to state court case removed to federal court, 114 ALR 1476.

Right of winning party to appeal from judgment granting him full relief sought, 69 ALR2d 701.

Right to appellate review of consent judgment, 69 ALR2d 755.

Appealability of order suspending imposition or execution of sentence, 51 ALR4th 939.

ARTICLE 1

GENERAL PROVISIONS

Cross references. — Requirement that, in ruling or decision in mandamus or quo warranto proceeding or in case involving writ of prohibition, there be final judgment in trial court prior to appeal to Supreme Court, § 9-6-1. Certification of questions to Supreme Court by federal appellate courts, § 15-2-9. Number of votes of Justices of Supreme Court required for rendering of decision, § 15-2-16. Number of votes of Judges of Court of Appeals required for rendering of decision, § 15-3-1. Requirement of special license to practice before Supreme Court or Court of Appeals, § 15-19-1.

RESEARCH REFERENCES

ALR. — Effect of reversal or vacation of judgment on execution sale, 29 ALR 1071.

Right of appellate court, in otherwise proper case, to affirm judgment on quantum meruit under a complaint declaring upon an express contract, rather than remanding it because of variance between pleading and proof, 118 ALR 1208.

Necessity of setting aside or reversing entire money judgment because of error in allowing certain items, where the verdict or judgment purports to specify the amounts allowed respectively for the proper and improper items, 135 ALR 1186.

Remittitur on which court has conditioned refusal of new trial or reversal, as inuring to benefit of codefendant failing to move for new trial or to appeal, 160 ALR 984.

Liability for costs on appeal relating to amount of condemnation award, 50 ALR2d 1386.

Right to file briefs in trial court, 86 ALR2d 1233.

Financial worth of one or more of several joint defendants as proper matter for consideration in fixing punitive damages, 9 ALR3d 692.

Emotional manifestations by victim or family of victim during criminal trial as ground for reversal, new trial, or mistrial, 31 ALR4th 229.

5-6-1. Appearance before court of interested third parties.

When a case is set for a hearing before the Supreme Court or the Court of Appeals and there are parties besides the plaintiffs and defendants, whether shown by the record or not, who have a direct interest in its result, upon the interest being made to appear the court shall allow the other parties to appear by counsel on equal terms with the parties directly before the court. (Ga. L. 1870, p. 47, § 5; Code 1873, § 4275; Code 1882, § 4275; Civil Code 1895, § 5581; Civil Code 1910, § 6196; Code 1933, § 6-1506.)

JUDICIAL DECISIONS

Cited in Reed v. Adventist Health Systems/Sunbelt, 181 Ga. App. 750, 353 S.E.2d 523 (1987); In re Stroh, 272 Ga. 894, 534 S.E.2d 790 (2000).

RESEARCH REFERENCES

Am. Jur. 2d. — 5 Am. Jur. 2d, Appellate Review, § 239.

C.J.S. — 5 C.J.S., Appeal and Error, § 870.

5-6-2. Disposition of transcript in appellate court.

The transcript of the record shall not be recorded by the clerk of the appellate court but shall be carefully labeled and filed so as to be found easily when needed. (Laws 1847, Cobb's 1851 Digest, p. 454; Code 1863, § 4185; Code 1868, § 4224; Code 1873, § 4289; Code 1882, § 4289; Civil Code 1895, § 5590; Civil Code 1910, § 6209; Code 1933, § 6-1701.)

Cross references. — Certification and transmittal of transcript and record, Rules of the Supreme Court of the State of Georgia, Rule 15.

RESEARCH REFERENCES

Am. Jur. 2d. — 5 Am. Jur. 2d, Appellate Review, § 449 et seq.

C.J.S. — 4 C.J.S., Appeal and Error, § 554 et seq.

5-6-3. Filing of briefs on court order where cases not disposed of during term; additional argument; effect of failure to comply with order.

(a) Whenever the appellate court may be unable to dispose of all cases on its docket for any term before the time fixed by law for the succeeding term to begin, the court may pass an order requiring counsel in all such cases to file their briefs in the clerk's office of the court on or before a certain day prior to the succeeding term. All cases in which briefs are thus filed shall be considered as heard at the term of the court to which returned. They shall be determined and the decision therein

shall be announced by the court as soon after the briefs are filed as may be practicable. Should the court desire to hear argument in addition to that submitted in the briefs, the court may pass an order requiring counsel to submit further argument by brief or in open court at such time as may be prescribed in the order.

(b) Upon failure of counsel for the appellant to comply with the order of the court, where no sufficient excuse is shown for noncompliance, the case shall be dismissed for want of prosecution. (Ga. L. 1878-79, p. 151, §§ 1-4; Civil Code 1910, §§ 6198, 6199, 6200, 6201; Code 1933, §§ 6-1602, 6-1603, 6-1604, 6-1605.)

Cross references. — Ga. Const. 1983, Art. VI, Sec. IX, Para. II. Schedule of terms of Court of Appeals and Supreme Court, §§ 15-2-4, 15-3-2. Filings in clerk's office, Rules of the Supreme Court of the State of Georgia, Rule 1. Filing with clerk's office, Rules of the Court of Appeals of the State of Georgia, Rule 1.

JUDICIAL DECISIONS

Cited in Hazen v. Morris, 94 Ga. App. 634, 95 S.E.2d 765 (1956); Robinwood, Inc. v. Baker, 206 Ga. App. 202, 425 S.E.2d 353 (1992).

RESEARCH REFERENCES

ALR. — Prejudicial effect of trial court's denial, or equivalent, of counsel's right to argue case, 38 ALR2d 1396.

5-6-4. Bill of costs; payment of costs; filing of affidavit of indigence; payment of costs or filing of affidavit as prerequisite to receipt of application for appeal or brief by clerk.

The bill of costs for every application to the Supreme Court for a writ of certiorari or for applications for appeals filed in the Supreme Court or the Court of Appeals or appeals to the Supreme Court or the Court of Appeals shall be $80.00 in criminal cases and in habeas corpus cases for persons whose liberty is being restrained by virtue of a sentence imposed against them by a state court and $300.00 in all other civil cases. The costs shall be paid by counsel for the applicant or appellant at the time of the filing of the application or, in the case of direct appeals, at the time of the filing of the original brief of the appellant. In those cases in which the writ of certiorari or an application for appeal is granted, there shall be no additional costs. Costs shall not be required in those instances when at the time the same are due counsel for the applicant or appellant shall file a statement that an affidavit of indigence has been duly filed or file an affidavit that he or she was appointed to represent the defendant by the trial court because of the defendant's indigency. The clerk is prohibited from receiving the application for appeal or the brief of the appellant unless the costs have been

paid or a sufficient affidavit of indigence is filed or contained in the record. (Ga. L. 1921, p. 239, § 1; Code 1933, § 6-1702; Ga. L. 1965, p. 650, § 1; Ga. L. 1982, p. 1186, § 1; Ga. L. 1991, p. 411, § 1; Ga. L. 2009, p. 644, § 1/HB 283.)

Cross references. — Payment by state of bill of costs in appeals or applications filed on behalf of state by a district attorney, § 15-18-13. Costs, Rules of the Supreme Court of the State of Georgia, Rule 11. Costs, Rules of the Court of Appeals of the State of Georgia, Rule 17.

Law reviews. — For annual survey of appellate practice and procedure, see 43 Mercer L. Rev. 73 (1991).

JUDICIAL DECISIONS

Appellate courts lack jurisdiction to review case where section not complied with. — Court of Appeals is without jurisdiction to review case when costs are not paid and no affidavit meeting requirements of section is filed by plaintiff in error. Carson v. Automobile Financing, Inc., 96 Ga. App. 336, 99 S.E.2d 903 (1957).

All attorneys representing plaintiff in error are bound jointly and severally for costs. — All attorneys representing plaintiff in error, as well those heard orally or by briefs as those signing bill of exceptions (see O.C.G.A. §§ 5-6-49, 5-6-50), are jointly and severally bound for costs, save where pauper affidavit is filed in clerk's office of court below, and certified copy thereof is transmitted to court with and as part of transcript of record, or, if no transcript is required, with bill of exceptions. Burke v. Seaboard Air Line Ry., 46 Ga. App. 488, 168 S.E. 90 (1933).

Transmission of certified copy of pauper's affidavit. — Where certified copy of pauper affidavit which was filed in clerk's office of lower court was filed on same date that bill of exceptions (see O.C.G.A. §§ 5-6-49, 5-6-50) and transcript of record were filed in court, and certified copy of pauper affidavit was not transmitted to court until some days after bill of exceptions and transcript of record were filed in court, and was therefore not transmitted with and as a part of transcript of record, plaintiff in error is not relieved from payment of cost. Burke v. Seaboard Air Line Ry., 46 Ga. App. 488, 168 S.E. 90 (1933).

Where next friend institutes suit, pauper's affidavit must assert next friend's indigence. — Where suit is instituted on behalf of infant by next friend, next friend is primarily liable for costs, hence affidavit prescribed by section must assert inability of next friend to pay costs. Carson v. Automobile Financing, Inc., 96 Ga. App. 336, 99 S.E.2d 903 (1957).

If harm from lost transcript, new trial. — The loss of transcripts and tapes from certain pretrial proceedings did not entitle the defendants to a new trial, as they did not prove harm resulting from the loss. Robinson v. State, 221 Ga. App. 865, 473 S.E.2d 519 (1996).

Cited in Hall v. Hall, 185 Ga. 502, 195 S.E. 731 (1938); Pilgrim Health & Life Ins. Co. v. Lee, 78 Ga. App. 713, 51 S.E.2d 875 (1949); Miller v. Grand Union Co., 250 Ga. App. 751, 552 S.E.2d 491 (2001).

RESEARCH REFERENCES

C.J.S. — 4 C.J.S., Appeal and Error, § 427 et seq.

ALR. — Right to sue or appeal in forma pauperis as dependent on showing of financial disability of attorney or other nonparty or nonapplicant, 11 ALR2d 607.

What costs or fees are contemplated by statute authorizing proceeding in forma pauperis, 98 ALR2d 292.

What constitutes "fees" or "costs" within meaning of Federal Statutory Provision (28 USCS § 1915 and similar predecessor statutes) permitting party to proceed in forma pauperis without prepayment of

fees and costs or security therefor, 142 ALR Fed 627.

5-6-5. Entry of judgment for costs on reversal.

If there is a judgment of reversal, the appellant shall be entitled to a judgment for the amount of the costs in the appellate court against the appellee as soon as the remittitur is returned to the court below. (Laws 1845, Cobb's 1851 Digest, p. 251; Code 1863, § 4186; Code 1868, § 4225; Code 1873, § 4290; Code 1882, § 4290; Civil Code 1895, § 5591; Civil Code 1910, § 6210; Code 1933, § 6-1704.)

JUDICIAL DECISIONS

Jury trial not authorized under this section. — Because O.C.G.A. § 5-6-5 was enacted in 1845, the statutory procedure for the recovery of appellate costs was unknown in 1798, the year the Georgia Constitution was enacted, and there was no right to jury trial under Ga. Const. 1983, Art. I, Sec. I, Para. XI(a). Mize v. First Citizens Bank & Trust Co., 302 Ga. App. 757, 691 S.E.2d 648 (2010).

Costs on appeal were controlled by former Code 1933, § 6-1704 (see O.C.G.A. § 5-6-5) rather than Ga. L. 1966, p. 609, § 54 (see O.C.G.A. § 9-11-54). Barnett v. Thomas, 129 Ga. App. 583, 200 S.E.2d 327 (1973), disapproved sub nom. Stone Mt. Mem. Ass'n v. Stone Mt. Scenic R.R., Inc., 232 Ga. 92, 205 S.E.2d 293 (1974).

Reporter's transcript and clerk's record are included in costs of appeal. — Reporter's transcript and clerk's record are both required for effective appeal and both are included in costs of appeal. In event of reversal or substantial modification, appellant is entitled to judgment for these costs on return of remittitur. Barnett v. Thomas, 129 Ga. App. 583, 200 S.E.2d 327 (1973), disapproved sub nom. Stone Mt. Mem. Ass'n v. Stone Mt. Scenic R.R., Inc., 232 Ga. 92, 205 S.E.2d 293 (1974).

Cost of transcript not recoverable. — Cost of having a transcript prepared by the court reporter is an expense of appeal, but it is not a cost of appeal. An expense of appeal is not recoverable from the appellee when the appellant is successful in obtaining a reversal in an appellate court. Flight Int'l, Inc. v. Dauer, 180 Ga. App. 405, 349 S.E.2d 271 (1986); Gwinnett Property v. G & H Montage, 215 Ga. App. 889, 453 S.E.2d 52 (1994).

When appellate court fails to pass on motion to tax costs, superior court may do so. — When motion was made that Court of Appeals tax costs of appeal, but that court did not pass upon motion and hence there was no adjudication of question as to how costs should be taxed, assuming that the court had jurisdiction to tax costs, superior court has original and concurrent jurisdiction to pass upon matter. Sweat v. Ehrensperger, 100 Ga. App. 58, 109 S.E.2d 889 (1959).

Motion to recover costs timely filed. — Appellant was entitled to recover costs, when the appellant's motion for costs, filed 20 days after remittitur was returned and three days after judgment was entered, was filed within "a reasonable time." Department of Medical Assistance v. Llewellyn, 197 Ga. App. 231, 398 S.E.2d 256 (1990).

Motion to recover costs not timely. — Trial court did not abuse the court's discretion in denying an insured's motion for appellate costs under O.C.G.A. § 5-6-5 as the insured filed the motion nearly eight months after the remittur from the appellate court's decision. Ponse v. Atlanta Cas. Co., 270 Ga. App. 122, 605 S.E.2d 826 (2004).

Because the movants failed to timely file the movant's motion for appellate costs within a reasonable time after the return of the remittitur, specifically, three months and twenty days later, and the

movant's sought appellate expenses in excess of those allowed under O.C.G.A. § 5-6-5, the movant's motion was properly denied as untimely. Morton v. Horace Mann Ins. Co., 282 Ga. App. 734, 639 S.E.2d 352 (2006), cert. denied, No. S07C0570, 2007 Ga. LEXIS 201 (Ga. 2007).

Return of case only for appropriate findings and conclusions, is not judgment of reversal, and plaintiff in error shall not be entitled to judgment for amount of such costs, and there is no error in failure of trial court to tax costs of former appeal to defendant. Greene v. Colonial Stores, Inc., 144 Ga. App. 645, 242 S.E.2d 489 (1978).

Obtaining substantial modification of judgment may entitle one to recovery of costs. — Judgment of reversal is not essential for recovery of costs by plaintiff in error; if the plaintiff in error obtains substantial modification of judgment complained of, the plaintiff is entitled to costs of appeal. Hartley v. Hartley, 212 Ga. 62, 90 S.E.2d 555 (1955); Sweat v. Ehrensperger, 100 Ga. App. 58, 109 S.E.2d 889 (1959).

Trial court erred in denying appellant's motion for appellate costs following the Court of Appeals' partial reversal of the trial court's grant of summary judgment, which was a substantial modification entitling appellant to fees. Burritt v. Media Mktg. Servs., 242 Ga. App. 92, 527 S.E.2d 890 (2000).

Judgment of reversal is not essential for the recovery of costs by the plaintiff in error; if the plaintiff in error obtains a substantial modification of the judgment complained of, then the plaintiff in error is entitled to the costs of bringing the case to the appellate court. Barrow County Airport Auth. v. Romanair, Inc., 260 Ga. App. 887, 581 S.E.2d 402 (2003).

Where a trial court found that a rent adjustment by a lessor was invalid under the terms of the lease, but the appellate court reversed the trial court's interpretation of the lease on that issue, affirmed most of the trial court's other rulings, and remanded the case for the trial court to apply the correct interpretation of the lease, the trial court, upon remand, did not err in casting all costs against the lessor, as the lessor's achievement of the partial reversal in the first appeal did not equate to obtaining a substantial modification of the judgment, especially since, upon remand, the trial court still found that the rent adjustment was invalid after applying the appellate court's interpretation of the lease. Barrow County Airport Auth. v. Romanair, Inc., 260 Ga. App. 887, 581 S.E.2d 402 (2003).

Taxing costs for maintaining crossbill of exceptions in criminal cases. — There is no law by which state can maintain crossbill of exceptions (now cross appeal) in criminal case; and in such case, there being no provision of law for taxing cost against state, cost will be taxed, under § 15-2-44 and this section against solicitor (now district attorney) bringing crossbill. Mill v. State, 2 Ga. App. 398, 58 S.E. 673 (1907), later appeal, 3 Ga. App. 414, 60 S.E. 4 (1908) (decided before enactment of Ch. 7 of this Title).

Acceptance and compliance with condition changing reversal into affirmance. — Reversal in Supreme Court carries cost against defendant in error, and judgment therefor is proper under this section, though condition changing reversal into affirmance is accepted and complied with. Gunnels v. Deavours, 59 Ga. 196 (1877).

Advance of costs by attorney for plaintiff in error does not defeat levy by plaintiff. — Levy under execution for costs, issued in name of plaintiff for use of officers of court, is not subject to be arrested by affidavit of illegality on account of fact that attorney for plaintiff advanced costs incurred in appellate court. Harvey v. Long Cigar & Grocery Co., 36 Ga. App. 45, 135 S.E. 222 (1926).

Cited in Murphy v. Drum & Bugle Corps., 55 Ga. App. 293, 190 S.E. 67 (1937); Mendenhall v. Kingloff, 215 Ga. 726, 113 S.E.2d 449 (1960); Wood v. Delta Ins. Co., 101 Ga. App. 720, 114 S.E.2d 883 (1960); Dependable Ins. Co. v. Gibbs, 218 Ga. 305, 127 S.E.2d 454 (1962); Nail v. Hiers, 116 Ga. App. 522, 157 S.E.2d 771 (1967); Herring v. Ferrell, 137 Ga. App. 156, 223 S.E.2d 213 (1976); Harris v. Collins, 145 Ga. App. 827, 245 S.E.2d 13 (1978); Marshall v. Fulton Nat'l Bank, 152 Ga. App. 121, 262 S.E.2d 448 (1979); Bry-

ant v. Randall, 245 Ga. 200, 264 S.E.2d 231 (1980); Paul v. Jones, 160 Ga. App. 671, 288 S.E.2d 13 (1981); Jamison v. West, 191 Ga. App. 431, 382 S.E.2d 170 (1989); Miller v. Grand Union Co., 250 Ga. App. 751, 552 S.E.2d 491 (2001); Effingham County Bd. of Tax Assessors v. Samwilka, Inc., 278 Ga. App. 521, 629 S.E.2d 501 (2006).

RESEARCH REFERENCES

ALR. — Award of costs by appellate court as affected by subsequent proceedings or course of the action in the lower court, 116 ALR 1152.

5-6-6. Damages for frivolous appeal.

When in the opinion of the court the case was taken up for delay only, 10 percent damages may be awarded by the appellate court upon any judgment for a sum certain which has been affirmed. The award shall be entered in the remittitur. (Laws 1845, Cobb's 1851 Digest, p. 450; Code 1863, § 4182; Code 1868, § 4221; Code 1873, § 4286; Code 1882, § 4286; Civil Code 1895, § 5594; Civil Code 1910, § 6213; Code 1933, § 6-1801.)

Cross references. — Penalty for frivolous appeals, Rules of the Supreme Court of the State of Georgia, Rule 14. Appeals deemed frivolous, Rules of the Court of Appeals of the State of Georgia, Rule 26.

Law reviews. — For survey of Georgia cases dealing with workers' compensation from June 1, 1976 through May 31, 1978, see 30 Mercer L. Rev. 269 (1978). For article, "Plying the Erie Waters: Choice of Law in the Deterrence of Frivolous Appeals," see 21 Ga. L. Rev. 653 (1987). For article, "Battling the Many-Headed Hydra: Abusive Litigation Law in Georgia," see 25 Ga. St. B.J. 65 (1988). For annual survey of construction law, see 56 Mercer L. Rev. 109 (2004). For annual survey of law on appellate practice and procedure, see 62 Mercer L. Rev. 25 (2010).

JUDICIAL DECISIONS

Analysis

General Consideration
Judgment for Sum Certain
Application
1. In General
2. When Appeal Is Frivolous
3. When Appeal Not Frivolous

General Consideration

Purpose of statute is to discourage frivolous appeals. Dickey v. Millen Fertilizer Co., 18 Ga. App. 629, 89 S.E. 1098 (1916); Thompson Enters., Inc. v. Coskrey, 168 Ga. App. 181, 308 S.E.2d 399 (1983).

Damages awarded pursuant to section serve dual purpose. — Damages are given not only as penalty upon plaintiff in error, but also as compensation for delay, cost, and vexation occasioned thereby to the defendant in error. Hardy v. Truitt, 20 Ga. App. 529, 93 S.E. 149 (1917).

Statute is properly invoked when courts are used to evade judgments. — When courts are used to evade judgments, especially when effort is made on frivolous grounds, after full opportunity has been had for fair adjudication, this statute in nature of penalty is properly

General Consideration (Cont'd)

invoked. Felker v. Johnson, 189 Ga. 797, 7 S.E.2d 668 (1940).

Justice demands damages award when appeal is obviously frivolous. — When record discloses that the plaintiff in error has no just case, that no new question of law is involved, and the record is full of those things which every judge and every lawyer recognizes as indicia of an attempt to fight merely for time, justice demands that the court overcome any personal hesitancy the court may have, and that it add an award of damages to the judgment of affirmance. Prattes v. Southeast Ceramics, Inc., 132 Ga. App. 584, 208 S.E.2d 600 (1974).

When motion for 10 percent damages is filed, court shall carefully examine record, and pass upon motion in light of entire history of the case as there presented. Prattes v. Southeast Ceramics, Inc., 132 Ga. App. 584, 208 S.E.2d 600 (1974).

Filing of enumeration of errors is essential to completion of appeal. James v. Seritt, 121 Ga. App. 783, 175 S.E.2d 163 (1970).

Motion for sum not representing 10 percent of damages dismissed. — Motion for imposition of $5,000 damages for filing a frivolous appeal will be denied when this sum does not represent 10 percent of the amount of damages awarded by the court below. Taylor v. Bentley, 166 Ga. App. 887, 305 S.E.2d 617 (1983).

Arbitration of attorney fees incurred on appeal. — Contractor, who successfully defended an arbitration award on appeal, was not limited to then seeking attorney fees for a frivolous appeal before the appellate court pursuant to O.C.G.A. § 5-6-6, but could submit the appellate fee dispute to arbitration as the issue of attorney fees was governed by the arbitration provision in a contract between the contractor and a county. Yates Paving & Grading Co. v. Bryan County, 265 Ga. App. 578, 594 S.E.2d 756 (2004).

Cited in Holmes v. Booher, Fee & Co., 41 Ga. 125 (1870); Eagle Mfg. Co. v. Wise, 48 Ga. 630 (1873); Crusselle v. Reinhardt, 68 Ga. 619 (1882); Saffold v. Foster, 75 Ga. 233 (1885); Bailey v. Wilner, 107 Ga. 364, 33 S.E. 434 (1899); Central of Ga. Ry. v. Cooper, 14 Ga. App. 738, 82 S.E. 310 (1914); Sirmans v. Folsom & Tillman Hdwe. Co., 18 Ga. App. 586, 89 S.E. 1103 (1916); Realty Bond & Mtg. Co. v. Harley, 19 Ga. App. 186, 91 S.E. 254 (1917); Wimberly v. Lumpkin Home Mixture Co., 19 Ga. App. 809, 92 S.E. 286 (1917); Kirkland v. Citizens Trust Co., 19 Ga. App. 133, 91 S.E. 254 (1917); Banks v. Giles, 20 Ga. App. 97, 92 S.E. 651 (1917); Adams v. Duvall, 20 Ga. App. 205, 92 S.E. 955 (1917); Coleman v. Hutcheson, Yeomans & Co., 21 Ga. App. 100, 94 S.E. 94 (1917); Miller v. Walker, 23 Ga. App. 273, 97 S.E. 869 (1919); Bateman v. Small & Tharpe, 24 Ga. App. 244, 100 S.E. 573 (1919); Bailey v. Miller Hdwe. & Furn. Co., 30 Ga. App. 786, 119 S.E. 428 (1923); Johnson v. Hicks, 31 Ga. App. 43, 119 S.E. 437 (1923); Dillingham v. Eslinger, 32 Ga. App. 36, 122 S.E. 627 (1924); Felker v. Still, 35 Ga. App. 236, 133 S.E. 519 (1926); Yeomans v. Beasley, 36 Ga. App. 467, 137 S.E. 131 (1927); Sheffield v. Sheffield, 38 Ga. App. 685, 145 S.E. 672 (1928); Todd-Worsham Auction Co. v. Underwood, 38 Ga. App. 792, 145 S.E. 889 (1928); Anthony v. Weldon, 40 Ga. App. 499, 150 S.E. 431 (1929); Felker v. Still, 41 Ga. App. 462, 153 S.E. 781 (1930); La Boon v. Wright & Locklin, 42 Ga. App. 275, 155 S.E. 770 (1930); Zurich Gen. Accident & Liab. Ins. Co. v. Rousseau, 42 Ga. App. 349, 156 S.E. 308 (1930); Mortgage Bond & Trust Co. v. Colonial Hill Co., 175 Ga. 150, 165 S.E. 25 (1932); Geer v. Underwood Typewriter Co., 45 Ga. App. 390, 165 S.E. 148 (1932); King v. Irwin, 47 Ga. App. 699, 171 S.E. 302 (1933); Varner v. Darien Bank, 48 Ga. App. 298, 172 S.E. 651 (1934); Sapp v. Sapp, 50 Ga. App. 145, 177 S.E. 265 (1934); Hall v. Eufaula Brick Co., 50 Ga. App. 466, 178 S.E. 403 (1935); Hartsfield Co. v. Ray, 51 Ga. App. 106, 179 S.E. 732 (1935); Campbell Coal Co. v. Pano, 51 Ga. App. 232, 180 S.E. 139 (1935); Wofford Oil Co. v. Story, 52 Ga. App. 496, 183 S.E. 840 (1936); First Joint Stock Land Bank v. Sasser, 185 Ga. 417, 195 S.E. 143 (1938); Hanley v. Rainey, 58 Ga. App. 485, 199 S.E. 248 (1938); Quinn v. O'Neal, 58 Ga. App. 628, 199 S.E. 359 (1938); Boggs v. Shadburn, 65 Ga. App. 683, 16 S.E.2d 234 (1941); Hankin v. Deaton, 68 Ga. App. 113,

22 S.E.2d 341 (1942); Haynie v. Murray, 74 Ga. App. 253, 39 S.E.2d 567 (1946); Adamson v. Gaultney, 74 Ga. App. 820, 41 S.E.2d 657 (1947); Saul Klenberg Co. v. Mrozinski, 78 Ga. App. 59, 50 S.E.2d 247 (1948); Bedgood v. Karp's U-Drive-It Co., 80 Ga. App. 216, 55 S.E.2d 654 (1949); Morrow v. Johnston, 85 Ga. App. 261, 68 S.E.2d 906 (1952); Quillian v. Mabry, 88 Ga. App. 817, 78 S.E.2d 97 (1953); Dickens v. Dickens, 211 Ga. 796, 89 S.E.2d 161 (1955); Tippins v. Spears, 92 Ga. App. 495, 89 S.E.2d 210 (1955); Reserve Life Ins. Co. v. Loyd, 94 Ga. App. 462, 95 S.E.2d 383 (1956); First Am. Acceptance Corp. v. Wheat, 217 Ga. 1, 120 S.E.2d 330 (1961); American Mut. Liab. Ins. Co. v. Quick, 106 Ga. App. 59, 126 S.E.2d 431 (1962); Schnuck v. Riales, 106 Ga. App. 647, 127 S.E.2d 825 (1962); Stanley Home Prods., Inc. v. Lucas, 107 Ga. App. 260, 129 S.E.2d 568 (1963); Borochoff v. Russell, 108 Ga. App. 266, 132 S.E.2d 861 (1963); Wright v. Collins, 117 Ga. App. 105, 159 S.E.2d 468 (1968); Bragg v. Bragg, 224 Ga. 294, 161 S.E.2d 313 (1968); Federated Ins. Group v. Pitts, 118 Ga. App. 356, 163 S.E.2d 841 (1968); Brown v. Royal Wood, Inc., 119 Ga. App. 564, 168 S.E.2d 211 (1969); American Liberty Ins. Co. v. Sanders, 122 Ga. App. 407, 177 S.E.2d 176 (1970); Phoenix Ins. v. Weaver, 124 Ga. App. 423, 183 S.E.2d 920 (1971); Fulton Indus. v. Knight, 127 Ga. App. 604, 194 S.E.2d 346 (1972); Wilson v. Lee, 129 Ga. App. 647, 200 S.E.2d 480 (1973); Buffington v. McClelland, 130 Ga. App. 460, 203 S.E.2d 575 (1973); Knox Jewelry Co. v. Cincinnati Ins. Co., 130 Ga. App. 519, 203 S.E.2d 739 (1974); Security Mgt. Co. v. King, 132 Ga. App. 618, 208 S.E.2d 576 (1974); Kelley v. Whitaker, 133 Ga. App. 229, 211 S.E.2d 176 (1974); American Fin. Co. v. First Nat'l Bank, 134 Ga. App. 24, 217 S.E.2d 364 (1975); Page v. Page, 235 Ga. 131, 218 S.E.2d 859 (1975); Lee v. Goldner, 135 Ga. App. 744, 219 S.E.2d 5 (1975); Motors Ins. Corp. v. Roper, 136 Ga. App. 224, 221 S.E.2d 55 (1975); Hodges v. Hodges, 235 Ga. 848, 221 S.E.2d 597 (1976); Waldrop v. Hite, 236 Ga. 608, 225 S.E.2d 19 (1976); Rea v. Rea, 237 Ga. 50, 226 S.E.2d 589 (1976); Crosby v. Greene, 237 Ga. 56, 226 S.E.2d 739 (1976); Seaboard Coast Line R.R. v. Davis, 139 Ga. App. 138, 227 S.E.2d 915 (1976); Contractors Mgt. Corp. v. McDowell-Kelley, Inc., 139 Ga. App. 4, 228 S.E.2d 6 (1976); Thomas v. Estes, 139 Ga. App. 738, 229 S.E.2d 538 (1976); Insurance Co. of N. Am. v. Puckett, 139 Ga. App. 772, 229 S.E.2d 550 (1976); Richardson v. Richardson, 237 Ga. 830, 229 S.E.2d 641 (1976); Billas v. Dwyer, 140 Ga. App. 774, 232 S.E.2d 102 (1976); Trust Inv. & Dev. Co. v. First Ga. Bank, 238 Ga. 309, 232 S.E.2d 828 (1977); Roe v. Williamson, 142 Ga. App. 834, 238 S.E.2d 128 (1977); Associated Distribs., Inc. v. Strozier, 144 Ga. App. 205, 240 S.E.2d 761 (1977); Boyd v. Maslia, 144 Ga. App. 683, 242 S.E.2d 338 (1978); Wood v. Wood, 240 Ga. 861, 242 S.E.2d 599 (1978); Prudential Timber & Farm Co. v. Collins, 144 Ga. App. 849, 243 S.E.2d 80 (1978); Perry v. Dudley, 145 Ga. App. 728, 244 S.E.2d 580 (1978); Nelson v. Fulton County Bank, 147 Ga. App. 98, 248 S.E.2d 173 (1978); Hartford Accident & Indem. Co. v. Mauldin, 147 Ga. App. 230, 248 S.E.2d 528 (1978); Rives E. Worrell Co. v. Key Sys., 147 Ga. App. 383, 248 S.E.2d 686 (1978); F. & G. Ins. Underwriters, Inc. v. Raines, 147 Ga. App. 675, 250 S.E.2d 58 (1978); United States Life Ins. Co. v. Huckaby, 148 Ga. App. 190, 250 S.E.2d 833 (1978); Travelers Ins. Co. v. Gaither, 148 Ga. App. 251, 251 S.E.2d 66 (1978); Match Point, Ltd. v. Adams, 148 Ga. App. 673, 252 S.E.2d 90 (1979); Berman v. Berman, 243 Ga. 246, 253 S.E.2d 706 (1979); Cale v. Cale, 243 Ga. 519, 255 S.E.2d 41 (1979); Thompson v. Stein Steel & Supply Co., 149 Ga. App. 682, 255 S.E.2d 138 (1979); Department of Pub. Safety v. Rodgers, 149 Ga. App. 683, 255 S.E.2d 139 (1979); Grier v. Grier, 243 Ga. 520, 255 S.E.2d 728 (1979); Brannon v. Simpson, 244 Ga. 58, 257 S.E.2d 541 (1979); Pippin v. Brigadier Indus. Corp., 150 Ga. App. 401, 258 S.E.2d 18 (1979); Spivey v. Eavenson, 150 Ga. App. 429, 258 S.E.2d 54 (1979); Walsey v. American Fletcher Nat'l Bank & Trust Co., 151 Ga. App. 104, 258 S.E.2d 760 (1979); Turner v. Turner, 244 Ga. 229, 259 S.E.2d 479 (1979); Ivey Contracting Co. v. Elliott, 151 Ga. App. 361, 259 S.E.2d 658 (1979); McCane v. Cappett Corp., 151 Ga. App. 423, 260 S.E.2d 379 (1979); Metaxis v. Sanders, 151 Ga. App. 702, 261 S.E.2d 651 (1979); Keappler v. Allen, 152 Ga. App.

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746, 264 S.E.2d 37 (1979); Scales v. American Lease Plans, Inc., 153 Ga. App. 670, 266 S.E.2d 323 (1980); Morrison v. Morrison, 153 Ga. App. 818, 266 S.E.2d 521 (1980); Trade City G.M.C., Inc. v. May, 154 Ga. App. 371, 268 S.E.2d 421 (1980); Tucker v. Whitehead, 155 Ga. App. 104, 270 S.E.2d 317 (1980); Davidson v. Becker, 156 Ga. App. 236, 273 S.E.2d 422 (1980); Seaboard Coast Line R.R. v. Towns, 156 Ga. App. 24, 274 S.E.2d 74 (1980); Barylak v. Jordan, 156 Ga. App. 508, 274 S.E.2d 846 (1980); Shepherd v. Shepherd, 247 Ga. 273, 275 S.E.2d 317 (1981); Garrett v. Atlantic Bank & Trust Co., 157 Ga. App. 103, 276 S.E.2d 152 (1981); Bhatia v. West Cash & Carry Bldg. Materials of Savannah, Inc., 157 Ga. App. 145, 276 S.E.2d 656 (1981); Bituminous Cas. Corp. v. Prudential Property & Cas. Ins. Co., 247 Ga. 481, 277 S.E.2d 23 (1981); Crutchfield v. Trust Co. Bank, 157 Ga. App. 557, 278 S.E.2d 138 (1981); Pharr v. Burnette, 158 Ga. App. 473, 280 S.E.2d 881 (1981); General Accident Fire & Life Assurance Corp. v. Kelch, 158 Ga. App. 555, 281 S.E.2d 258 (1981); King v. Chrisler, 160 Ga. App. 784, 287 S.E.2d 124 (1982); Edhul Co. v. Collins, 248 Ga. 611, 287 S.E.2d 216 (1981); City of Atlanta v. West, 160 Ga. App. 609, 287 S.E.2d 558 (1981); City of Atlanta v. State Farm Fire & Cas. Co., 160 Ga. App. 822, 287 S.E.2d 665 (1982); Sizemore Sec. Int'l, Inc. v. Lee, 161 Ga. App. 332, 287 S.E.2d 782 (1982); Anderson v. King, 160 Ga. App. 802, 288 S.E.2d 231 (1982); McGaha v. Kwon, 161 Ga. App. 216, 288 S.E.2d 289 (1982); Decatur Invs. Co. v. McWilliams, 162 Ga. App. 181, 290 S.E.2d 526 (1982); Williams v. Struble, 162 Ga. App. 196, 290 S.E.2d 538 (1982); Holland v. Tri-City Hosp. Auth., 162 Ga. App. 256, 291 S.E.2d 107 (1982); Cameron v. Cox, 162 Ga. App. 268, 291 S.E.2d 115 (1982); Barker v. Century 21-Atlanta E. Realty, Inc., 162 Ga. App. 828, 293 S.E.2d 76 (1982); Collier v. Cosby, 293 S.E.2d 567 (1982); Freeman v. Paradise, Inc., 293 S.E.2d 567 (1982); Capitol T.V. Serv., Inc. v. Derrick, 163 Ga. App. 65, 293 S.E.2d 724 (1982); Watkins v. Citizens & S. Nat'l Bank, 163 Ga. App. 468, 294 S.E.2d 703 (1982); Burleson v. Jordan, 163 Ga. App. 496, 295 S.E.2d 335 (1982); Shick Moulding & Frame Co. v. Edwards, 163 Ga. App. 879, 296 S.E.2d 161 (1982); Gates Rental, Inc. v. Perry, 164 Ga. App. 297, 297 S.E.2d 79 (1982); Mansell v. Benson Chevrolet Co., 165 Ga. App. 568, 302 S.E.2d 114 (1983); McCormick v. Clemenson, 165 Ga. App. 529, 302 S.E.2d 122 (1983); Pittard Mach. Co. v. Eisele Corp., 166 Ga. App. 324, 304 S.E.2d 129 (1983); Becker v. Fairman, 167 Ga. App. 708, 307 S.E.2d 520 (1983); Toporek v. Water Processing Co., 169 Ga. App. 141, 312 S.E.2d 132 (1983); Chatham County Comm'rs v. Rumary, 253 Ga. 60, 315 S.E.2d 881 (1984); First of Ga. Underwriters Co. v. Beck, 170 Ga. App. 68, 316 S.E.2d 519 (1984); Kelco Roofing Co. v. Tri-D Roofing & Sheet Metal Co., 170 Ga. App. 164, 316 S.E.2d 577 (1984); Price & Sons Grading Co. v. Associated Iron & Metal Co., 171 Ga. App. 270, 319 S.E.2d 105 (1984); Crawford v. Holt, 172 Ga. App. 326, 323 S.E.2d 245 (1984); Caswell v. Pelham, 172 Ga. App. 317, 323 S.E.2d 247 (1984); Khoury v. Skidaway Island Eng'g, Inc., 172 Ga. App. 503, 323 S.E.2d 692 (1984); Brown v. WTA/CHC, Inc., 172 Ga. App. 636, 324 S.E.2d 205 (1984); Miller v. Grier, 175 Ga. App. 91, 332 S.E.2d 323 (1985); Moore v. Sanford, Adams, McCullough & Beard, 175 Ga. App. 552, 333 S.E.2d 681 (1985); Wheeler v. McDonald, 175 Ga. App. 785, 334 S.E.2d 367 (1985); Anderson v. Hendrix, 175 Ga. App. 720, 334 S.E.2d 697 (1985); Gowdey v. Rem Assocs., 176 Ga. App. 83, 335 S.E.2d 309 (1985); Murray v. Pratt-Dudley Bldrs. Supply Co., 176 Ga. App. 225, 335 S.E.2d 443 (1985); Miller v. Bank of S., 177 Ga. App. 42, 338 S.E.2d 436 (1985); Re/Max 100 of Sandy Springs, Inc. v. Tri-Continental Leasing Corp., 177 Ga. App. 111, 338 S.E.2d 542 (1985); Associated Software Consultants Org., Inc. v. Wysocki, 177 Ga. App. 135, 338 S.E.2d 679 (1985); A.P.S.S., Inc. v. Clary & Assocs., 178 Ga. App. 131, 342 S.E.2d 375 (1986); Carr v. Nodvin, 178 Ga. App. 228, 342 S.E.2d 698 (1986); Dobbs v. Titan Properties, Inc., 178 Ga. App. 389, 343 S.E.2d 419 (1986); Sadler v. Trust Co. Bank, 178 Ga. App. 871, 344 S.E.2d 694 (1986); Smith v. Pierce, 179 Ga. App. 724, 347 S.E.2d 692 (1986); Barone v. McRae & Holloway, P.C., 179 Ga. App. 812, 348

S.E.2d 320 (1986); Holcomb v. Commercial Credit Servs. Corp., 180 Ga. App. 451, 349 S.E.2d 523 (1986); Crucet v. Bovis, Kyle & Burch, 180 Ga. App. 765, 350 S.E.2d 322 (1986); Concepts, Inc. v. Innovative Property Mgt., Inc., 180 Ga. App. 903, 350 S.E.2d 805 (1986); Murray v. Stratford, 181 Ga. App. 592, 353 S.E.2d 85 (1987); Grissett v. Wilson, 181 Ga. App. 727, 353 S.E.2d 621 (1987); Vitner v. Funk, 182 Ga. App. 39, 354 S.E.2d 666 (1987); AAA Van Servs., Inc. v. Willis, 182 Ga. App. 46, 354 S.E.2d 631 (1987); Republic Ins. Co. v. Martin, 182 Ga. App. 390, 355 S.E.2d 694 (1987); Chrysler Corp. v. Marinari, 182 Ga. App. 399, 355 S.E.2d 719 (1987); Harrell v. Thompson, 182 Ga. App. 470, 356 S.E.2d 69 (1987); Caylor v. Potts, 183 Ga. App. 133, 358 S.E.2d 291 (1987); Williams v. Kaminsky, 183 Ga. App. 283, 358 S.E.2d 667 (1987); Thomas v. Bartlett, 183 Ga. App. 412, 359 S.E.2d 156 (1987); DOT v. Pilgrim, 183 Ga. App. 470, 359 S.E.2d 227 (1987); Hudson v. Omaha Indem. Co., 183 Ga. App. 847, 360 S.E.2d 406 (1987); Carpet Transp., Inc. v. Dixie Truck Tire Co., 185 Ga. App. 181, 363 S.E.2d 840 (1987); Reahard v. Ivester, 188 Ga. App. 17, 371 S.E.2d 905 (1988); Morris v. Clark, 189 Ga. App. 228, 375 S.E.2d 616 (1989); Seligman v. Milam Bldrs., Inc., 191 Ga. App. 224, 381 S.E.2d 401 (1989); Phillips v. Plymale, 191 Ga. App. 338, 381 S.E.2d 580 (1989); Hert v. Gibbs, 191 Ga. App. 471, 382 S.E.2d 191 (1989); Zorn & Son Ins. Agency, Inc. v. Jim Altman Ins., Inc., 191 Ga. App. 649, 382 S.E.2d 696 (1989); Williamson v. Ward, 192 Ga. App. 857, 386 S.E.2d 727 (1989); Johnson v. Ashkouti, 193 Ga. App. 810, 389 S.E.2d 27 (1989); Sanders v. Robertson, 196 Ga. App. 739, 397 S.E.2d 26 (1990); Williamscraft Dev., Inc. v. Vulcan Materials Co., 196 Ga. App. 703, 397 S.E.2d 122 (1990); Stevens v. McCarty, 198 Ga. App. 412, 401 S.E.2d 605 (1991); Britt v. West Coast Cycle, 198 Ga. App. 525, 402 S.E.2d 121 (1991); City Group, Inc. v. Ehlers, 198 Ga. App. 709, 402 S.E.2d 787 (1991); Smith v. Law Office of Tony Center, 198 Ga. App. 873, 403 S.E.2d 451 (1991); Spicewood, Inc. v. Dykes Paving & Constr. Co., 199 Ga. App. 165, 404 S.E.2d 305 (1991); Bi-Lo, Inc. v. McConnell, 199 Ga. App. 154, 404 S.E.2d 327 (1991); Heslen v. Heslen, 199 Ga. App. 271, 404 S.E.2d 592 (1991); Moxley v. Lariscy, 199 Ga. App. 522, 405 S.E.2d 339 (1991); Gorham v. Turner Outdoor Adv., Ltd., 199 Ga. App. 712, 405 S.E.2d 900 (1991); Covrig v. Miller, 199 Ga. App. 864, 406 S.E.2d 239 (1991); Harris v. Wilwat Properties, 201 Ga. App. 161, 410 S.E.2d 372 (1991); Crow v. Northside Bldg. Supply Co., 201 Ga. App. 441, 411 S.E.2d 914 (1991); Webb v. Sheu, 201 Ga. App. 769, 412 S.E.2d 289 (1991); Gaillard v. Coldwell Banker Residential Real Estate Servs. of Ga., Inc., 202 Ga. App. 315, 414 S.E.2d 19 (1991); Alpharetta, Old Milton County, Ga. Historical & Genealogical Soc'y, Inc. v. Dowda, 217 Ga. App. 792, 459 S.E.2d 443 (1995); Johnson v. Nelson-Rives Realty, 245 Ga. App. 638, 538 S.E.2d 536 (2000); Hubbard v. DOT, 256 Ga. App. 342, 568 S.E.2d 559 (2002); Williams v. Morgan, 262 Ga. App. 848, 586 S.E.2d 740 (2003); Delta Cleaner Supply Co. v. Mendel Drive Assocs., 286 Ga. App. 227, 648 S.E.2d 651 (2007); DOT v. Gilbert's Auto Serv., 301 Ga. App. 419, 687 S.E.2d 659 (2009).

Judgment for Sum Certain

Unless there is judgment for sum certain, court cannot award damages under this statute. Collins P. & B.R.R. v. Short Elec. Ry., 95 Ga. 570, 20 S.E. 495 (1894); Berryman v. Royston Bank, 145 Ga. 135, 88 S.E. 682 (1916).

Unless judgment for sum certain has been rendered in trial court, the Supreme Court has no authority under this statute to award damages in favor of the defendant in error against the plaintiff in error, although it might be the opinion of court that the cause was taken up for delay only. Jackson v. Jackson, 178 Ga. 203, 172 S.E. 459 (1934).

Motion to assess damages under statute because appeal was for delay, will be denied when appeal is not from judgment for sum certain. Shepherd v. Epps, 242 Ga. 322, 249 S.E.2d 33 (1978).

Even though an appeal is taken for delay only, when the judgment is not for a sum certain, a motion for ten percent damages must be denied. Fawcett v. Fawcett Contracting, Inc., 252 Ga. 242, 312 S.E.2d 790 (1984).

An award of damages for frivolous ap-

Judgment for Sum Certain (Cont'd)

peal was not an available remedy since where there had been no award of money damages in the case sub judice. Young v. First Am. Bank, 196 Ga. App. 348, 396 S.E.2d 73 (1990).

When record fails to show any judgment, damages will not be awarded. Dozier v. Williams, 57 Ga. 600 (1876).

Section inapplicable to judgment involving validation of proposed issue of bonds. Clark v. Union School Dist., 36 Ga. App. 80, 135 S.E. 318 (1926).

Damages improper when judgment is refusal of interlocutory judgment and not money judgment. Pittsburg-Bartow Mining & Mfg. Co. v. Washington Trust Co., 137 Ga. 232, 73 S.E. 367 (1911).

Declaring property subject and directing that fi. fa. proceed is not judgment for sum certain. Brantly v. Buck, 62 Ga. 172 (1878).

Award of damages in connection with judgments requiring continuing payments. — When judgment affirms compensation award requiring continuing payments, damages awarded under statute are to be computed against only so much of award as is for sum certain; that is, ten percent of whatever compensation is definitely ascertainable at date of judgment. Refrigerated Transp. Co. v. Kennelly, 144 Ga. App. 713, 242 S.E.2d 352 (1978).

Application

1. In General

Applicable only to affirmed judgments for sums certain appealed for delay only. — Statute is applicable only upon affirmance of judgments for sums certain when, in the opinion of the court, an appeal was taken for delay only. Atlanta Gas Light Co. v. Slaton, 117 Ga. App. 317, 160 S.E.2d 414 (1968).

Applies when issue appealed is without merit, not when issue tried below is nonmeritorious. Brown v. Rooks, 139 Ga. App. 770, 229 S.E.2d 548 (1976), overruled on other grounds, Miller Grading Contractors v. Georgia Fed. Sav. & Loan Ass'n, 247 Ga. 730, 279 S.E.2d 442 (1981).

Damages never assessed in doubtful cases. — Damages under statute are in nature of a penalty, and will not be awarded in any case unless it is clearly apparent that it was brought up for delay only; and damages are never assessed in doubtful cases. Lipton v. Lipton, 211 Ga. 442, 86 S.E.2d 299 (1955).

Damages against litigant for bringing case up for delay only are never assessed in doubtful cases when exceptions are at least colorable. Almond v. Bentley Gray, Inc., 138 Ga. App. 508, 226 S.E.2d 776 (1976).

Court must be fully satisfied that appeal was for delay only. — When the court is not fully convinced that the case is brought up for delay only, request to award damages should be denied. Hancock v. Tifton Guano Co., 19 Ga. App. 185, 91 S.E. 246 (1917); Robinson v. Woodruff Mach. Mfg. Co., 23 Ga. App. 426, 98 S.E. 405 (1919); Majette v. Strickland, 30 Ga. App. 624, 118 S.E. 477 (1923); Royal v. Montfort & Robinson, 30 Ga. App. 780, 119 S.E. 427 (1923); Guthrie v. Rowan, 34 Ga. App. 671, 131 S.E. 93 (1925).

Damages will not be awarded by Court of Appeals unless court is fully satisfied that case was brought up for delay only. Diamond v. Williams, 75 Ga. App. 111, 42 S.E.2d 382 (1947); Stone v. Cook, 190 Ga. App. 11, 378 S.E.2d 142 (1989).

When reviewing court is not fully satisfied that cause was taken up for delay only, additional damages will not be awarded. Rackard v. Merritt, 114 Ga. App. 743, 152 S.E.2d 701 (1966).

Sanction precluded when not meritorious but not for delay only. — When the defendant's appeal is not meritorious, but the appeal is not so palpably without merit as to admit of no other conclusion than that the appeal was filed for purposes of delay, the sanction of O.C.G.A. § 5-6-6 is precluded. Great Atl. & Pac. Tea Co. v. Burgess, 157 Ga. App. 632, 278 S.E.2d 174 (1981).

When none of the appellant's enumerations of error are meritorious, but neither are the enumerations so specious as to warrant the conclusion that the appeal is taken for the purpose of delay only, a

motion for damages for a frivolous appeal is denied. Ale-8-One of Am., Inc. v. Graphicolor Servs., Inc., 166 Ga. App. 506, 305 S.E.2d 14 (1983).

Lack of merit is not ordinarily a proper ground for dismissal of appeal but results in the affirmance of the trial court's judgment. Taylor v. Bentley, 166 Ga. App. 887, 305 S.E.2d 617 (1983).

Dismissal of appeal. — O.C.G.A. § 5-6-6 authorizing ten percent damages when a judgment is affirmed, does not expressly authorize these damages when an appeal is dismissed. Radford v. IPD Printing & Distrib., Inc., 184 Ga. App. 64, 360 S.E.2d 656 (1987); Bowles v. Lovett, 190 Ga. App. 650, 379 S.E.2d 805 (1989); Scott v. McLaughlin, 192 Ga. App. 230, 384 S.E.2d 212, cert. denied, 192 Ga. App. 903, 384 S.E.2d 212 (1989); Joyner v. Joyner, 197 Ga. App. 304, 398 S.E.2d 294 (1990); Royal v. Curry, 199 Ga. App. 133, 404 S.E.2d 302 (1991); Weiland v. Weiland, 216 Ga. App. 417, 454 S.E.2d 613 (1995).

Court of appeals was unable to assess damages against appellants under O.C.G.A. § 5-6-6 because that statute did not authorize damages when an appeal was dismissed. Noaha, LLC v. Vista Antiques & Persian Rugs, Inc., 306 Ga. App. 323, 702 S.E.2d 660 (2010).

Award of attorney's fees. — While O.C.G.A. § 5-6-6 and Ga. Ct. App. R. 15 allow the Court of Appeals of Georgia to impose damages and penalties for frivolous appeals, those provisions do not allow the court of appeals to award attorney fees for unjustified violations of the Open Meetings Act, O.C.G.A. § 50-14-1 et seq.; O.C.G.A. § 50-14-5 expressly vests jurisdiction to award such fees in the superior courts of Georgia, not in the court of appeals. Evans County Bd. of Comm'rs v. Claxton Enter., 255 Ga. App. 656, 566 S.E.2d 399 (2002).

2. When Appeal Is Frivolous

Damages granted when appellant knew appeal ill-founded. — When it appears that the appellant knew or should have known that, under a careful reading of the facts and the relevant law, the appellant's appeal was ill-founded, appellee's motion for ten percent damages will be granted. Ray v. Standard Fire Ins. Co., 168 Ga. App. 116, 308 S.E.2d 221 (1983).

Bank's motion for ten percent damages for frivolous appeal was granted since the plaintiffs brought an appeal only for purposes of delay and when there was no valid reason for the plaintiffs to anticipate reversal of the trial court's judgment. Jamison v. Button Gwinnett Sav. Bank, 204 Ga. App. 341, 419 S.E.2d 91 (1992); Cunningham v. Tara State Bank, 212 Ga. App. 468, 442 S.E.2d 18 (1994).

Motion for imposition of a frivolous appeal penalty, pursuant to O.C.G.A. § 5-6-6, was granted since all the issues raised by the appellant were meritless and pursued for purposes of delay only. Shamsai v. Coordinated Props., Inc., 259 Ga. App. 438, 576 S.E.2d 901 (2003).

Appealing litigant was assessed frivolous appeal penalties, as was the litigant's counsel, in the amount of $1,500 each, and a ten percent penalty against the judgment against the litigant was also assessed, as a result of the litigant pursuing meritless claims and filing a wholly meritless appeal solely for the purpose of delay, even after the trial court gave repeated warnings not to pursue an appeal. Austin v. Austin, 292 Ga. App. 335, 664 S.E.2d 780 (2008).

Case without merit evidences fact that it is brought up for delay. Chabble v. O'Neal, 19 Ga. App. 809, 92 S.E. 288 (1917).

When it did not appear from the facts that there was any valid reason for an appellant to anticipate reversal of the trial court's judgment, the appeal was brought only for purposes of delay, and the appellee's motion for ten percent damages for frivolous appeal was granted. Foreman v. Eastern Foods, Inc., 195 Ga. App. 332, 393 S.E.2d 695 (1990); Malin Trucking, Inc. v. Progressive Cas. Ins. Co., 212 Ga. App. 273, 441 S.E.2d 684 (1994).

Pure attempt to gain time is proof of delay. Patillo v. Smith & Clifford, 61 Ga. 265 (1878).

Failure of plaintiff in error to appear and lack of good cause for exception warrants damages. Avera v. Vason, 42 Ga. 233 (1871); Craton v. Hackney, 91 Ga. 192, 17 S.E. 124 (1893); Bater v. Bater, 2 Ga. App. 62, 58 S.E. 312 (1907); Belcher

Application (Cont'd)
2. When Appeal Is Frivolous (Cont'd)

v. Massey Bros., 8 Ga. App. 34, 68 S.E. 460 (1910).

Bringing affidavit of illegality in violation of § 9-13-121 as means of delay. — When the defendant attempts to go behind the judgment by bringing an affidavit of illegality in violation of Civil Code 1910, § 5311 (see O.C.G.A. § 9-13-121) and as a means of delay only, the court could award damages for delay. Drake v. Ludden & Bates S. Music House, 46 Ga. App. 745, 169 S.E. 213 (1933).

Damages warranted when issues raised have been previously decided adversely to plaintiff in error. Brown v. Brown, 51 Ga. 554 (1874).

When issues raised have been settled by previous decisions, damages are appropriate. Pinkerton & Laws Co. v. Robert & Co. Assocs., 129 Ga. App. 881, 201 S.E.2d 654 (1973).

When there is no issue of fact and all questions of law raised on appeal have already been settled, so that no reason for appeal presents itself except to secure a delay in payment of the debt, damages may be awarded. Egerton v. Jolly, 133 Ga. App. 805, 212 S.E.2d 462 (1975).

Second appeal, raising issues identical to those raised unsuccessfully on first appeal. — When second appeal from order for alimony payments raised issues identical to those raised on the first appeal which was decided adversely to the appellant, the appeal was for delay only and ten percent damages were justified. Maslia v. Maslia, 243 Ga. 244, 253 S.E.2d 706 (1979).

Absent valid reason to anticipate reversal of judgment below, a court may determine appeal is frivolous. Hatchett v. Hatchett, 240 Ga. 103, 239 S.E.2d 512 (1977).

When there was no valid reason for appellant to anticipate reversal of the superior court's judgment, the appeal was for purpose of delay only, and the appellee was entitled to an award of damages in the amount of ten 10 percent of judgment. Hanover Ins. Co. v. Scruggs Co., 162 Ga. App. 640, 292 S.E.2d 493 (1982); St. Amour v. Roberts, 170 Ga. App. 717, 318 S.E.2d 313 (1984); Hornsby v. Phillips, 190 Ga. App. 335, 378 S.E.2d 870, cert. denied, 190 Ga. App. 898, 378 S.E.2d 870 (1989).

Appellee's motion for imposition of damages as a sanction for filing a frivolous appeal will be granted when it appears that there was no reasonable ground upon which to anticipate reversal of the trial court's judgment and, consequently, that the appeal was brought for delay only. Burger v. Burton, 168 Ga. App. 378, 308 S.E.2d 868 (1983).

When the garnishee appealed the default judgments with no valid reason to anticipate reversal of the judgments, and the court accordingly concluded that the appeal was taken up for delay only, creditors were awarded ten percent damages. J.E.E.H. Enters., Inc. v. Montgomery Ward & Co., 172 Ga. App. 58, 321 S.E.2d 800 (1984).

Court permitted damages for frivolous appeal when there was no reason for the tenants to anticipate reversal of the court's judgment and appeals must have been brought for purpose of delay. Allen v. Peachtree Airport Park Joint Venture, 231 Ga. App. 549, 499 S.E.2d 690 (1998).

Penalty for frivolous appeal denied. — Motion for assessing a penalty for a frivolous appeal denied, where although there is no merit in the appeal, there is no evidence the appeal was filed merely for the purpose of delay. Moultrie Ins. Agency, Inc. v. Goodbar, 203 Ga. App. 677, 417 S.E.2d 658 (1992).

Meritless argument on appeal different from trial strategy is for delay. — When the argument raised on appeal is totally different from that argued at trial and lacks any merit whatever, the appellate court may conclude that the appeal was taken for the purpose of delay only. Ayers v. Advertising Concepts, Inc., 169 Ga. App. 400, 312 S.E.2d 876 (1984).

When appellant's liability was clear and amount of the appellant's liability was readily ascertainable, the issues raised in the appellant's appeal being meritless, a conclusion that the objective of the appeal was solely to delay, making an award of damages in the amount of ten percent of the judgment to appellees, pursuant to O.C.G.A. § 5-6-6, was justified.

Karsman v. Portman, 173 Ga. App. 108, 325 S.E.2d 608 (1984).

Motion for ten percent damages granted. Petty v. Chrysler Credit Corp., 169 Ga. App. 418, 312 S.E.2d 874 (1984); Bacon v. Decatur Fed. Sav. & Loan Ass'n, 169 Ga. App. 538, 313 S.E.2d 727 (1984); Bradbury v. Mead Corp., 174 Ga. App. 601, 330 S.E.2d 801 (1985); Tiftarea Shopper, Inc. v. Maddox, 187 Ga. App. 227, 369 S.E.2d 545 (1988); Kennerly v. First Colony Bank, 205 Ga. App. 352, 422 S.E.2d 243 (1992); International Indem. Co. v. Saia Motor Freight Line, 223 Ga. App. 544, 478 S.E.2d 776 (1996); Safadi v. Thompson, 226 Ga. App. 685, 487 S.E.2d 457 (1997); Yoh v. Daniel, 230 Ga. App. 640, 497 S.E.2d 392 (1998); Phillips & Sons Logging v. Pioneer Mach., Inc., 232 Ga. App. 240, 501 S.E.2d 585 (1998); Sellers Bros., Inc. v. Imperial Flowers, Inc., 232 Ga. App. 687, 503 S.E.2d 573 (1998); Marshall v. SDA, Inc., 234 Ga. App. 312, 506 S.E.2d 661 (1998); Garrett v. McDowell, 242 Ga. App. 78, 527 S.E.2d 918 (2000).

Appeal was held to have been palpably without merit so as to permit no conclusion other than that the appeal was filed for purposes of delay, and appellee's motion for the imposition of ten percent damages pursuant to O.C.G.A. § 5-6-6 was granted. Adams v. Cato, 175 Ga. App. 28, 332 S.E.2d 355 (1985); I.M.C. Motor Express, Inc. v. Cochran, 180 Ga. App. 232, 348 S.E.2d 750 (1986); T.L. Rogers Oil Co. v. Sommers Co., 203 Ga. App. 404, 417 S.E.2d 44 (1992).

In an appeal of a proceeding in which an arbitrator's award in a home construction dispute was confirmed, the appealing homeowners were subject to a ten percent penalty, under O.C.G.A. § 5-6-6, for a frivolous appeal, because the homeowners showed no basis for vacating the arbitrator's award, and no valid reason for the homeowners to anticipate the reversal of the trial court's confirmation of that award existed, so the appeal was brought only for purposes of delay. Marchelletta v. Seay Constr. Servs., 265 Ga. App. 23, 593 S.E.2d 64 (2004).

Appeal by county of summary judgment in a breach of contract action was frivolous. — Summary judgment for a city for $2,885,827 damages, plus pre-judgment interest under O.C.G.A. § 13-6-13, was proper on the city's claim against a county and the county's tax commissioner for breach of an agreement under which the county was required to collect the city's taxes and remit the taxes to the city, but instead withheld $2,885,827 for an obligation owed by the county. The county's appeal of the judgment was frivolous and subject to a ten percent penalty under O.C.G.A. § 5-6-6 and a $2,500 penalty against both the county and the county's counsel under Ga. Ct. App. R. 15(b). Ferdinand v. City of E. Point, 301 Ga. App. 333, 687 S.E.2d 617 (2009).

3. When Appeal Not Frivolous

Even slight grounds for bringing case up will prevent award of damages for frivolous exception. Stripling v. Calhoun, 98 Ga. App. 354, 105 S.E.2d 923 (1958).

No purposeful delay found in meritless appeal. — Despite the appellate court's conclusion that an appeal lacked merit, the appellate court could not conclude that the appealing party pursued the appeal for purposes of delay only; hence, the appellee's motion for sanctions for a frivolous appeal under O.C.G.A. § 5-6-6 was denied. Realty Lenders, Inc. v. Levine, 286 Ga. App. 326, 649 S.E.2d 333 (2007).

Sanctions for a frivolous appeal under O.C.G.A. § 5-6-6 were not imposed against an insurer that appealed a subrogation award against the insurer as there was no indication that the appeal was pursued for purposes of delay only, although the appeal was lacking in merit. Universal Underwriters Group v. Southern Guar. Ins. Co., 297 Ga. App. 587, 677 S.E.2d 760 (2009).

Presenting bona fide contest over colorable matter. — If, after reviewing the whole matter, the court believes that the plaintiff in error is presenting a bona fide contest over colorable matter, though the plaintiff's view of the law may not in fact be well founded, or that the plaintiff is seeking a ruling upon an open or doubtful question, damages will be refused. Prattes v. Southeast Ceramics, Inc., 132 Ga. App.

Application (Cont'd)
3. When Appeal Not Frivolous (Cont'd)

584, 208 S.E.2d 600 (1974).

Appeal from what is determined to be harmless error. — While assignments of error made are insufficient to bring about reversal, nevertheless counsel for the losing party has an absolute right to test the legality of the judgment, and the very fact that part of the charge on which the error was assigned was shown to have been inexact and perhaps even error, though harmless, afforded a reasonable ground for testing the judgment. Stripling v. Calhoun, 98 Ga. App. 354, 105 S.E.2d 923 (1958).

Mere zeal and persistence of counsel for plaintiff in error will not justify damages. Walden v. Barwick, 72 Ga. App. 545, 34 S.E.2d 552 (1945).

When the issue was not obviously controlled by former decisions, a request for damages was denied. Aetna Ins. Co. v. Windsor, 133 Ga. App. 159, 210 S.E.2d 373 (1974).

Reliance on grounds incorporated in prior writ of error. — When an appeal is brought on grounds which were incorporated in, or by exercise of ordinary diligence could have been and were not incorporated in a prior writ of error, grant of damages to appellee is particularly appropriate. Pinkerton & Laws Co. v. Robert & Co. Assocs., 129 Ga. App. 881, 201 S.E.2d 654 (1973).

When appellant wrongly contends appellant was misled. — When plaintiff in error bases an appeal on the contention that the plaintiff was misled by the difference between service copy of document and original, and when discovery of the fact was made in time to have presented question on prior appeal of case, and statement of plaintiff in error's brief and facts in record refute entire contention that the plaintiff was misled, damages may be awarded. Rahal v. Titus, 110 Ga. App. 122, 138 S.E.2d 68 (1964).

When there is dismissal in appellate court, assessment of damages is not made. James v. Seritt, 121 Ga. App. 783, 175 S.E.2d 163 (1970).

When there is a dismissal in the appellate court, damages cannot be recovered in the trial court because of the dismissal. James v. Seritt, 121 Ga. App. 783, 175 S.E.2d 163 (1970).

Issues held sufficient for Court of Appeals to determine that the case was not taken up for delay only so that appellee's motion for damages was denied. Fleming v. Federal Land Bank, 167 Ga. App. 326, 306 S.E.2d 332 (1983); Carco Supply Co. v. Clem, 194 Ga. App. 566, 391 S.E.2d 134 (1990).

Reversible error. — When a party files a motion for damages of ten percent of a judgment for filing a frivolous appeal, such motion must be denied when reversible error is found as to a part of the original judgment. Wisseh v. Bank of Credit & Commerce Int'l, 173 Ga. App. 286, 325 S.E.2d 897 (1985).

Motion for damages denied. — Ranger Constr. Co. v. Robertshaw Controls Co., 166 Ga. App. 679, 305 S.E.2d 361 (1983); Hillis v. First Nat'l Bank, 168 Ga. App. 408, 309 S.E.2d 404 (1983); Gateway Leasing Corp. v. Heath, 168 Ga. App. 858, 310 S.E.2d 549 (1983); Glenn v. Fourteen W. Realty, Inc., 169 Ga. App. 549, 313 S.E.2d 730 (1984); Macon-Bibb County Hosp. Auth. v. Miller, 180 Ga. App. 231, 348 S.E.2d 752 (1986); New York Ins. Co. v. Willett, 183 Ga. App. 767, 360 S.E.2d 37 (1987); Farmers Mut. Ins. Ass'n v. Brown, 183 Ga. App. 810, 360 S.E.2d 42 (1987); Glenridge Unit Owners Ass'n v. Felton, 183 Ga. App. 858, 360 S.E.2d 418 (1987); Casgar v. Citizens & S. Nat'l Bank, 188 Ga. App. 234, 372 S.E.2d 815 (1988); Dever v. Lee, 188 Ga. App. 483, 373 S.E.2d 224 (1988); Nabisco Brands, Inc. v. Huggins, 190 Ga. App. 664, 379 S.E.2d 630 (1989); Hunter v. Hardnett, 199 Ga. App. 443, 405 S.E.2d 286 (1991), cert. denied, 199 Ga. App. 906, 405 S.E.2d 286 (1991); Pulliam v. Nichols, 202 Ga. App. 95, 413 S.E.2d 215 (1991); Signsation, Inc. v. Harper, 218 Ga. App. 141, 460 S.E.2d 854 (1995); Hendricks v. Blake & Pendleton, Inc., 221 Ga. App. 651, 472 S.E.2d 482 (1996); Moss v. Rutzke, 223 Ga. App. 58, 476 S.E.2d 770 (1996); Warnock v. Davis, 267 Ga. 336, 478 S.E.2d 124 (1996); Newman v. Filsoof, 224 Ga. App. 461, 481 S.E.2d 4 (1997); Starrett v. Commercial Bank, 226 Ga. App. 598, 486 S.E.2d 923 (1997).

Sanctions were denied after a doctor was successful on appeal in reversing an order requiring the doctor to pay attorney fees that the parties had mutually released in a settlement of all claims; the appeal was not frivolous and there was no merit in the motion for sanctions. Carey v. Houston Oral Surgeons, LLC, 265 Ga. App. 812, 595 S.E.2d 633 (2004).

RESEARCH REFERENCES

Am. Jur. 2d. — 5 Am. Jur. 2d, Appellate Review, §§ 891, 892.

C.J.S. — 5 C.J.S., Appeal and Error, § 754.

ALR. — Award of damages for dilatory tactics in prosecuting appeal in state court, 91 ALR3d 661.

5-6-7. No decisions to be rendered ore tenus; publication of judgments and opinions.

No decision shall be rendered ore tenus. The reporter shall publish in the official reports of the Supreme Court and the Court of Appeals all judgments, but only those opinions which the courts shall direct to be published. (Ga. L. 1866, p. 46, § 5; Code 1868, § 4210; Code 1873, § 4270; Code 1882, § 4270; Civil Code 1895, § 5583; Civil Code 1910, § 6202; Code 1933, § 6-1606; Ga. L. 1966, p. 493, § 9.)

Cross references. — Motions for rehearing, Rules of the Court of Appeals of the State of Georgia, Rule 48.

Law reviews. — For article, "1966 Amendments to the Appellate Procedure Act of 1965," see 2 Ga. St. B.J. 433 (1966).

For comment discussing the operation of stare decisis, in light of Walton v. Benton, 191 Ga. 548, 13 S.E.2d 185 (1941), see 3 Ga. B.J. 62 (1941).

JUDICIAL DECISIONS

Cited in Rayle v. Bennet, 173 Ga. 897, 162 S.E. 267 (1931); Trammell v. Atlanta Coach Co., 51 Ga. App. 705, 181 S.E. 315 (1935); Smith v. State, 196 Ga. 595, 27 S.E.2d 369 (1943).

5-6-8. Entry of decision on minutes; directions to lower court.

The decision in each case shall be entered on the minutes. It shall be within the power of the appellate court rendering the decision in a case to make such order and to give such direction as to the final disposition of the case by the lower court as may be consistent with the law and justice of the case. (Orig. Code 1863, § 4180; Code 1868, § 4219; Code 1873, § 4284; Code 1882, § 4284; Civil Code 1895, § 5586; Penal Code 1895, § 1068; Civil Code 1910, § 6205; Penal Code 1910, § 1095; Code 1933, § 6-1610.)

JUDICIAL DECISIONS

Analysis

General Consideration
Application
1. In General
2. Direction Allowing Amendment to Petition or Appeal
3. Directions to Write Off Part of Verdict

General Consideration

One great purpose in establishing Supreme Court (or Court of Appeals) was to terminate suits, and with this view, it is made its duty not only to grant judgments of affirmance or reversal, but any other order, direction or decree required, and if necessary to make final disposition of cause, and it is empowered to give to cause in court below such direction as may be consistent with law and justice of case. Gray v. Watson, 54 Ga. App. 885, 189 S.E. 616 (1936).

Court of Appeals has both inherent and express powers to prevent unjust results. Peace Officers' Annuity & Benefit Fund v. Blocker, 135 Ga. App. 822, 219 S.E.2d 456 (1975).

Section applies to appellate courts, rather than trial judges when considering motions for new trial. McDonald v. McDonald, 229 Ga. 702, 194 S.E.2d 429 (1973).

When lower court fails to, or improperly exercises discretion. — Power to direct specific, final disposition of case will not be exercised unless discretion of lower court has been improperly used or not exercised at all. Finley v. Southern Ry., 5 Ga. App. 722, 64 S.E. 312 (1909).

Superior court cannot modify Supreme Court's direction to amend its decree. — When in affirming judgment, the Supreme Court gives direction to the trial court to amend the trial court's decree in a certain specified manner, the trial court on receipt of remittitur has no power or discretion to vary or modify direction given, but must enter judgment in conformity with instructions contained therein. Estes v. Estes, 206 Ga. 530, 57 S.E.2d 587 (1950); Akins v. State, 237 Ga. 826, 229 S.E.2d 645 (1976).

Cited in Central R.R. & Banking Co. v. Kent, 91 Ga. 687, 18 S.E. 850 (1893); Gibson v. Wilkins, Neely & Jones, 110 Ga. 93, 35 S.E. 316 (1900); Fricker v. Americus Mfg. & Imp. Co., 124 Ga. 165, 52 S.E. 65 (1905); Massachusetts Bonding & Ins. Co. v. Realty Trust Co., 139 Ga. 180, 77 S.E. 86 (1913); Atlantic Ice & Coal Corp. v. Town of Decatur, 154 Ga. 882, 115 S.E. 912 (1923); Jolly v. Catoosa County Bd. of Educ., 171 Ga. 193, 154 S.E. 788 (1930); Burkhalter v. De Loach, 171 Ga. 384, 155 S.E. 513 (1930); McRae v. Atlanta Title & Trust Co., 42 Ga. App. 656, 157 S.E. 231 (1931); Wilson v. State, 173 Ga. 275, 160 S.E. 319 (1931); Tinsley v. Maddox, 176 Ga. 471, 168 S.E. 297 (1933); Irons v. American Nat'l Bank, 178 Ga. 160, 172 S.E. 629 (1933); Davis v. Metropolitan Life Ins. Co., 148 Ga. App. 179, 172 S.E. 467 (1934); Gibbs v. Georgia S. & F. Ry., 49 Ga. App. 565, 176 S.E. 648 (1934); Douglas v. Austin-Western Rd. Mach. Co., 180 Ga. 29, 177 S.E. 912 (1934); Smith v. Bailey, 183 Ga. 869, 189 S.E. 905 (1937); Pope v. United States Fid. & Guar. Co., 193 Ga. 769, 20 S.E.2d 13 (1942); Davis v. Wright, 194 Ga. 1, 21 S.E.2d 88 (1942); Hadden v. Fuqua, 194 Ga. 621, 22 S.E.2d 377 (1942); Ross v. Rambo, 195 Ga. 100, 23 S.E.2d 687 (1942); Singleton v. State, 196 Ga. 136, 26 S.E.2d 736 (1943); Reese v. Baker, 197 Ga. 265, 29 S.E.2d 412 (1944); Parks v. State, 206 Ga. 675, 58 S.E.2d 142 (1950); American Airmotive Co. v. Meyer, 81 Ga. App. 554, 59 S.E.2d 514 (1950); McKoy v. Smith, 82 Ga. App. 645, 61 S.E.2d 926 (1950); Seymour v. Seymour, 210 Ga. 49, 77 S.E.2d 433 (1953); Parks v. Parks, 89 Ga. App. 725, 80 S.E.2d 837 (1954); McLaurin v. Henry, 90 Ga. App. 864, 84 S.E.2d 713 (1954); Carter v. State, 93 Ga. App. 12, 90 S.E.2d 672 (1955); Taylor v. Atlanta Gas Light Co., 93 Ga. App. 766, 92 S.E.2d 709 (1956); Jackson v. Jackson, 214 Ga. 746, 107 S.E.2d 833 (1959); Brown v. Goodloe, 215 Ga. 755, 113 S.E.2d 393 (1960); Cauble v. Weimer, 101 Ga. App.

313, 113 S.E.2d 641 (1960); McEntyre v. Clack, 104 Ga. App. 646, 122 S.E.2d 595 (1961); Turner v. McGee, 217 Ga. 769, 125 S.E.2d 36 (1962); Almon v. Citizens & S. Nat'l Bank, 108 Ga. App. 799, 134 S.E.2d 435 (1963); Whiten v. Orr Constr. Co., 109 Ga. App. 267, 136 S.E.2d 136 (1964); McCurry v. McCurry, 223 Ga. 334, 155 S.E.2d 378 (1967); Woods v. State, 117 Ga. App. 546, 160 S.E.2d 922 (1968); Miller v. State, 224 Ga. 627, 163 S.E.2d 730 (1968); Massey v. Smith, 224 Ga. 721, 164 S.E.2d 786 (1968); T.K. v. State, 126 Ga. App. 269, 190 S.E.2d 588 (1972); Camp v. Fidelity Bankers Life Ins. Co., 129 Ga. App. 590, 200 S.E.2d 332 (1973); Davey v. City of Atlanta, 130 Ga. App. 687, 204 S.E.2d 322 (1974); United Family Life Ins. Co. v. DeKalb County, 134 Ga. App. 1, 213 S.E.2d 123 (1975); Travelers Indem. Co. v. Sasser & Co., 138 Ga. App. 361, 226 S.E.2d 121 (1976); Swish Mfg. S.E., Inc. v. Wilkie, 158 Ga. App. 275, 279 S.E.2d 724 (1981); Mijajlovic v. State, 179 Ga. App. 506, 347 S.E.2d 325 (1986); Thomas v. Clark, 188 Ga. App. 606, 373 S.E.2d 668 (1988); Baxter v. Kemp, 260 Ga. 184, 391 S.E.2d 754 (1990); Wisenbaker v. Warren, 196 Ga. App. 551, 396 S.E.2d 528 (1990).

Application

1. In General

Supreme Court has power to give direction to court below such as ordering affirmance of alimony award if lump sum payment was written off. Weatherford v. Weatherford, 204 Ga. 553, 50 S.E.2d 323 (1948).

Nature of allowable direction. — Appellate courts may give such direction to cause as is consistent with law and justice. Mollins v. State, 122 Ga. App. 865, 179 S.E.2d 111 (1970).

Reversal when appellants file separate motions. — Appellate court can reverse judgment as to one defendant only when appellants themselves separate their cause by filing separate motions for new trial and coming to court on separate bills of exceptions (see O.C.G.A. 5-6-49, O.C.G.A. 5-6-50). Gray v. Watson, 54 Ga. App. 885, 189 S.E. 616 (1936).

Reversing condemnation judgment. — Pursuant to O.C.G.A. § 5-6-8, the judgment of the trial court setting aside a condemnation judgment would be upheld on condition that, within 20 days of receipt of the remittitur, the trial court would hold a hearing to determine the actual and necessary expenses incurred by the condemnee as the result of the county's error in condemning the wrong property. Gatefield Corp. v. Gwinnett County, 234 Ga. App. 621, 507 S.E.2d 164 (1998).

Appellate court can reverse as to only one defendant upon joint motion for new trial. Gray v. Watson, 54 Ga. App. 885, 189 S.E. 616 (1936).

Direction that government agent be made party defendant is allowable. Payne v. Hayes, 25 Ga. App. 730, 104 S.E. 917 (1920).

Leave to amend in respect to multifariousness is allowable. Whatley v. Cohen & Co., 24 Ga. App. 514, 101 S.E. 310 (1919).

Direction allowing acceptance of nonsuit (now dismissal) on payment of costs is proper. Etowah Mfg. Co. v. Alford, 78 Ga. 345 (1886).

Direction may be to enter judgment of nonsuit (now dismissal) after setting aside verdict and judgment. Ayer v. Chapman, 141 Ga. 377, 81 S.E. 198 (1914).

Direction may be given to set aside verdict in main suit and to reinstate case. James v. Steele, 147 Ga. 598, 95 S.E. 11 (1918).

When it appears plaintiff cannot show materially different state of facts, direction to dismiss is proper. Central R.R. & Banking Co. v. Kent, 91 Ga. 687, 18 S.E. 850 (1893).

Direction may be given resubmitting issues to jury. Adair v. St. Amand, 136 Ga. 1, 70 S.E. 578 (1911).

Issues may be restricted and direction given for summary disposition of question remaining in case. Fudge v. Kelly, 6 Ga. App. 5, 64 S.E. 316 (1909).

Directions are sometimes given limiting issue of another trial. Zellars v. Orr, 147 Ga. 607, 95 S.E. 6 (1918); Fraser v. Jarrett, 153 Ga. 441, 112 S.E. 487 (1922).

Court may direct that affirmance shall not prejudice plaintiffs' right to present another application for in-

Application (Cont'd)
1. In General (Cont'd)

junction. Sims v. Cordele Ice Co., 119 Ga. 597, 46 S.E. 841 (1904).

Court may direct that judge presiding at retrial render proper judgment as to costs. Peebles v. McCrary, 28 Ga. App. 716, 113 S.E. 233 (1922).

Judgment may be affirmed in part and reversed in part, with direction to tax costs against plaintiff in error. Columbus Power Co. v. Puckett, 24 Ga. App. 390, 100 S.E. 800 (1919).

Direction may be made to correct miscalculated interest and attorney's fees. Fisher v. Shands, 24 Ga. App. 743, 102 S.E. 190 (1920).

Prevention of binding effect on subsequent action of motion to dismiss. — Direction may be given that judgment on certain grounds of demurrer (now motion to dismiss) should not be binding on parties in subsequent action. Styles v. American Home Ins. Co., 146 Ga. 92, 90 S.E. 718 (1916).

Supreme Court's affirmance, without condition or direction, of dismissal by superior court. — After general demurrer (now motion to dismiss) to declaration has been sustained and cause dismissed by superior court, and that judgment affirmed in Supreme Court without condition or direction, declaration is not amendable. McRae v. Sears, 183 Ga. 133, 187 S.E. 664 (1936).

Remand for findings as to counterclaims. — When the Supreme Court has overruled a lower court's decision on certain counterclaims and remanded the case for findings of fact with respect to those counterclaims, in the event that the defendant establishes any of the counterclaims, judgment against the defendant should be modified accordingly. Jones v. J.S.H. Co., 199 Ga. 755, 35 S.E.2d 288 (1945).

Vacating verdict and substituting judgment of nonsuit (now dismissal). — When the plaintiffs failed to prove case, judgment overruling motion for new trial will not be reversed, but, in exercise of power possessed by Supreme Court under this section, direction may be given that the plaintiffs have leave to vacate the verdict and to substitute therefor judgment of nonsuit in lieu of judgment entered on verdict. Lewis v. Bowen, 208 Ga. 671, 68 S.E.2d 900 (1952).

2. Direction Allowing Amendment to Petition or Appeal

Directions may be awarded allowing amendments to petitions. Jones v. Hurst, 95 Ga. 286, 22 S.E. 122 (1895); Ferrell v. Greenway & Co., 157 Ga. 535, 122 S.E. 198 (1924).

Direction may permit amendment by petitioner and require notice to defendant. Brown v. Tyson, 150 Ga. 598, 104 S.E. 420 (1920).

Amendment may be required to set up jurisdictional facts. Burton v. Wadley S. Ry., 25 Ga. App. 599, 103 S.E. 881 (1920).

Direction may allow amendment to add parties to petition. Green & Colwell v. Hill, 101 Ga. 258, 28 S.E. 692 (1897); Robinson v. Central of Ga. Ry., 25 Ga. App. 507, 103 S.E. 737 (1920); Payne v. Hayes, 25 Ga. App. 730, 104 S.E. 917 (1920).

Direction may allow amendment adding parties as complainants to bill in equity. Hayes v. Farmer, 58 Ga. 324 (1877).

Amendment to dismiss party improperly joined may be directed or allowed. Charleston & W.C. Ry. v. McElmurray, 16 Ga. App. 504, 85 S.E. 804 (1915).

Direction may be made allowing party to amend appeal. Holston Box & Lumber Co. v. Holcomb, 30 Ga. App. 651, 118 S.E. 577 (1923).

3. Directions to Write Off Part of Verdict

Judgment may be affirmed with direction to write off an amount from judgment. Tift v. Shiver & Aultman, 24 Ga. App. 638, 102 S.E. 47 (1919).

Affirmance on condition that amount be written off from judgment is proper. Ellard v. Smith, 145 Ga. 262, 88 S.E. 932 (1916); Short & Co. v. Lynchburg Shoe Co., 145 Ga. 375, 89 S.E. 333 (1916).

Conditioning on plaintiff's remitting part of verdict and dismissing action as to defendant. — It has been held that a case may be reversed, but if

the plaintiff remits part of verdict, and dismisses action as to the defendants, the judgment shall stand affirmed against the defendant. Davis v. Gurley, 51 Ga. 74 (1874).

Affirmance may be on condition that damages and attorney's fees be written off. Southern States Life Ins. Co. v. Morris, 24 Ga. App. 746, 102 S.E. 179 (1920).

There may be direction that amount inadvertently entered be written off. Drew v. Drew, 25 Ga. App. 355, 103 S.E. 196 (1920).

There may be direction that illegal part of verdict be written off. Tice Co. v. Evans, 32 Ga. App. 385, 123 S.E. 742 (1924).

Erroneous verdict may be corrected by writing off of illegal part if separable from the rest. Coop. Cab Co. v. Arnold, 106 Ga. App. 160, 126 S.E.2d 689 (1962).

Directing new trial as to damages if plaintiff refuses to write off. — When, in a suit seeking an injunction to prevent cutting of timber and for damages to realty, the jury found that the plaintiff was entitled to an injunction, and also damages in a stated amount, and case was reversed on condition, solely because of erroneous ruling as to measure of damages, the Supreme Court may in exercise of power conferred on it, direct that if the plaintiff will not elect to write off a certain amount of damages, a new trial shall be limited to inquiry as to measure of damages. Holcombe v. Jones, 197 Ga. 825, 30 S.E.2d 903 (1944).

RESEARCH REFERENCES

C.J.S. — 5 C.J.S., Appeal and Error, §§ 1109 et seq., 1154.

5-6-9. Transmittal of opinion to lower court generally.

(a) Where a further hearing of the case is to follow in the lower court, the clerk of the appellate court shall transmit a copy of the opinion to the clerk of the lower court, without charge, as soon as the opinion is written out. The copy shall remain on file for the information of the court and the parties.

(b) The appellate court, on rendering its decision in any case, shall instruct the clerk whether the case comes within the terms of this Code section; and a note of such instructions shall be entered on the minutes of the court. (Ga. L. 1887, p. 106, §§ 1, 2; Civil Code 1895, §§ 5595, 5596; Civil Code 1910, §§ 6214, 6215; Code 1933, §§ 6-1802, 6-1803; Ga. L. 1982, p. 3, § 5.)

Cross references. — Transmittal of remittitur, Rules of the Court of Appeals of the State of Georgia, Rule 49.

JUDICIAL DECISIONS

Filing of remittitur merely annuls and vacates orders which have been reversed, leaving examiner's report standing as before, and restoring exceptions to their original status — neither sustained nor overruled, but ripe for disposition according to law. Holton v. Lankford, 189 Ga. 506, 6 S.E.2d 304 (1939).

Effect of reversal by Supreme Court is to place case where it stood prior thereto; and thereafter the trial court

should enter order sustaining exceptions of law, and a finding sustaining exceptions of fact when a jury trial is not demanded. Holton v. Lankford, 189 Ga. 506, 6 S.E.2d 304 (1939).

5-6-10. Transmittal of remittitur to lower court generally.

The decision of the appellate court and any direction awarded in the case shall be certified by the clerk to the court below, under the seal of the court. The decision and direction shall be respected and carried into full effect in good faith by the court below. The remittitur shall contain nothing more, except the costs paid in the appellate court. (Laws 1845, Cobb's 1851 Digest, p. 450; Laws 1850, Cobb's 1851 Digest, p. 455; Code 1863, § 4181; Code 1868, § 4220; Code 1873, § 4285; Code 1882, § 4285; Civil Code 1895, § 5597; Civil Code 1910, § 6216; Code 1933, § 6-1804.)

Cross references. — Filing of remittitur and judgment, Uniform Superior Court Rules, Rule 38.

JUDICIAL DECISIONS

Analysis

General Consideration
Effect of Affirmance
Effect of Reversal

General Consideration

Court of Appeals opinions binding on trial court. — Trial court, regardless of the court's good intentions, cannot decide to disregard the opinions of the Court of Appeals. Eastgate Assocs. v. Piggly Wiggly S., Inc., 200 Ga. App. 872, 410 S.E.2d 129, cert. denied, 200 Ga. App. 896, 410 S.E.2d 129 (1991).

Second appeal cannot enlarge scope of first appeal. — Party cannot, on a second appeal, by challenging the judgment entered on remittitur, enlarge the scope of the previous appeal. Womack Indus., Inc. v. B & A Equip. Co., 204 Ga. App. 32, 418 S.E.2d 411 (1992).

Remittitur, whenever presented, is proper evidence to court below of decision of Supreme Court, and decision thus evidenced is to be respected and in good faith carried into effect. Hartley v. Hartley, 212 Ga. 62, 90 S.E.2d 555 (1955).

Cases are "sent back" to trial court by transmittal and filing of remittitur in clerk's office. Hagan v. Robert & Co. Assocs., 222 Ga. 469, 150 S.E.2d 663 (1966).

Filing of remittitur immediately reestablishes jurisdiction. — Filing of a remittitur in the office of the clerk of a trial court immediately reinvests the court with jurisdiction for all purposes over the case to which such remittitur relates, though good practice requires that the trial court cause the remittitur to be entered upon the trial court's minutes. Chambers v. State, 262 Ga. 200, 415 S.E.2d 643 (1992).

Carrying remittitur into effect is not discretionary with presiding judge, but is a matter of statutory mandate and compulsion. Hartley v. Hartley, 212 Ga. 62, 90 S.E.2d 555 (1955).

Trial court cannot vary or modify direction given. — When in affirming judgment, the Supreme Court gives direction to the trial court to amend the trial court's decree in a certain specified manner, trial court on receipt of remittitur has no power or discretion to vary or modify direction given, but must enter judgment

in compliance with instructions contained therein. Estes v. Estes, 206 Ga. 530, 57 S.E.2d 587 (1950); Akins v. State, 237 Ga. 826, 229 S.E.2d 645 (1976).

Superior court order making judgment of Georgia Supreme Court its own judgment closes state suit. Giordano v. Stubbs, 356 F. Supp. 1041 (N.D. Ga.), aff'd, 483 F.2d 1395 (5th Cir. 1973).

New hearing cannot be had before remittitur from appellate court is filed in lower court. Lyon v. Lyon, 103 Ga. 747, 30 S.E. 575 (1898).

Effect of loss of remittitur before entry on minutes of lower court. Jones v. State, 67 Ga. 240 (1881).

Awarding costs upon return of remittitur which makes no reference to costs. — It is within supreme jurisdiction of judge of superior court, upon return of remittitur in case brought by bill of exceptions (see O.C.G.A. §§ 5-6-49 and 5-6-50) to Supreme Court, and in which no reference is made to subject of costs in cases to incorporate in judgment costs allowed by law as costs in Supreme Court, as well as costs of officers of superior court for their services in transmission of bill of exceptions and transcript of record to Supreme Court. Anderson v. Beasley, 169 Ga. 720, 151 S.E. 360 (1930).

Effect of failure to file appellate court's order. — When the trial court which originally reentered summary judgment lacks jurisdiction over the case, the remittitur of the appellate court remanding for the entry of a new order not having been filed with the clerk of the lower court, the trial court's order is a nullity. Talley v. City Tank Corp., 158 Ga. App. 130, 279 S.E.2d 264 (1981).

Trial court was without jurisdiction to order the defendant to appear for trial when remittitur had not been filed. Nave v. State, 171 Ga. App. 165, 318 S.E.2d 753 (1984).

Cited in Hadden v. Fuqua, 194 Ga. 621, 22 S.E.2d 377 (1942); Gay v. Crockett, 219 Ga. 248, 132 S.E.2d 673 (1963); Rahal v. Titus, 110 Ga. App. 122, 138 S.E.2d 68 (1964); Stone v. Peoples Bank, 128 Ga. App. 796, 197 S.E.2d 925 (1973); Summer-Minter & Assocs. v. Giordano, 231 Ga. 601, 203 S.E.2d 173 (1974); Ansley v. Atlanta Suburbia Estates, Ltd., 231 Ga. 640, 203 S.E.2d 861 (1974); Keener v. MacDougall, 233 Ga. 881, 213 S.E.2d 835 (1975); Ellington v. Tolar Constr. Co., 142 Ga. App. 218, 235 S.E.2d 729 (1977); Gold Kist, Inc. v. Wilson, 247 Ga. App. 107, 542 S.E.2d 126 (2000).

Effect of Affirmance

Affirmance denies trial court jurisdiction to grant new trial. — When judgment was entered for the plaintiff, who then filed a notice of appeal, and the defendant then filed a cross appeal as well as a motion for new trial in the trial court, and the Court of Appeals then affirmed the trial court's judgment, the trial court could not reassert the trial court's jurisdiction and grant a new trial to the defendant. The fact that the case made its way through the appeal processes of the Court of Appeals effectively cut off the defendant's right to pursue the defendant's motion for a new trial. Thus, the proper means of placing this issue before the appellate court would be to file a motion for a stay of the direct appeal with the Court of Appeals, and if the stay is denied, then to petition for writ of certiorari. Housing Auth. v. Van Geeter, 252 Ga. 196, 312 S.E.2d 309 (1984).

Upon affirmance of trial court's final judgment, rights involved are conclusively adjudicated. — When final judgment of trial court is affirmed by Supreme Court, and not remanded to trial court for further proceedings, controversy is at an end; rights of parties, so far as those rights are involved in litigation, are conclusively adjudicated. Pearle Optical of Monroeville, Inc. v. Georgia State Bd. of Exmrs. in Optometry, 219 Ga. 856, 136 S.E.2d 371 (1964).

Affirmance without remand gives judgment full effect. — When final judgment of trial court is affirmed on appeal, and not remanded to trial court, further proceedings on case in appellate court and in trial court are precluded and judgment of lower court is in full force and effect, precisely the same as if no appeal had been taken. Pearle Optical of Monroeville, Inc. v. Georgia State Bd. of Exmrs. in Optometry, 219 Ga. 856, 136 S.E.2d 371 (1964).

Effect of Affirmance (Cont'd)

After affirmance of final decree trial court cannot entertain ex parte motions to alter decree. — Affirmance of final decree of trial court by Supreme Court without condition or direction leaves trial court on return of remittitur without jurisdiction to entertain or pass upon ex parte motion to add to or amend decree. Pearle Optical of Monroeville, Inc. v. Georgia State Bd. of Exmrs. in Optometry, 219 Ga. 856, 136 S.E.2d 371 (1964).

Effect of Reversal

Reversal without direction results in vacation of judgment and trial de novo. Worley v. Travelers Indem. Co., 121 Ga. App. 179, 173 S.E.2d 248 (1970).

Judgment of reversal, without more, operates only to vacate orders and decree as therein stated, and to reinvest trial court with jurisdiction, on filing of remittitur in office of clerk of trial court. It neither serves as a substitute for findings for appellant, nor enlarges powers of trial judge in reference thereto. Holton v. Lankford, 189 Ga. 506, 6 S.E.2d 304 (1939).

Effect of reversal by Supreme Court is to place case where it stood prior thereto; and thereafter the trial court should enter order sustaining exceptions of law, and a finding sustaining exceptions of fact when jury trial is not demanded. Holton v. Lankford, 189 Ga. 506, 6 S.E.2d 304 (1939).

Filing of remittitur merely annuls and vacates orders which have been reversed, leaving examiner's report standing as before, and restoring exceptions to their original status — neither sustained nor overruled, but ripe for disposition according to law. Holton v. Lankford, 189 Ga. 506, 6 S.E.2d 304 (1939).

Lower court's entry of judgment on remittitur reversing denial of dispositive motion. — If appellate court has reversed lower court's denial of motion dispositive of case — such as motion to dismiss or motion for summary judgment — entry by lower court of judgment on remittitur constitutes final judgment and terminates case, whereas generally in all other situations case continues in lower court until final judgment. Giordano v. Stubbs, 356 F. Supp. 1041 (N.D. Ga.), aff'd, 483 F.2d 1395 (5th Cir. 1973).

When the lower court has entered a judgment on remittitur reversing the denial of a dispositive motion, the judgment on remittitur is dispositive and the losing party cannot amend or dismiss. Giordano v. Stubbs, 356 F. Supp. 1041 (N.D. Ga.), aff'd, 483 F.2d 1395 (5th Cir. 1973).

Judgment on remittitur reversing decree not dispositive of case. — When the appellate court reverses the lower court's decree which was not dispositive of the case, and further findings of fact and conclusions of law are necessary, party which loses on appeal may amend pleadings or dismiss case even after entry by lower court of judgment on remittitur. Giordano v. Stubbs, 356 F. Supp. 1041 (N.D. Ga.), aff'd, 483 F.2d 1395 (5th Cir. 1973).

When the appellate court reverses lower court's denial of motion dispositive of case and transmits remittitur back to lower court, before entry by lower court of judgment on remittitur party that lost on appeal can amend that party's pleadings, or can even dismiss the case entirely. Giordano v. Stubbs, 356 F. Supp. 1041 (N.D. Ga.), aff'd, 483 F.2d 1395 (5th Cir. 1973).

Effect of reversal of trial court's sustaining of motion to vacate judgment. — When trial court, after hearing motion to set aside prior order in pending case vacates judgment complained of, and on appeal trial court's decision is reversed without direction, judgment of appellate court is final. Upon remittitur from appellate court being filed in trial court, issue is res judicata, and lower court has no authority to allow movant to amend the movant's motion. Nor can the lower court hear further evidence or consider any other matter that would otherwise affect the finality of the judgment of the Supreme Court. Shepherd v. Shepherd, 243 Ga. 253, 253 S.E.2d 696 (1979).

Repayment of funds tendered in attempt to satisfy trial court's judgment. — Appellate court's order reversing the trial court's judgment in favor of the plaintiff was enforceable, pursuant to

O.C.G.A. § 5-6-10, and the trial court correctly ordered the plaintiff to return money paid by the defendant bank in an attempt to satisfy the judgment prior to appeal. Blanton v. Bank of Am., 263 Ga. App. 284, 587 S.E.2d 411 (2003).

RESEARCH REFERENCES

Am. Jur. 2d. — 5 Am. Jur. 2d, Appellate Review, §§ 265, 593 et seq.

ALR. — Remittitur on which court has conditioned refusal of new trial or reversal, as inuring to benefit of codefendant failing to move for new trial or to appeal, 160 ALR 984.

Appellate court's power to order remittitur of portion of actual damages awarded at trial while sustaining trial award of punitive damages, 97 ALR2d 1145.

Financial worth of one or more of several joint defendants as proper matter for consideration in fixing punitive damages, 9 ALR3d 692.

5-6-11. Issuance of remittitur in cases involving death penalty.

In all cases where the Supreme Court of Georgia has affirmed the imposition of the death penalty in a case or has affirmed the denial of a petition for a writ of habeas corpus in any case in which the death penalty has been imposed, the remittitur shall not issue from that court for at least 90 days from the date of the court's decision, or from the date of the court's denial of a motion for a rehearing, if such motion is timely filed, whichever is later; provided, however, that this Code section shall not apply where the defendant has previously applied for a writ of habeas corpus which has been denied and the denial thereof has been affirmed by the Supreme Court of Georgia, or where the writ has been granted but the grant thereof has been reversed by the Supreme Court of Georgia. (Ga. L. 1970, p. 691, § 1; Ga. L. 1971, p. 212, § 1.)

Cross references. — Habeas corpus procedure for persons under sentence of state court of record, § 9-14-40 et seq. Review of death sentences by Supreme Court, § 17-10-35 et seq. Transmittal of remittiturs, Rules of the Supreme Court of the State of Georgia, Rule 60. Filing of remittitur and judgment, Uniform Superior Court Rules, Rule 38.

5-6-12. Cessation of supersedeas and issuance of execution upon affirmance of judgment of lower court.

If the judgment of the lower court is affirmed, upon the filing of the remittitur with the clerk of the court below, the supersedeas shall cease and execution shall issue at once for the amount of the original judgment. (Orig. Code 1863, § 4183; Code 1868, § 4222; Code 1873, § 4287; Code 1882, § 4287; Civil Code 1895, § 5598; Civil Code 1910, § 6217; Code 1933, § 6-1805.)

Cross references. — Supersedeas, Rules of the Supreme Court of the State of Georgia, Rule 12. Supersedeas, Rules of the Court of Appeals of the State of Georgia, Rule 50.

JUDICIAL DECISIONS

Supersedeas deprives trial court of jurisdiction to take further proceedings towards enforcing judgment excepted to. Tanner v. Wilson, 184 Ga. 628, 192 S.E. 425 (1937).

What is lawfully done before supersedeas is granted or becomes effective is valid and stands, but anything done thereafter is unauthorized and must be set aside. Tanner v. Wilson, 184 Ga. 628, 192 S.E. 425 (1937).

Running of statute of limitations upon enforcement of judgments. — Copeland v. Pope, 90 Ga. App. 304, 83 S.E.2d 40 (1954).

Cited in Equity Life Ass'n v. Gammon, 119 Ga. 271, 46 S.E. 100 (1903); Holton v. Lankford, 189 Ga. 506, 6 S.E.2d 304 (1939); Bird v. Riggs, 210 Ga. 297, 79 S.E.2d 803 (1954).

RESEARCH REFERENCES

Am. Jur. 2d. — 5 Am. Jur. 2d, Appellate Review, § 774 et seq.

ALR. — Amount named in appeal or supersedeas bond as the maximum limit of sureties' liability or as a limitation of the amount which they undertake shall be paid on the judgment appealed from, 87 ALR 257.

Effect of supersedeas or stay on antecedent levy, 90 ALR2d 483.

5-6-13. Granting of supersedeas in cases of contempt.

(a) A judge of any trial court or tribunal having the power to adjudge and punish for contempt shall grant to any person convicted of or adjudged to be in contempt of court a supersedeas upon application and compliance with the provisions of law as to appeal and certiorari, where the person also submits, within the time prescribed by law, written notice that he intends to seek review of the conviction or adjudication of contempt. It shall not be in the discretion of any trial court judge to grant or refuse a supersedeas in cases of contempt.

(b) This Code section shall not apply to contempt in the presence of the court during the progress of a proceeding. (Ga. L. 1939, p. 260, § 1.)

Cross references. — Supersedeas, Rules of the Supreme Court of the State of Georgia, Rule 12. Supersedeas, Rules of the Court of Appeals of the State of Georgia, Rule 50.

Law reviews. — For article, "Jury Trials in Contempt Cases," see 20 Ga. B.J. 297 (1957).

JUDICIAL DECISIONS

Grant of supersedeas is mandatory upon giving of required notice. — Under subsection (a), one adjudged in contempt is entitled as a matter of right to a supersedeas upon written notice that one intends to except to court's judgment. Cody v. Cody, 221 Ga. 677, 146 S.E.2d 778 (1966).

Trial court did not have discretion to grant or refuse a supersedeas in the parent's contempt case and should not have confined the parent to jail for two days as a mandatory halt was required after the parent submitted an application and written notice indicating the parent's intention to seek an appeal of the civil contempt

ruling against the parents. Brinkley v. Flatt, 256 Ga. App. 263, 568 S.E.2d 95 (2002).

Grant of supersedeas proper. — Read together, O.C.G.A. §§ 5-6-13(a) and 5-6-46(a) required the trial court to grant the husband a supersedeas when the husband filed a "Notice of Intent to Appeal" and to grant the wife's motion to require the husband to post a supersedeas bond. Horn v. Shepherd, 292 Ga. 14, 732 S.E.2d 427 (2012).

Subsection (b) does not preclude review of judgments within its scope. — While grant of supersedeas for contempt committed in presence of court is a matter within sound discretion of trial court before whom contempt is committed, and while person so held is not as a matter of right entitled to a hearing, such judgment of the trial court is nevertheless reviewable by the Court of Appeals. Garland v. Tanksley, 99 Ga. App. 201, 107 S.E.2d 866 (1959).

Failure to give required notice for grant of supersedeas. — Trial court did not err in refusing to grant supersedeas when there was no indication that the complainant submitted a written notice of intent to appeal and when there was no evidence that the complainant complied with O.C.G.A. § 5-6-13. Blake v. Spears, 254 Ga. App. 21, 561 S.E.2d 173 (2002).

Trial court did not err in failing to release a father from incarceration while the father's appeal of a contempt order was pending because there was no indication that the father submitted either an application for supersedeas or a written notice of intent to appeal as required by O.C.G.A. § 5-6-13(a). Cross v. Ivester, 315 Ga. App. 760, 728 S.E.2d 299 (2012).

Cited in Smith v. Smith, 224 Ga. 689, 164 S.E.2d 225 (1968); Calvert Enters., Inc. v. Griffin-Spalding County Hosp. Auth., 197 Ga. App. 727, 399 S.E.2d 287 (1990); In re Hughes, 299 Ga. App. 66, 681 S.E.2d 745 (2009).

RESEARCH REFERENCES

Am. Jur. 2d. — 5 Am. Jur. 2d, Appellate Review, §§ 197, 421.

C.J.S. — 17 C.J.S., Contempt, §§ 168, 218 et seq.

5-6-14. Execution of extraordinary orders of Supreme Court.

When judgments are rendered in the Supreme Court in injunction or other extraordinary cases, the judges of the superior courts may give immediate effect to such judgments. (Ga. L. 1870, p. 405, § 5; Code 1873, § 3215; Code 1882, § 3215; Civil Code 1895, § 5599; Civil Code 1910, § 6218; Code 1933, § 6-1806.)

Cross references. — Supersedeas, Rules of the Supreme Court of the State of Georgia, Rule 12.

JUDICIAL DECISIONS

When injunction is denied, execution may proceed upon filing of remittitur in clerk's office below. Brown v. Wilson, 59 Ga. 604 (1877).

Interlocutory hearing in injunction proceedings cannot be had until remittitur reversing judgment is filed in office of clerk below. Lyon v. Lyon, 103 Ga. 747, 30 S.E. 575 (1898).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 2 Am. Jur. Pleading and Practice Forms, Appeal and Error, § 871.

5-6-15. Certiorari from Supreme Court to Court of Appeals.

The writ of certiorari shall lie from the Supreme Court to the Court of Appeals as provided by Article VI, Section VI, Paragraph V of the Constitution of this state. (Orig. Code 1863, § 3957; Code 1868, § 3977; Code 1873, § 4049; Code 1882, § 4049; Civil Code 1895, § 4634; Civil Code 1910, § 5180; Code 1933, § 19-101; Ga. L. 1983, p. 3, § 47.)

Cross references. — Certiorari to the Court of Appeals, Rules of the Supreme Court of the State of Georgia, Rules 28 et seq. Applications, how made, Rules of the Court of Appeals of the State of Georgia, Rule 16.

Law reviews. — For annual survey of domestic relations law, see 56 Mercer L. Rev. 221 (2004).

JUDICIAL DECISIONS

Habeas petition improperly granted. — Writ of habeas corpus granted to a prisoner was reversed because the prisoner had presented the same issues raised in a habeas petition to the trial court and relief had been denied, and the prisoner's appeal of that decision was rejected by the appellate courts; the prisoner's claim was procedurally barred. Thompson v. Stinson, 279 Ga. 196, 611 S.E.2d 29 (2005).

Habeas petition was untimely. — Because a state prisoner did not appeal a conviction to the state supreme court, the conviction became final ten days after the appellate court affirmed the conviction, and the prisoner was not entitled to seek certiorari review to the U.S. Supreme Court under 28 U.S.C. § 1257(a). Thus, the habeas petition was untimely under 28 U.S.C. § 2244(d)(1)(A); although the Georgia Constitution circumscribed review by the state supreme court, the state supreme court placed no limit on its certiorari jurisdiction under Ga. Const. 1983, Art. VI, O.C.G.A. § 5-6-15, and Ga. Sup. Ct. R. 40. Pugh v. Smith, 465 F.3d 1295 (11th Cir. 2006).

Cited in Daniels v. Commissioners of Pilotage, 147 Ga. 295, 93 S.E. 887 (1917); McDonald v. Georgia Fed'n of Labor, 178 Ga. 313, 173 S.E. 662 (1933); Gullatt v. Slaton, 189 Ga. 758, 8 S.E.2d 47 (1940); Butler v. City of Dublin, 191 Ga. 551, 13 S.E.2d 362 (1941); Murdock v. Perkins, 219 Ga. 756, 135 S.E.2d 869 (1964); Manning v. A.A.B. Corp., 223 Ga. 111, 153 S.E.2d 561 (1967); Sonesta Int'l Hotels Corp. v. Colony Square Co., 482 F.2d 281 (5th Cir. 1973); McClung v. Richardson, 232 Ga. 530, 207 S.E.2d 472 (1974); Shantha v. Municipal Court, 240 Ga. 280, 240 S.E.2d 32 (1977); Housworth v. Glisson, 485 F. Supp. 29 (N.D. Ga. 1978); Mulling v. Wilson, 245 Ga. 773, 267 S.E.2d 212 (1980); Board of Trustees v. Christy, 154 Ga. App. 488, 269 S.E.2d 33 (1980); City of Adairsville v. Barton, 159 Ga. App. 810, 285 S.E.2d 581 (1981); Jackson v. State, 286 Ga. 407, 688 S.E.2d 351 (2010).

RESEARCH REFERENCES

ALR. — Propriety of certiorari to review decisions of public officer or board granting, denying, or revoking permit, certificate, or license required as condition

of exercise of particular right or privilege, 102 ALR 534.

Legislature's express denial of right of appeal as affecting right to review on the merits by certiorari or mandamus, 174 ALR 194.

5-6-16. Time for appeal by representative where party dies after trial; effect of entry of appeal and of failure to enter appeal; when appeal heard.

(a) When either the plaintiff or the defendant dies after a case has been tried and before the expiration of the time within which the party, if living, might have entered an appeal, and no appeal has been entered, the legal representative of the deceased party may enter an appeal within 30 days from the time he qualifies. If an appeal is not entered within the time prescribed in this Code section, judgment may be entered and execution issued as though the deceased party were alive, without making the representative a party.

(b) When an appeal is entered as provided in subsection (a) of this Code section, it shall not be necessary to revive the action, but it shall be revived by the appealing party giving notice to the adverse party within 30 days from the time of entering the appeal. When a defendant appeals, the case shall stand for trial on the appeal docket at the first term of the court after the expiration of six months from the qualification of the executor or administrator.

(c) In case of the death or removal from office of any executor or administrator pending such proceedings as are prescribed in subsections (a) and (b) of this Code section, an administrator de bonis non may be made a party in like manner. (Laws 1843, Cobb's 1851 Digest, pp. 474, 502; Code 1863, §§ 3358, 3359, 3361; Code 1868, §§ 3377, 3378, 3380; Code 1873, §§ 3425, 3426, 3428; Code 1882, §§ 3425, 3426, 3428; Civil Code 1895, §§ 5023, 5024, 5026; Civil Code 1910, §§ 5605, 5606, 5608; Code 1933, §§ 3-408, 3-409, 3-411.)

Cross references. — Death of party, Rules of the Supreme Court of the State of Georgia, Rule 10. Parties, Rules of the Court of Appeals of the State of Georgia, Rule 39.

JUDICIAL DECISIONS

Section changed common law. Mims v. McKenzie, 22 Ga. App. 571, 96 S.E. 441 (1918).

Administrator de bonis non may be made party to suit in county of executor's residence. — Administrator de bonis non is permitted to be made party to suit pending in county of residence of the executor. Walton v. Gill, 46 Ga. 600 (1872).

No application to foreign executors. — Rule that an administrator de bonis may be made party to a suit in the county of the executor's residence does not apply to suits by foreign executors. Jones v. Lamar, 77 Ga. 149 (1886).

Section inapplicable when plaintiff executor died before trial. Edwards v. Sosebee, 188 Ga. 602, 4 S.E.2d 473 (1939).

Cited in Waldrop v. Nolan, 192 Ga. 234, 15 S.E.2d 225 (1941); Eubank v.

Barber-Colman Co., 115 Ga. App. 217, 154 S.E.2d 638 (1967).

RESEARCH REFERENCES

Am. Jur. 2d. — 1 Am. Jur. 2d, Abatement, Survival, and Revival, §§ 46, 103.

C.J.S. — 1 C.J.S., Abatement and Revival, §§ 133, 138 et seq. 67A C.J.S., Parties, § 80 et seq.

ALR. — Right of administrator de bonis non to recover proceeds of personal property of the estate converted by his predecessor, 3 ALR 1252.

Right to revive by amendment an action dismissed by judgement entered upon plea of abatement or demurrer, 106 ALR 570.

Death of principal defendant as abating or dissolving garnishment or attachment, 131 ALR 1146.

Death of party to divorce suit after final divorce decree, but pending appeal or period allowed for appeal, 148 ALR 1111.

Right of substitution of successive personal representatives as party plaintiff, 164 ALR 702.

Order granting or denying revival of action after death of party as final order subject to appeal, 167 ALR 261.

Continuance of civil case because of illness or death of party, 68 ALR2d 470.

Validity of exception for specific kind of tort action in survival statute, 77 ALR3d 1349.

Effect of death of party to divorce proceeding pending appeal or time allowed for appeal, 33 ALR4th 47.

Abatement of state criminal case by accused's death pending appeal of conviction—modern cases, 80 ALR4th 189.

Abatement effects of accused's death before appellate review of federal criminal conviction, 80 ALR Fed. 446.

ARTICLE 2

APPELLATE PRACTICE

Law reviews. — For article suggesting change in Georgia appellate procedure prior to the adoption of the Appellate Practice Act, see 15 Ga. B.J. 322 (1953). For article advocating reform of appellate procedure prior to the adoption of the Appellate Practice Act, see 18 Ga. B.J. 415 (1956). For article outlining proposed revisions of appellate procedure rules with comments, prior to the adoption of the Appellate Practice Act, see 19 Ga. B.J. 145 (1956). For article, "A Discussion of the 1957 Amendments to Rules of Practice and Procedure in Georgia," see 19 Ga. B.J. 395 (1957). For article discussing results of legislative changes in appellate procedure, prior to the enactment of the Appellate Practice Act, see 20 Ga. B.J. 38 (1957). For article, "The Appellate Procedure Act of 1965" (this article), see 1 Ga. St. B.J. 451 (1965). For article, "1966 Amendments to the Appellate Procedure Act of 1965" (this article), see 2 Ga. St. B.J. 433 (1966). For article, "The 1967 Amendments to the Georgia Civil Practice Act and the Appellate Procedure Act" (this article), see 3 Ga. St. B.J. 383 (1967). For article discussing problems in Georgia appellate procedure after the adoption of the Appellate Practice Act of 1965 (this article), see 5 Ga. St. B.J. 231 (1968). For article discussing developments in Georgia appellate practice and procedure in 1976 to 1977 (this article), see 29 Mercer L. Rev. 21 (1977). For annual survey of appellate practice and procedure, see 36 Mercer L. Rev. 79 (1984).

JUDICIAL DECISIONS

Legislative intent was to provide a uniform post-trial procedure in all courts of this state from which a writ of error (see O.C.G.A. § 5-6-50) would lie to Supreme Court or Court of Appeals at time of passage. White Oak Acres, Inc. v. Campbell,

113 Ga. App. 833, 149 S.E.2d 870 (1966); Blackburn v. Hall, 115 Ga. App. 235, 154 S.E.2d 392 (1967).

Clear intent is to simplify procedures and avoid dismissal on appeal on account of technical deficiencies. Continental Cas. Co. v. Stephenson, 114 Ga. App. 555, 152 S.E.2d 5 (1966).

Forms of appeals and enumerations of error are governed by practically unlimited looseness authorized by this article. Thomas v. Scott, 221 Ga. 875, 148 S.E.2d 300 (1966) (see O.C.G.A. Art. 2, Ch. 6, T. 5).

Compliance is prerequisite to appellate jurisdiction. — Appellate court lacks jurisdiction to review judgment sought to be appealed when the appellant fails to follow procedure which confers jurisdiction upon the appellate court. Associated Distribs., Inc. v. Willard, 242 Ga. 247, 248 S.E.2d 645 (1978).

Court's general powers cannot be used to correct noncompliance. — While a court may have the general power to enter certain types of orders, such as those allowing late filing of papers or those entered or effective nunc pro tunc, that power cannot be used to correct failure to comply with the mandatory requirements of this article. Cranman Ins. Agency, Inc. v. Wilson Marine Sales & Serv., Inc., 147 Ga. App. 590, 249 S.E.2d 631 (1978) (see O.C.G.A. Art. 2, Ch. 6, T. 5).

Cited in Crosby v. Crosby, 247 Ga. 792, 279 S.E.2d 712 (1981).

RESEARCH REFERENCES

ALR. — Power of legislature to require appellate court to review evidence, 19 ALR 744; 24 ALR 1267; 33 ALR 10.

Sufficiency of general objection or exception to evidence admitted without qualification, which was competent against one or more parties, but not all, 106 ALR 467.

Interlocutory ruling or order of one judge as binding on another in same case, 132 ALR 14.

Judgment favorable to convicted criminal defendant in subsequent civil action arising out of same offense as ground for reversal of conviction, 96 ALR3d 1174.

5-6-30. Purpose of article; construction.

It is the intention of this article to provide a procedure for taking cases to the Supreme Court and the Court of Appeals, as authorized in Article VI, Sections V and VI of the Constitution of this state; to that end, this article shall be liberally construed so as to bring about a decision on the merits of every case appealed and to avoid dismissal of any case or refusal to consider any points raised therein, except as may be specifically referred to in this article. (Ga. L. 1965, p. 18, § 23; Ga. L. 1983, p. 3, § 47.)

Law reviews. — For article, "Let's Revise Appellate Procedure in Georgia," see 27 Ga. St. B.J. 135 (1991). For article, "Appeals, Interlocutory and Discretionary Applications, and Post-Judgment Motions in the Georgia Courts: The Current Practice and the Need for Reform Legislation," see 44 Mercer L. Rev. 17 (1992).

For comment on Davis v. Davis, 222 Ga. 579, 151 S.E.2d 123 (1966), see 4 Ga. St. B.J. 259 (1967).

JUDICIAL DECISIONS

Purpose of appellate practice rules. — Appellate practice rules were adopted by the General Assembly for the primary purpose of securing speedy and uniform

justice in a uniform and well ordered manner; the rules were not adopted to set traps and pitfalls, by way of technicalities, for unwary litigants. Chambliss v. Hall, 113 Ga. App. 96, 147 S.E.2d 334 (1966).

Liberal construction. — Pleadings and procedure shall be liberally construed so as to bring about a decision on the merits. Grantham v. State, 244 Ga. 775, 262 S.E.2d 777 (1979).

When the plaintiff failed to file enumerations of error as a separate document, but did set forth enumerations of error in the plaintiff's brief, it was apparent from the notice of appeal, the brief, the enumerations of error in that brief, and the record, exactly what judgment was appealed from and what errors were asserted, and a liberal construction of the appellate practice act required the court to exercise the court's discretion to reach the merits of the case. Leslie v. Williams, 235 Ga. App. 657, 510 S.E.2d 130 (1998).

When the plaintiffs presented an enumeration of error in the plaintiff's appellate brief and it was apparent from that brief, the notice of appeal and the record what judgment was being appealed from and what error was being asserted, the appellate court considered the merits of the appeal to the extent the appeal was supported by argument, citation to the record, and authority. Reeder v. GMAC, 235 Ga. App. 617, 510 S.E.2d 337 (1998).

Although plaintiff's delay in following up on the transmission of the record was unreasonable and inexcusable, the language of this section and O.C.G.A. §§ 5-6-30 and 5-6-48 mandated that the appellate practice provisions be liberally construed. Accordingly, the trial court properly denied the defendant's motion to dismiss when the plaintiffs had filed affidavits of indigency. Carter v. Fulton-DeKalb County Hosp. Auth., 209 Ga. App. 384, 433 S.E.2d 433 (1993).

Notice of appeal containing the petitioner's name, indicating the opposing party, specifying the case number and that the appeal involved an adverse ruling in petitioner's habeas corpus action satisfied the requirements of the Appellate Practice Act, O.C.G.A. § 5-6-30 et seq., and, in conjunction with the timely application for a certificate of probable cause, was sufficient to confer jurisdiction over the case upon the Supreme Court. Hughes v. Sikes, 273 Ga. 804, 546 S.E.2d 518 (2001).

Despite the deficiencies in the appellant's brief, which made it difficult for the court of appeals to determine what the case was even about, much less allow the court to perform any meaningful analysis of the asserted errors, given that the Appellate Practice Act, O.C.G.A. § 5-6-30 et seq., was to be liberally construed so as to bring about a decision on the merits of every case appealed and to avoid dismissal of any case, the appeals court declined to dismiss the appeal, opting instead to exercise the court's discretion to consider the case's merits. Parekh v. Wimpy, 288 Ga. App. 125, 653 S.E.2d 352 (2007), cert. denied, No. S08C0520, 2008 Ga. LEXIS 319 (Ga. 2008).

No application to all appeals. — While O.C.G.A. § 9-14-52(a) provides that appeals in habeas corpus cases shall be governed by the Appellate Practice Act (Act), O.C.G.A. § 5-6-30 et seq., that provision only means that appeals in habeas corpus cases, once begun, are to be handled in the same way as other civil appeals, and the Act does not provide for every single act involved in an appeal as there is no provision in the Act for computing time limits, and it is necessary to supplement the provisions of the Act by reference to O.C.G.A. § 9-11-6. Head v. Thomason, 276 Ga. 434, 578 S.E.2d 426, cert. denied, 540 U.S. 957, 124 S. Ct. 409, 157 L. Ed. 2d 294 (2003).

Court of Appeals should pass upon all questions of law not requiring consideration of evidence. Irby v. Christian, 130 Ga. App. 375, 203 S.E.2d 284 (1973), rev'd on other grounds sub nom. Department of Pub. Safety v. Irby, 232 Ga. 384, 207 S.E.2d 23 (1974).

Code citation. — In raising constitutional issue, one need not cite to official Code, rather than Code Annotated. Grantham v. State, 244 Ga. 775, 262 S.E.2d 777 (1979).

Judgment overruling motion for new trial based upon appealable judgment. — Using a liberal construction as required by this section, it would be incongruous to declare unappealable a judgment overruling a motion for new

trial which is based upon an admittedly appealable judgment. Munday v. Brissette, 113 Ga. App. 147, 148 S.E.2d 55, rev'd on other grounds, 222 Ga. 162, 149 S.E.2d 110 (1966).

"Appellee" construed. — Interpretation of the word appellee, as used in Ga. L. 1968, p. 1072, § 7 (see O.C.G.A. § 5-6-38), to mean only the party against whom appeal is taken and who has a particular interest adverse to setting aside judgment appealed is too restrictive because a liberal construction of Ga. L. 1965, p. 18, § 23 (see O.C.G.A. § 5-6-30) comports with policies of the law, enhances efficient administration of justice, and avoids multiplicity of appeals. Executive Jet Sales, Inc. v. Jet America, Inc., 242 Ga. 307, 248 S.E.2d 676 (1978).

"Proceedings in lower court" construed. — To define "proceedings in lower court," as used in Ga. L. 1973, p. 303, § 1 (see O.C.G.A. § 5-6-37) to mean only those proceedings which directly relate to the appellant's enumerations of error is unduly restrictive because liberal construction comports with the policies of the law, enhances the efficient administration of justice, and avoids a multiplicity of appeals. Executive Jet Sales, Inc. v. Jet America, Inc., 242 Ga. 307, 248 S.E.2d 676 (1978).

Dismissal improper under § 5-6-39 when appellant does not cause delay and judge denies extension. — To construe Ga. L. 1965, p. 18, § 6 (see O.C.G.A. § 5-6-39) as requiring dismissal when the appellant does not cause delay and trial judge declines to grant requested extension would shut off the right of appeal, and would thus violate Ga. Const. 1976, Art. VI, Sec. II, Para. V (see Ga. Const. 1983, Art. VI, Sec. IX, Para. II), and would be contrary to the legislative intent expressed in Ga. L. 1965, p. 18, § 23 and Ga. L. 1966, p. 493, § 10 (see O.C.G.A. §§ 5-6-30 and 5-6-48(b)) as to decision upon the merits. Elliott v. Leathers, 223 Ga. 497, 156 S.E.2d 440 (1967).

Appeal when first-impression issue decided on merits. — Because important first-impression issue was raised under recently enacted and previously unconstrued public revenue statute, and because the trial court dealt with that issue on the merits, the appellate court chose to pretermit procedural issue and decide the appeal on the merits. In re Board of Twiggs County Comm'rs, 249 Ga. 642, 292 S.E.2d 673 (1982).

Delay in filing amendment to notice of appeal. — Although it has been over two months later, after the expiration of the statutory appeal period, that the appellant filed an amendment to the appellant's original notice of appeal to correct the error the appellant made, in light of O.C.G.A. §§ 5-6-30 and 5-6-48, appellant is entitled to amend the appellant's notice of appeal to correct the name of the court to which the appeal is directed. Griffin v. Johnson, 157 Ga. App. 657, 278 S.E.2d 422 (1981).

Dismissal proper when procedure not complied with. — When the appellant has failed to comply with the interlocutory review procedure, the appellant's appeal must be dismissed. Bautz v. Best, 166 Ga. App. 268, 304 S.E.2d 439 (1983).

In an attorney lien case, the trial court did not abuse the court's discretion by dismissing the former client's appeal for a delay in transmitting the record appendix because the delay of 55 days was inexcusable and caused by the former client, who had elected to take responsibility for transmitting the record by stating in the notice of appeal that the client would file a record appendix and never amended the client's notice of appeal to provide that the clerk would be responsible for transmission of the record. McAlister v. Abam-Samson, 318 Ga. App. 1, 733 S.E.2d 58 (2012).

Dismissal of appeal not warranted. Estate of Thurman v. Dodaro, 169 Ga. App. 531, 313 S.E.2d 722 (1984).

Cited in Crowe v. Holloway Dev. Corp., 114 Ga. App. 856, 152 S.E.2d 913 (1966); Puckett v. Edmonds, 115 Ga. App. 776, 156 S.E.2d 151 (1967); Mixon v. Hall, 117 Ga. App. 626, 161 S.E.2d 429 (1968); Bonner v. Smith, 226 Ga. 250, 174 S.E.2d 438 (1970); Gilmore v. State, 127 Ga. App. 249, 193 S.E.2d 219 (1972); Ramsey v. Ramsey, 231 Ga. 334, 201 S.E.2d 429 (1973); Taylor v. Columbia County Planning Comm'n, 232 Ga. 155, 205 S.E.2d 287 (1974); Blanchard v. Westview Cem., 133 Ga. App. 262, 211 S.E.2d 135 (1974);

Checker Cab Co. v. Fedor, 134 Ga. App. 28, 213 S.E.2d 485 (1975); Contractors Mgt. Corp. v. McDowell-Kelley, Inc., 136 Ga. App. 116, 220 S.E.2d 473 (1975); Gold Kist, Inc. v. Stokes, 235 Ga. 643, 221 S.E.2d 49 (1975); State v. Eubanks, 239 Ga. 483, 238 S.E.2d 38 (1977); Justice v. Dunbar, 244 Ga. 415, 260 S.E.2d 327 (1979); Harrison v. Southern Talc Co., 245 Ga. 212, 264 S.E.2d 2 (1980); Cochran v. Levitz Furn. Co., 249 Ga. 504, 291 S.E.2d 535 (1982); Steele v. Cincinnati Ins. Co., 252 Ga. 58, 311 S.E.2d 470 (1984); Dugger v. Danello, 175 Ga. App. 618, 334 S.E.2d 3 (1985); Neese v. Long, 178 Ga. App. 105, 341 S.E.2d 861 (1986); Vaughan v. Brown, 181 Ga. App. 680, 353 S.E.2d 608 (1987); Sharp v. State, 183 Ga. App. 641, 360 S.E.2d 50 (1987); City of Atlanta v. Starke, 192 Ga. App. 267, 384 S.E.2d 419 (1989); Butts v. State, 193 Ga. App. 824, 389 S.E.2d 395 (1989); Griffin v. State, 194 Ga. App. 624, 391 S.E.2d 675 (1990); Hall v. World Omni Leasing, Inc., 209 Ga. App. 115, 433 S.E.2d 297 (1993); Wells v. State, 210 Ga. App. 165, 435 S.E.2d 523 (1993); Green v. State, 226 Ga. App. 467, 486 S.E.2d 691 (1997); Hipple v. Simpson Paper Co., 234 Ga. App. 516, 507 S.E.2d 156 (1998); Adams v. State, 234 Ga. App. 696, 507 S.E.2d 538 (1998); Holy Fellowship Church of God in Christ v. First Community Bank, 242 Ga. App. 400, 530 S.E.2d 24 (2000); Blanton v. Duru, 247 Ga. App. 175, 543 S.E.2d 448 (2000); American Cent. Ins. Co. v. Lee, 273 Ga. 880, 548 S.E.2d 338 (2001); State v. Jones, 283 Ga. App. 539, 642 S.E.2d 183 (2007); Register v. Elliott, 285 Ga. App. 741, 647 S.E.2d 406 (2007); Coote v. Branch Banking & Trust Co., 292 Ga. App. 164, 664 S.E.2d 554 (2008); Hann v. State, 292 Ga. App. 719, 665 S.E.2d 731 (2008); Weaver v. State, 299 Ga. App. 718, 683 S.E.2d 361 (2009); Benefield v. Tominich, 308 Ga. App. 605, 708 S.E.2d 563 (2011).

5-6-31. Entry of judgment defined.

The filing with the clerk of a judgment, signed by the judge, constitutes the entry of a judgment within the meaning of this article. (Ga. L. 1965, p. 18, § 18B.)

Cross references. — Motions for rehearing, Rules of the Court of Appeals of the State of Georgia, Rule 48.

Law reviews. — For article comparing sections of Ch. 11, T. 9 with preexisting provisions of the Georgia Code, see 3 Ga. St. B.J. 295 (1967).

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Judgment is effective only upon entry. — Rule is clear under Civil Practice Act, and under Appellate Practice Act, that a judgment is effective only upon entry. Minnich v. First Nat'l Bank, 154 Ga. App. 439, 268 S.E.2d 688 (1980).

Judgment cannot be considered appealable until actually entered. Cunningham v. State, 131 Ga. App. 133, 205 S.E.2d 899, rev'd on other grounds, 232 Ga. 416, 207 S.E.2d 48 (1974).

Court of Appeals lacked jurisdiction to consider enumerations of error arising from breach of contract claim, since the jury's verdict on the claim was never reduced to judgment because of the plaintiff's election to have judgment entered on the plaintiff's theory of fraud. Miner v. Harrison, 205 Ga. App. 523, 422 S.E.2d 899, cert. denied, 205 Ga. App. 900, 422 S.E.2d 899 (1992).

Judgment must be signed and filed for notice of appeal time to begin running. — O.C.G.A. § 5-6-31 plainly provides that the filing with the clerk of a judgment, signed by the judge, constitutes the entry of a judgment within the meaning of the Appellate Practice Act, and as a result the 30-day limit under O.C.G.A. § 5-6-38(a) for filing a notice of appeal does not begin to run until a judgment, signed by the judge, is filed with the clerk; to the extent that Ross v. State, 259 Ga. App. 246 (2003) holds otherwise, it is

hereby overruled. Rocha v. State, 287 Ga. App. 446, 651 S.E.2d 781 (2007).

When notice of appeal is filed before entry of judgment, appeal must be dismissed. Cunningham v. State, 131 Ga. App. 133, 205 S.E.2d 899, rev'd on other grounds, 232 Ga. 416, 207 S.E.2d 48 (1974).

Both written judgment and entry by filing with clerk are prerequisite. — Under the Appellate Practice Act, O.C.G.A. § 5-6-30 et seq., the well established rule that what the judge orally declares is no judgment until put into writing and entered as such, is still of force, and both written judgment and the judgment's entry by filing writing with clerk are essential prerequisites to appeal. Boynton v. Reeves, 226 Ga. 202, 173 S.E.2d 702 (1970).

Filing judgment signed by judge with clerk constitutes entry. Minnich v. First Nat'l Bank, 154 Ga. App. 439, 268 S.E.2d 688 (1980).

Entry means filing judgment signed by judge in office of clerk of court. Joiner v. Perkerson, 160 Ga. App. 343, 287 S.E.2d 327 (1981).

Construction with Civil Practice Act. — What additional requirements are imposed by the Civil Practice Act, O.C.G.A. § 9-11-58(b), for entry of a judgment are not relevant for purposes of the Appellate Practice Act, O.C.G.A. §§ 5-6-31 and 5-6-38(a), which has its own definition of when a judgment is entered. GMC Group, Inc. v. Harsco Corp., 293 Ga. App. 707, 667 S.E.2d 916 (2008).

Filing of judgment in open court with trial judge as provided in § 9-11-5(e) is the entry of judgment within the meaning of O.C.G.A. § 5-6-31. Storch v. Hayes Microcomputer Prods., Inc., 181 Ga. App. 627, 353 S.E.2d 350 (1987).

Directed verdict is reduced to writing by virtue of recitation in verdict signed by judge. — Although directed verdict is normally issued ore tenus, it becomes reduced to writing by virtue of its recitation in the verdict which is signed by the judge and therefore is reviewable as a final judgment. Crowe v. Holloway Dev. Corp., 114 Ga. App. 856, 152 S.E.2d 913 (1966).

Entry of oral order. — Oral order is not final nor appealable until and unless the order is reduced to writing, signed by the judge, and filed with the clerk. This constitutes "entry;" and it is only an "entered" decision or judgment which is appealable. Sharp v. State, 183 Ga. App. 641, 360 S.E.2d 50 (1987).

Because the notice of appeal was from an unappealable oral order, the appeal was dismissed and the appellant's motion to remand was, therefore, moot. In the Interest of W.P.B., 269 Ga. App. 101, 603 S.E.2d 454 (2004).

To the extent that a later contempt finding was based on the trial court's oral pronouncement, it was a nullity. In re Tidwell, 279 Ga. App. 734, 632 S.E.2d 690 (2006).

Nunc pro tunc entry. — Under O.C.G.A. §§ 5-6-31 and 5-6-38(a), the 30-day time period for filing a notice of appeal did not begin to run until a judgment, signed by the judge, was filed with the clerk; thus, a defendant's appeal was timely as the 30 days did not begin to run on the nunc pro tunc date, but on the date the signed judgment was filed. Rocha v. State, 287 Ga. App. 446, 651 S.E.2d 781 (2007).

While a nunc pro tunc entry does not extend the statutory period for filing a notice of appeal, case law does not stand for the proposition that a nunc pro tunc entry can shorten the statutory period for filing a notice of appeal provided in O.C.G.A. § 5-6-38(a), which begins to run when judgment is entered in accordance with O.C.G.A. § 5-6-31. Rocha v. State, 287 Ga. App. 446, 651 S.E.2d 781 (2007).

Change of decision after oral order. — Because the trial court orally granted the bank's motion to dismiss for failure to state a claim but then the trial court granted the plaintiffs' motion for voluntary dismissal pursuant to O.C.G.A. § 9-11-41(a), the trial court was entitled to change the court's mind, as the oral decision had not been reduced to writing pursuant to O.C.G.A. § 5-6-31. Wachovia Bank Savannah, N.A. v. Kitchen, 272 Ga. App. 601, 612 S.E.2d 885 (2005).

Date on a copy of a judgment bearing a certification by a deputy clerk to the effect that the copy is a true and

correct reproduction of the original on file with the court, serves as the starting date of the appeal period if no evidence is presented as to the actual date of the filing of judgment. Swinney v. City of Atlanta, 176 Ga. App. 823, 338 S.E.2d 52 (1985).

Time for filing a motion for attorney fees. — As real property contestants failed to file a request for attorney fees pursuant to O.C.G.A. § 9-15-14 within 45 days following a trial court's final disposition in a real property proceeding, the trial court erred in granting the contestants' request because the court lacked jurisdiction to consider the motion; the time for filing the motion began to run when judgment was entered under O.C.G.A. § 5-6-31, and the time when a civil disposition form was filed under O.C.G.A. § 9-11-58(b) had no effect on the timing for purposes of the motion. Horesh v. DeKinder, 295 Ga. App. 826, 673 S.E.2d 311 (2009).

Relief from default judgment denied. — Petitioner was not entitled to relief from default judgment entered in favor of the judgment creditor because the petitioner did not seek relief from the default judgment until well outside the 60-day window pursuant to O.C.G.A. § 18-4-91. W. Ray Camp, Inc. v. Cavalry Portfolio Servs., LLC, 308 Ga. App. 597, 708 S.E.2d 560 (2011).

Cited in Gibson v. Hodges, 221 Ga. 779, 147 S.E.2d 329 (1966); Langdale Co. v. Day, 115 Ga. App. 30, 153 S.E.2d 671 (1967); Spadea v. Spadea, 225 Ga. 80, 165 S.E.2d 836 (1969); Turner v. Harper, 231 Ga. 175, 200 S.E.2d 748 (1973); Alexander v. Blackmon, 129 Ga. App. 214, 199 S.E.2d 376 (1973); Unigard Mut. Ins. Co. v. Carroll, 131 Ga. App. 699, 206 S.E.2d 603 (1974); Pilgrim v. Brookfield West, Inc., 136 Ga. App. 619, 222 S.E.2d 137 (1975); Lewis & Sheron Enterprises, Inc. v. Great A & P Tea Co., 136 Ga. App. 910, 222 S.E.2d 659 (1975); Bowen v. State, 239 Ga. 517, 238 S.E.2d 62 (1977); Murff v. State, 165 Ga. App. 808, 302 S.E.2d 697 (1983); Davis v. Langham, 170 Ga. App. 346, 317 S.E.2d 903 (1984); Ramirez v. State, 196 Ga. App. 11, 395 S.E.2d 315 (1990); Smith v. State, 242 Ga. App. 459, 530 S.E.2d 223 (2000); Zepp v. Brannen, 283 Ga. 395, 658 S.E.2d 567 (2008).

RESEARCH REFERENCES

C.J.S. — 5 C.J.S., Appeal and Error, § 1109 et seq.

ALR. — Appeal as affecting time allowed by judgment or order appealed from for the performance of a condition affecting a substantive right or obligation, 28 ALR 1029.

5-6-32. Manner of service of notices and other papers upon parties; waiver or acknowledgment of service.

(a) Whenever under this article service or the giving of any notice is required or permitted to be made upon a party and the party is represented by an attorney, the service shall be made upon the attorney unless service upon the party himself is ordered by the court. Service of all notices and other papers hereunder and service of motions for new trial, motions in arrest, motions for judgment notwithstanding the verdict, and all other similar motions, orders, and proceedings may be made by the attorney or party filing the notice or paper, in person or by mail, and proof thereof shown by acknowledgment of the attorney or party served, or by certificate of the attorney, party, or other person perfecting service. Service of any paper, motion, or notice may be perfected either before or after filing with the clerk thereof; and when service is made by mail it shall be deemed to be perfected as of the day

deposited in the mail. Where the address of any party is unknown and the party is not represented by an attorney of record, service of all notices and other papers referred to above may be perfected on the party by mail directed to the last known address of the party.

(b) Service of any notice, motion, or other paper provided for in this article may be waived or acknowledged either before or after filing. (Ga. L. 1965, p. 18, § 18; Ga. L. 1966, p. 493, § 7; Ga. L. 1968, p. 1072, § 5.)

Cross references. — Service of motion for supersedeas, Rules of the Supreme Court of the State of Georgia, Rule 12. Objection to failure to comply with Appellate Practice Act, Rules of the Supreme Court of the State of Georgia, Rule 20. Filing notice of appeal and cross appeal, Rules of the Supreme Court of the State of Georgia, Rule 38. Service where capital crime involved, Rules of the Supreme Court of the State of Georgia, Rule 44. Preparation and filing of motions, Rules of the Court of Appeals of the State of Georgia, Rule 32. Notices of appeal and cross appeal, Rules of the Court of Appeals of the State of Georgia, Rule 33. Objections to records or transcripts, Rules of the Court of Appeals of the State of Georgia, Rule 47.

Law reviews. — For article, "The Appellate Procedure Act of 1965," see 1 Ga. St. B.J. 451 (1965). For article, "1966 Amendments to the Appellate Procedure Act of 1965," see 2 Ga. St. B.J. 433 (1966). For article, "Synopses of 1968 Amendments Appellate Procedure Act and Georgia Civil Practice Act," see 4 Ga. St. B.J. 503 (1968).

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Section assumedly includes service of rules nisi issued on motions for new trial. Short v. Riles, 141 Ga. App. 881, 234 S.E.2d 710 (1977).

Service of enumeration of errors need be made only by mail. Travelers Ins. Co. v. Burch, 114 Ga. App. 723, 152 S.E.2d 697 (1966).

Service by mail prior to filing of original notice of appeal. — It is no ground for dismissal of an appeal that service of notice of appeal was made by mail three days before original was filed, or that order was in the first instance erroneously dated. Fidelity & Cas. Co. v. Whitehead, 117 Ga. App. 200, 160 S.E.2d 241 (1968).

Failure to serve notice of appeal as required by section. — Failure to serve notice of appeal upon appellee's attorney as required by Ga. L. 1965, p. 18, § 18 (see O.C.G.A. § 5-6-32) is insufficient within itself to work dismissal under Ga. L. 1965, p. 18, § 13 and Ga. L. 1965, p. 240, § 1 (see O.C.G.A. § 5-6-48), because the court could require that service be perfected in the manner prescribed by law. Birdwell v. Pippen, 113 Ga. App. 202, 147 S.E.2d 673 (1966).

Trial court not deprived of jurisdiction because appellant fails to serve notice of appeal on appellee as required. Bull v. Bull, 243 Ga. 72, 252 S.E.2d 494 (1979).

Cited in Turner v. Bogle, 115 Ga. App. 710, 155 S.E.2d 667 (1967); City of Atlanta v. Cagle, 146 Ga. App. 324, 246 S.E.2d 380 (1978); Shipman v. Horizon Corp., 151 Ga. App. 242, 259 S.E.2d 221 (1979); McKinney v. Jennings, 246 Ga. App. 862, 542 S.E.2d 580 (2000).

RESEARCH REFERENCES

C.J.S. — 4 C.J.S., Appeal and Error, § 453 et seq.

ALR. — Who is adverse party within statute providing for service of notice of appeal on adverse party, 88 ALR 419.

Necessity that trial court give parties

notice and opportunity to be heard before ordering new trial on its own motion, 23 ALR2d 852.

5-6-33. Right of appeal generally.

(a)(1) Either party in any civil case and the defendant in any criminal proceeding in the superior, state, or city courts may appeal from any sentence, judgment, decision, or decree of the court, or of the judge thereof in any matter heard at chambers.

(2) Either party in any civil case in the probate courts provided for by Article 6 of Chapter 9 of Title 15 may appeal from any judgment, decision, or decree of the court, or of the judge thereof in any matter heard at chambers.

(b) This Code section shall not affect Chapter 7 of this title. (Orig. Code 1863, § 4160; Code 1868, § 4192; Code 1873, § 4251; Ga. L. 1880-81, p. 123, § 1; Code 1882, § 4251; Ga. L. 1887, p. 41, § 1; Civil Code 1895, § 5527; Penal Code 1895, § 1070; Civil Code 1910, § 6139; Penal Code 1910, § 1097; Code 1933, § 6-901; Ga. L. 1965, p. 18, § 22; Ga. L. 1986, p. 982, § 5.)

Cross references. — Appeals in habeas corpus cases, §§ 9-14-22, 9-14-52. Review of death sentences by Supreme Court, § 17-10-35 et seq. Appeal to Court of Appeals or Supreme Court from final judgment of superior court pertaining to review of final decision of administrative agency, § 50-13-20.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1987, a comma was deleted following "city courts" in paragraph (a)(1).

Editor's notes. — Ga. L. 1986, p. 982, § 25, not codified by the General Assembly, provided that that Act would apply to all cases filed on or after July 1, 1986.

JUDICIAL DECISIONS

Analysis

General Consideration
When Appeal Lies
Who May Appeal
Criminal Proceedings

General Consideration

Liberality is exercised in favor of right of review. Armour Car Lines v. Summerour, 5 Ga. App. 619, 63 S.E. 667 (1909).

No question will be considered on appeal unless question was passed on by trial court. — No question will be considered by appellate courts of this state unless it was presented to and passed on by trial court. This rule of law is applicable, whether the case be one involving issues of law and fact, or one involving merely questions of law decided on an agreed statement of facts. Garland v. State, 101 Ga. App. 395, 114 S.E.2d 176 (1960).

When question has never been referred to or decided by court below, the question cannot be reviewed by the appellate court. Hart v. Altmeyer & Co., 74 Ga. 367 (1884).

Judge must approve verdict before state can review judge's action. — In criminal proceeding, trial judge must ap-

prove verdict, and if the judge does not, the state cannot review the judge's action in setting aside the conviction. Sims v. State, 221 Ga. 190, 144 S.E.2d 103 (1965), rev'd on other grounds, 385 U.S. 538, 87 S. Ct. 639, 17 L. Ed. 2d 593, later appeal, 223 Ga. 465, 156 S.E.2d 65, rev'd on other grounds, 389 U.S. 404, 88 S. Ct. 523, 19 L. Ed. 2d 634 (1967).

No waiver of right to trial by jury. — Because: (1) by repealing former provisions of O.C.G.A. § 5-3-30, the Georgia legislature intended that appeals from the probate court to the superior court would continue without special limitations on the right to a jury trial; and (2) de novo appeals to the superior court from the probate court were to be tried by the jury unless the right to a jury trial was waived, given that a widow specifically requested a jury trial, and hence did not waive the right, the trial court erred in denying the widow's request. Montgomery v. Montgomery, 287 Ga. App. 77, 650 S.E.2d 754 (2007).

Cited in Banigan v. Nelms, 106 Ga. 441, 32 S.E. 337 (1899); Key v. State, 207 Ga. 552, 63 S.E.2d 356 (1951); Hester v. Dixie Fin. Corp., 109 Ga. App. 204, 135 S.E.2d 504 (1964); Lowndes County v. Dasher, 229 Ga. 289, 191 S.E.2d 82 (1972); Sheet Metal Workers Int'l Ass'n v. Carter, 131 Ga. App. 176, 205 S.E.2d 715 (1974); Daniels v. McRae, 180 Ga. App. 732, 350 S.E.2d 317 (1986); State v. Speir, 189 Ga. App. 254, 375 S.E.2d 298 (1988); Massachusetts Bay Ins. Co. v. Hall, 196 Ga. App. 349, 395 S.E.2d 851 (1990); In re Estate of Taylor, 270 Ga. App. 807, 608 S.E.2d 299 (2004); Burnett v. State, 309 Ga. App. 422, 710 S.E.2d 624 (2011).

When Appeal Lies

What is a judgment. — Judgment is a decision or sentence of law, pronounced by the court and entered upon the court's docket, minutes, or record. A mere oral decision is not a judgment from which an appeal can be entered, until the decision has been put in writing and entered as such. Easterling v. State, 11 Ga. App. 134, 74 S.E. 899 (1912), later appeal, 12 Ga. App. 690, 78 S.E. 140 (1913).

Final decision or decree of court of record. — Court lacked jurisdiction over the caveator's appeal from a letter from the Director of Enforcement, Division of Securities & Business Regulation within the office of the Georgia Secretary of State informing the caveator that the Secretary had no jurisdiction over the caveator's complaints, because the letter was not a final decision or decree by a superior, state, or city court rendered in an actual case or controversy instituted in a court of record. Thierman v. Thierman, 234 Ga. App. 716, 507 S.E.2d 489 (1998).

Matters not of a criminal nature. — State may appeal decisions respecting bonds, recognizances, and other matters not strictly of criminal nature. City of Atlanta v. Stallings, 198 Ga. 510, 32 S.E.2d 256 (1944) (decided before enactment of Ch. 7 of this Title).

City court decision in habeas corpus case is reviewable under section. — Writ of error (see O.C.G.A. § 5-6-50) will lie direct to Supreme Court from decision of judge of city court in habeas corpus case. Barranger v. Baum, 103 Ga. 465, 30 S.E. 524, 68 Am. St. R. 113 (1898).

Verdict of jury, whether directed or by deliberation, is not an appealable judgment under any provisions of the Appellate Practice Act (see O.C.G.A. § 5-6-30 et seq.). Smith v. Sorrough, 226 Ga. 744, 177 S.E.2d 246 (1970).

Sustaining of motion for directed verdict is not an appealable judgment under any provisions of the Appellate Practice Act (see O.C.G.A. § 5-6-30 et seq.). Smith v. Sorrough, 226 Ga. 744, 177 S.E.2d 246 (1970).

Granting of ex parte order for injunction not reviewable. Johnson v. Stewart, 40 Ga. 167 (1869).

Sustaining motion to dismiss plea and overruling striking of plea. — Sustaining of demurrer (now motion to dismiss) to plea in abatement and overruling of the striking of the plea is not a final judgment in the case, and a direct bill of exceptions (see O.C.G.A. §§ 5-6-49 and 5-6-50) assigning error thereon cannot be maintained. Jackson v. State, 76 Ga. 551 (1886); Hightower v. State, 22 Ga. App. 276, 95 S.E. 873 (1918).

Defendant, who was convicted of malice murder, felony murder, and other offenses, voluntarily, knowingly, and intelli-

When Appeal Lies (Cont'd)

gently waived the defendant's right to appeal the defendant's conviction beyond filing a motion for a new trial, and the state supreme court dismissed an appeal which the defendant filed after the defendant's motion for a new trial was denied. Rush v. State, 276 Ga. 541, 579 S.E.2d 726 (2003).

No appeal from foreclosure. — After a valid foreclosure sale of a Chapter 13 debtor's residence, O.C.G.A. § 5-6-33(a)(1) did not apply to create a right of appeal because foreclosure in Georgia did not involve any judgment, decision, or court decree. Bishop v. GMAC Mortg., LLC (In re Bishop), 470 B.R. 633 (Bankr. M.D. Ga. 2011).

Who May Appeal

Only party to case below can bring case to appellate court. Epping v. Aiken, 71 Ga. 682 (1883); Booth v. Saunders, 128 Ga. 33, 57 S.E. 93 (1907); Edwards v. Gabrels, 42 Ga. App. 163, 155 S.E. 340 (1930).

Subsequently-named corporation lacked standing to appeal from orders against the previously-named corporation, as that corporation was not a party to the litigation, was not granted or denied intervention pursuant to a motion to amend with leave of court, and an attempted substitution by the predecessor was more than an attempt to correct a misnomer. Degussa Wall Sys. v. Sharp, 286 Ga. App. 349, 648 S.E.2d 687 (2007), cert. denied, 2007 Ga. LEXIS 701 (Ga. 2007).

As neither a law firm nor the attorneys representing an employee were parties to the employer/employee litigation, and the attorneys never sought to be added as parties and were denied that option, the firm had no standing to appeal from the trial court's order granting the attorney fees to the employee's attorneys; thus, the law firm's appeal was dismissed. Thaxton v. Norfolk Southern Corp., 287 Ga. App. 347, 652 S.E.2d 161 (2007).

Non-parties to the underlying case could not otherwise appeal a judgment; moreover, the attorneys lacked standing to challenge an award of attorney fees as a part of the judgment. Rice v. Champion Bldgs., Inc., 288 Ga. App. 597, 654 S.E.2d 390 (2007), cert. denied, 2008 Ga. LEXIS 326 (Ga. 2008).

Party not aggrieved by judgment of trial court is without legal right to except thereto, since the party has no just cause of the complaint. Cooper Motor Lines v. B.C. Truck Lines, 215 Ga. 195, 109 S.E.2d 689 (1959).

Only accused may appeal adverse judgment in criminal proceeding. City of Gainesville v. Butts, 127 Ga. App. 140, 193 S.E.2d 59 (1972) (decided before enactment of Ch. 7 of this Title).

Writ of error (see O.C.G.A. § 5-6-50) does not lie in criminal case at instance of state. State v. Johnson, 61 Ga. 640 (1878); City of Atlanta v. Stallings, 198 Ga. 510, 32 S.E.2d 256 (1944) (decided before enactment of Ch. 7 of this Title).

Judgment in favor of defendant in criminal case cannot be appealed by the state absent an express statutory provision. State v. Gossett, 214 Ga. 840, 108 S.E.2d 272 (1959) (decided before enactment of Ch. 7 of this Title).

Decision of superior court reversing conviction in municipal court. — Decision of superior court on certiorari reversing judgment of a municipal court convicting one of a violation of a municipal ordinance is not subjected to review by this court and may not be appealed by the city. City of Moultrie v. Csiki, 71 Ga. App. 13, 29 S.E.2d 785 (1944); City of Gainesville v. Butts, 127 Ga. App. 140, 193 S.E.2d 59 (1972) (decided before enactment of Ch. 7 of this Title).

State generally cannot appeal grant of new trial or quash of conviction. — Absent statute expressly so providing, state cannot appeal from order granting accused a new trial, or from order quashing conviction and sentence. State v. Gossett, 214 Ga. 840, 108 S.E.2d 272 (1959) (decided before enactment of Ch. 7 of this Title).

Georgia courts generally refuse to entertain appeals of escapees. — If, however, information or proof reaches court of the surrender or recapture of an escaped appellant before dismissal, appeal is not dismissed summarily; but appellant must be in custody within jurisdic-

tion of the State of Georgia. Golden v. State, 145 Ga. App. 36, 243 S.E.2d 303 (1978).

Fugitive from justice forfeits all right to have the aid of courts in reviewing errors claimed to have occurred in connection with the fugitive's case. Shelton v. State, 131 Ga. App. 786, 206 S.E.2d 654 (1974).

When plaintiff in error escapes, plaintiff's bill of exceptions will be dismissed (see O.C.G.A. §§ 5-6-49 and 5-6-50) when the plaintiff fails to surrender. Staten v. State, 140 Ga. 110, 78 S.E. 766 (1913).

Insurance company filing caveat to petition for appointment of estate administrator. — Insurance company, which was deceased attorney's errors and omissions carrier, had the right to file an appeal from grant of letters of administration to appellee since such action implicitly denied the insurance company's caveat to the appellee's petition for appointment. General Accident Ins. Co. v. Wells, 179 Ga. App. 440, 346 S.E.2d 886 (1986).

Criminal Proceedings

Proceeding must involve possibility of fine or imprisonment. — Proceedings instituted by state for violations of penal laws, and prosecutions by cities for infraction of criminal municipal ordinances, each of which involve the possibility of fine or imprisonment, are criminal proceedings not subject to review at instance of state or city. City of Atlanta v. Stallings, 198 Ga. 510, 32 S.E.2d 256 (1944) (decided before enactment of Ch. 7 of this Title).

Proceedings as to revocation of probation order. — When superior court judge sustains certiorari sued out by probationer and orders the probationer discharged and relieved from all further liability in connection with orders and judgment of the judge of a city court, the proceedings, both in city court and in superior court, as to revocation of the probation order, constitute a criminal proceeding within the meaning of the section, thus the state has no right to except, and the Court of Appeals is without jurisdiction to entertain the case. State v. Thompson, 45 Ga. App. 530, 165 S.E. 310 (1932) (decided before enactment of Ch. 7 of this Title).

Prosecution for violation of city ordinance is a quasi-criminal action. City of Moultrie v. Csiki, 71 Ga. App. 13, 29 S.E.2d 785 (1944).

Right to appeal. — When a defendant sentenced to life in prison asserted that the defendant's failure to file a timely appeal was not due to any negligence on the defendant's part, and wished to exercise the defendant's right to appeal, the defendant's motion for out-of-time appeal was improperly denied without further inquiry or a hearing. Randolph v. State, 220 Ga. App. 769, 470 S.E.2d 300 (1996).

State appeal of order disqualifying district attorney. — State did not have the right to appeal an order of the trial court disqualifying the district attorney from prosecuting a criminal defendant. State v. Smith, 268 Ga. 75, 485 S.E.2d 491 (1997).

Prosecution to remove clerk of superior court. — Prosecution to remove clerk of superior court under former Civil Code 1895, § 4366 (see O.C.G.A. § 15-6-82) was a quasi-criminal proceeding and upon acquittal cannot be reviewed. Cobb v. Smith, 102 Ga. 585, 27 S.E. 763 (1897).

Waiver of right to appeal. — Criminal defendant may waive the defendant's statutory right to appeal a conviction in return for the state's waiver of the right to seek the death penalty. Thomas v. State, 260 Ga. 262, 392 S.E.2d 520 (1990).

RESEARCH REFERENCES

Am. Jur. 2d. — 5 Am. Jur. 2d, Appellate Review, § 231 et seq.

C.J.S. — 4 C.J.S., Appeal and Error, § 237 et seq. 24 C.J.S., Criminal Law, §§ 2327, 2340 et seq.

ALR. — Right to appeal from order releasing one in extradition proceedings, 5 ALR 1156.

Power of legislature to require appellate court to review evidence, 24 ALR 1267; 33 ALR 10.

Payment of fine, serving sentence, or

discharge on habeas corpus, as waiver of right to review conviction, 74 ALR 638.

Power of appellate court to reconsider its decision after mandate has issued, 84 ALR 579.

Right of public officer or board to appeal from a judicial decision affecting his or its order or decision, 117 ALR 216.

Acceptance of probation, parole, or suspension of sentence as waiver of error or right to appeal or to move for new trial, 117 ALR 929.

Right of appeal in proceeding for restoration to competency, 122 ALR 541.

Application for or acceptance of executive clemency as affecting appellate proceedings or motion for new trial, 138 ALR 1162.

Exclusion of women from grand or trial jury panel in criminal case as violation of constitutional rights of accused or as ground for reversal of conviction, 9 ALR2d 661; 70 ALR5th 587.

Questions or legal theories affecting trust estates as subject to consideration on appeal though not raised below, 11 ALR2d 317.

Appealability of order granting or denying right of intervention, 15 ALR2d 336.

Appealability of order pertaining to pretrial examination, discovery, interrogatories, production of books and papers, or the like, 37 ALR2d 586.

Reviewability, on appeal from final judgment, of interlocutory order, as affected by fact that order was separately appealable, 79 ALR2d 1352.

Inattention of juror from sleepiness or other cause as ground for reversal or new trial, 88 ALR2d 1275; 59 ALR5th 1.

Judgment subject to appeal as entitled to full faith and credit, 2 ALR3d 1384.

Validity and effect of criminal defendant's express waiver of right to appeal as part of negotiated plea agreement, 89 ALR3d 864.

Appeal by state of order granting new trial in criminal case, 95 ALR3d 596.

Right of municipal corporation to review of unfavorable decision in action or prosecution for violation of ordinance — modern status, 11 ALR4th 399.

5-6-34. Judgments and rulings deemed directly appealable; procedure for review of judgments, orders, or decisions not subject to direct appeal; scope of review; hearings in criminal cases involving a capital offense for which death penalty is sought; appeals involving nonmonetary judgments in child custody cases.

(a) Appeals may be taken to the Supreme Court and the Court of Appeals from the following judgments and rulings of the superior courts, the constitutional city courts, and such other courts or tribunals from which appeals are authorized by the Constitution and laws of this state:

(1) All final judgments, that is to say, where the case is no longer pending in the court below, except as provided in Code Section 5-6-35;

(2) All judgments involving applications for discharge in bail trover and contempt cases;

(3) All judgments or orders directing that an accounting be had;

(4) All judgments or orders granting or refusing applications for receivers or for interlocutory or final injunctions;

(5) All judgments or orders granting or refusing applications for attachment against fraudulent debtors;

(6) Any ruling on a motion which would be dispositive if granted with respect to a defense that the action is barred by Code Section 16-11-173;

(7) All judgments or orders granting or refusing to grant mandamus or any other extraordinary remedy, except with respect to temporary restraining orders;

(8) All judgments or orders refusing applications for dissolution of corporations created by the superior courts;

(9) All judgments or orders sustaining motions to dismiss a caveat to the probate of a will;

(10) All judgments or orders entered pursuant to subsection (c) of Code Section 17-10-6.2;

(11) All judgments or orders in child custody cases awarding, refusing to change, or modifying child custody or holding or declining to hold persons in contempt of such child custody judgment or orders; and

(12) All judgments or orders entered pursuant to Code Section 35-3-37.

(b) Where the trial judge in rendering an order, decision, or judgment, not otherwise subject to direct appeal, including but not limited to the denial of a defendant's motion to recuse in a criminal case, certifies within ten days of entry thereof that the order, decision, or judgment is of such importance to the case that immediate review should be had, the Supreme Court or the Court of Appeals may thereupon, in their respective discretions, permit an appeal to be taken from the order, decision, or judgment if application is made thereto within ten days after such certificate is granted. The application shall be in the nature of a petition and shall set forth the need for such an appeal and the issue or issues involved therein. The applicant may, at his or her election, include copies of such parts of the record as he or she deems appropriate, but no certification of such copies by the clerk of the trial court shall be necessary. The application shall be filed with the clerk of the Supreme Court or the Court of Appeals and a copy of the application, together with a list of those parts of the record included with the application, shall be served upon the opposing party or parties in the case in the manner prescribed by Code Section 5-6-32, except that such service shall be perfected at or before the filing of the application. The opposing party or parties shall have ten days from the date on which the application is filed in which to file a response. The response may be accompanied by copies of the record in the same manner as is allowed with the application. The Supreme Court or the Court of Appeals shall issue an order granting or denying such an appeal within

45 days of the date on which the application was filed. Within ten days after an order is issued granting the appeal, the applicant, to secure a review of the issues, may file a notice of appeal as provided in Code Section 5-6-37. The notice of appeal shall act as a supersedeas as provided in Code Section 5-6-46 and the procedure thereafter shall be the same as in an appeal from a final judgment.

(c) In criminal cases involving a capital offense for which the death penalty is sought, a hearing shall be held as provided in Code Section 17-10-35.2 to determine if there shall be a review of pretrial proceedings by the Supreme Court prior to a trial before a jury. Review of pretrial proceedings, if ordered by the trial court, shall be exclusively as provided by Code Section 17-10-35.1 and no certificate of immediate review shall be necessary.

(d) Where an appeal is taken under any provision of subsection (a), (b), or (c) of this Code section, all judgments, rulings, or orders rendered in the case which are raised on appeal and which may affect the proceedings below shall be reviewed and determined by the appellate court, without regard to the appealability of the judgment, ruling, or order standing alone and without regard to whether the judgment, ruling, or order appealed from was final or was appealable by some other express provision of law contained in this Code section, or elsewhere. For purposes of review by the appellate court, one or more judgments, rulings, or orders by the trial court held to be erroneous on appeal shall not be deemed to have rendered all subsequent proceedings nugatory; but the appellate court shall in all cases review all judgments, rulings, or orders raised on appeal which may affect the proceedings below and which were rendered subsequent to the first judgment, ruling, or order held erroneous. Nothing in this subsection shall require the appellate court to pass upon questions which are rendered moot.

(e) Where an appeal is taken pursuant to this Code section for a judgment or order granting nonmonetary relief in a child custody case, such judgment or order shall stand until reversed or modified by the reviewing court unless the trial court states otherwise in its judgment or order. (Orig. Code 1863, § 4159; Code 1868, § 4191; Code 1873, § 4250; Code 1882, § 4250; Ga. L. 1890-91, p. 82, § 1; Civil Code 1895, § 5526; Penal Code 1895, § 1069; Civil Code 1910, § 6138; Penal Code 1910, § 1096; Code 1933, § 6-701; Ga. L. 1965, p. 18, § 1; Ga. L. 1968, p. 1072, § 1; Ga. L. 1975, p. 757, § 1; Ga. L. 1979, p. 619, §§ 1, 2; Ga. L. 1984, p. 599, § 1; Ga. L. 1988, p. 1437, § 1; Ga. L. 1994, p. 347, § 1; Ga. L. 2001, p. 88, § 1; Ga. L. 2005, p. 20, § 2/HB 170; Ga. L. 2005, p. 224, § 2/HB 221; Ga. L. 2006, p. 379, § 2/HB 1059; Ga. L. 2006, p. 583, § 1/SB 382; Ga. L. 2007, p. 554, § 2/HB 369; Ga. L. 2011, p. 562, § 1/SB 139; Ga. L. 2012, p. 899, § 8-1/HB 1176; Ga. L. 2013, p. 735, § 1/SB 204.)

The 2011 amendment, effective July 1, 2011, added subsection (e). See editor's note for applicability.

The 2012 amendment, effective July 1, 2013, in subsection (a), deleted "and" at the end of paragraph (a)(10), substituted "; and" for the period at the end of paragraph (a)(11), and added paragraph (a)(12).

The 2013 amendment, effective May 6, 2013, substituted "awarding, refusing to change, or modifying child custody" for "including, but not limited to, awarding or refusing to change child custody" in paragraph (a)(11).

Cross references. — Certification for immediate review of nonfinal judgments, § 5-7-2. Applicability of section to orders denying summary judgment, see § 9-11-56. Right of appeal by first offenders placed on probation, see § 42-8-64. Granting of application for leave to appeal interlocutory order, Rules of the Supreme Court of the State of Georgia, Rule 22. Jurisdictional statement and copy of order and compliance with statutory duty to file notice of appeal, Rules of the Supreme Court of the State of Georgia, Rule 24. Leave to appeal interlocutory order, Rules of the Court of Appeals of the State of Georgia, Rule 29. Leave to appeal, Rules of the Court of Appeals of the State of Georgia, Rule 40.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2006, "and" was added to the end of paragraph (a)(9), former paragraph (a)(10), which read: "Repealed; and" was deleted, and former paragraph (a)(11) was redesignated as present paragraph (a)(10).

Pursuant to Code Section 28-9-5, in 2009, "Code Section 16-11-173" was substituted for "Code Section 16-11-184" at the end of paragraph (a)(6).

Editor's notes. — Ga. L. 2001, p. 88, § 3, not codified by the General Assembly, provides that: "This Act shall apply to any case pending on or brought after the effective date of this Act; and, for purposes of taking an appeal pursuant to the provisions of paragraph (5.1) of subsection (a) of Code Section 5-6-34 as enacted by this Act, any ruling actually entered before the effective date of this Act in any case which is pending on the effective date of this Act shall be deemed to have been entered on the effective date of this Act." The effective date of this Act was March 23, 2001.

Ga. L. 2005, p. 20, § 1/HB 170, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Criminal Justice Act of 2005.'"

Ga. L. 2005, p. 20, § 17/HB 170, not codified by the General Assembly, provides that this Act shall apply to all trials which commence on or after July 1, 2005.

Ga. L. 2005, p. 224, § 1/HB 221, not codified by the General Assembly, provides that: "The General Assembly finds and declares that it is important to assess periodically child support guidelines and determine whether existing guidelines continue to be viable and effective or whether they have failed or ceased to accomplish their original policy objectives. The General Assembly further finds that supporting Georgia's children is vitally important to the citizens of Georgia. Therefore, the General Assembly has determined that it is in the best interests of the state and its citizenry to undertake an evaluation of the child support guidelines on a continuing basis. The General Assembly declares that it is important that all of Georgia's children are provided with adequate financial support whether the children's parents are living together or not living together. The General Assembly finds that both parents have a continuing obligation with respect to providing financial and emotional stability for their child or children. It is the hope of the members of the General Assembly that all parents work together to advance the best interest of their children."

Ga. L. 2006, p. 379, § 1/HB 1059, not codified by the General Assembly, provides that: "The General Assembly finds and declares that recidivist sexual offenders, sexual offenders who use physical violence, and sexual offenders who prey on children are sexual predators who present an extreme threat to the public safety. Many sexual offenders are extremely likely to use physical violence and to repeat their offenses; and some sexual offenders commit many offenses, have many more victims than are ever reported, and are prosecuted for only a frac-

tion of their crimes. The General Assembly finds that this makes the cost of sexual offender victimization to society at large, while incalculable, clearly exorbitant. The General Assembly further finds that the high level of threat that a sexual predator presents to the public safety, and the long-term effects suffered by victims of sex offenses, provide the state with sufficient justification to implement a strategy that includes:

"(1) Incarcerating sexual offenders and maintaining adequate facilities to ensure that decisions to release sexual predators into the community are not made on the basis of inadequate space;

"(2) Requiring the registration of sexual offenders, with a requirement that complete and accurate information be maintained and accessible for use by law enforcement authorities, communities, and the public;

"(3) Providing for community and public notification concerning the presence of sexual offenders;

"(4) Collecting data relative to sexual offenses and sexual offenders;

"(5) Requiring sexual predators who are released into the community to wear an electronic monitoring system for the rest of their natural life and to pay for such system; and

"(6) Prohibiting sexual predators from working with children, either for compensation or as a volunteer.

"The General Assembly further finds that the state has a compelling interest in protecting the public from sexual offenders and in protecting children from predatory sexual activity, and there is sufficient justification for requiring sexual offenders to register and for requiring community and public notification of the presence of sexual offenders. The General Assembly declares that in order to protect the public, it is necessary that the sexual offenders be registered and that members of the community and the public be notified of a sexual offender's presence. The designation of a person as a sexual offender is neither a sentence nor a punishment but simply a regulatory mechanism and status resulting from the conviction of certain crimes. Likewise, the designation of a person as a sexual predator is neither a sentence nor a punishment but simply a regulatory mechanism and status resulting from findings by the Sexual Offender Registration Review Board and a court if requested by a sexual offender."

Ga. L. 2006, p. 379, § 30(c)/HB 1059, not codified by the General Assembly, provides that: "The provisions of this Act shall not affect or abate the status as a crime of any such act or omission which occurred prior to the effective date of the Act repealing, repealing and reenacting, or amending such law, nor shall the prosecution of such crime be abated as a result of such repeal, repeal and reenactment, or amendment."

Ga. L. 2006, p. 583, § 8/SB 382, not codified by the General Assembly, amended Ga. L. 2005, p. 224, § 13, so as to delay the effective date of the 2005 amendment to subsection (a) of this Code section until January 1, 2007.

Ga. L. 2006, p. 583, § 9/SB 382, not codified by the General Assembly, provided that it was the intention of the 2006 Act to delay for six months the effectiveness of the provisions of 2005 Act No. 52 (Ga. L. 2005, p. 224) of the General Assembly, excepting only those provisions of 2005 Act No. 52 (Ga. L. 2005, p. 224) creating the Georgia Child Support Commission which went into effect upon approval of that Act by the Governor.

Ga. L. 2006, p. 583, § 10(b)/SB 382, not codified by the General Assembly, provides: "Sections 1 through 7 of this Act shall become effective on January 1, 2007, and shall apply to all pending civil actions on or after January 1, 2007."

Ga. L. 2007, p. 554, § 1/HB 369, not codified by the General Assembly, provides that: "The General Assembly of Georgia declares that it is the policy of this state to assure that minor children have frequent and continuing contact with parents who have shown the ability to act in the best interests of their children and to encourage parents to share in the rights and responsibilities of rearing their children after the parents have separated or dissolved their marriage or relationship."

Ga. L. 2007, p. 554, § 8/HB 369, not codified by the General Assembly, provides that the 2007 amendment applies to

all child custody proceedings and modifications of child custody filed on or after January 1, 2008.

Ga. L. 2011, p. 562, § 4/SB 139, not codified by the General Assembly, provides that the amendment by that Act shall apply to all notices or applications for appeal filed on or after July 1, 2011.

Law reviews. — For article discussing the inefficiency of mandamus and impeachment as remedies for judicial inaction, see 5 Ga. St. B.J. 467 (1969). For article surveying Georgia cases in the area of trial practice and procedure from June 1977 through May 1978, see 30 Mercer L. Rev. 239 (1978). For article surveying judicial developments in Georgia's trial practice and procedure laws, see 31 Mercer L. Rev. 249 (1979). For article surveying developments in Georgia trial practice and procedure from mid-1980 through mid-1981, see 33 Mercer L. Rev. 275 (1981). For article surveying appellate practice and procedure, see 34 Mercer L. Rev. 3 (1982). For article surveying recent developments in administrative law, see 37 Mercer L. Rev. 503 (1985). For annual survey of appellate practice and procedure, see 38 Mercer L. Rev. 47 (1986). For annual survey of trial practice and procedure, see 38 Mercer L. Rev. 383 (1986). For annual survey of appellate practice and procedure, see 40 Mercer L. Rev. 51 (1988). For article, "Intangible Tax Appeals After Blank v. Collins; The Uncertainty Continues," see 27 Ga. St. B.J. 78 (1990). For article, "Let's Revise Appellate Procedure in Georgia," see 27 Ga. St. B.J. 135 (1991). For article, "Getting Certiorari Granted," 28 Ga. St. B.J. 90 (1991). For annual survey of appellate practice and procedure, see 43 Mercer L. Rev. 73 (1991). For annual survey of domestic relations, see 43 Mercer L. Rev. 243 (1991). For article, "Appeals, Interlocutory and Discretionary Applications, and Post-Judgment Motions in the Georgia Courts: The Current Practice and the Need for Reform Legislation," see 44 Mercer L. Rev. 17 (1992). For annual survey of appellate practice and procedure, see 56 Mercer L. Rev. 61 (2004). For annual survey of domestic relations law, see 56 Mercer L. Rev. 221 (2004). For annual survey of appellate practice and procedure, see 57 Mercer L. Rev. 35 (2005). For annual survey of domestic relations cases, see 57 Mercer L. Rev. 173 (2005). For article on 2005 amendment of this Code section, see 22 Ga. St. U.L. Rev. 73 (2005). For article on 2006 amendment of this Code section, see 23 Ga. St. U.L. Rev. 11, 103 (2006). For survey article on appellate practice and procedure, see 59 Mercer L. Rev. 21 (2007). For survey article on domestic relations law, see 59 Mercer L. Rev. 139 (2007). For survey article on administrative law, see 60 Mercer L. Rev. 1 (2008). For survey article on appellate practice and procedure, see 60 Mercer L. Rev. 21 (2008). For annual survey on appellate practice and procedure, see 61 Mercer L. Rev. 31 (2009). For annual survey on domestic relations, see 61 Mercer L. Rev. 117 (2009). For annual survey of law on appellate practice and procedure, see 62 Mercer L. Rev. 25 (2010). For article, "Appellate Practice and Procedure," see 63 Mercer L. Rev. 67 (2011). For article on the 2012 amendment of this Code section, see 29 Ga. St. U.L. Rev. 290 (2012).

For comment on Sayers v. Rothberg, 222 Ga. 626, 151 S.E.2d 445 (1967), see 3 Ga. St. B.J. 489 (1967). For comment on Milholland v. Oglesby, 223 Ga. 230, 154 S.E.2d 194 (1967), see 4 Ga. St. B.J. 392 (1968).

JUDICIAL DECISIONS

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General Consideration

1. Constitutionality and Purpose of Section

Editor's notes. — In light of the similarity of the issues dealt with by the provisions, decisions under former Code 1933, § 6-701 as it read prior to revision by Ga. L. 1965, p. 18, § 1 are included in the annotations for this Code section.

The conditional plea procedures established in Mims v. State, 201 Ga. App. 277, 410 S.E.2d 824 are disapproved and will no longer be allowed by the Court of Appeals of Georgia; Mims v. State, 201 Ga. App. 277, 410 S.E.2d 824 on this issue, and all decisions by the Court of Appeals of Georgia based upon Mims v. State authorizing conditional pleas, will not be followed. See Hooten v. State, 212 Ga. App. 770, 442 S.E.2d 836 (1994), annotated below.

Failure to comply with O.C.G.A. § 5-6-34(b). — Plaintiff's interlocutory appeal of a removal order transferring the plaintiff's case to another county was dismissed because the plaintiff failed to follow the interlocutory procedures set forth in O.C.G.A. § 5-6-34(b); although the removal order was issued by the original trial judge, the certificate of immediate review was issued by the trial judge in the other county following the transfer of the case, and because the certificate was not signed by the trial judge who issued the removal order, it was invalid and could not provide a basis for the exercise of jurisdiction by the court of appeals to consider the merits of the plaintiff's appeal. Mauer v. Parker Fibernet, LLC, 306 Ga. App. 160, 701 S.E.2d 599 (2010).

Supreme Court of Georgia concludes that the interlocutory appeal procedures set forth in O.C.G.A. § 5-6-34(b) regarding motions to compel arbitration is not preempted by the Federal Arbitration Act, 9 U.S.C. § 16(a)(1)(B). Am. Gen. Fin. Servs. v. Jape, 291 Ga. 637, 732 S.E.2d 746 (2012).

Constitutionality. — Fife v. Johnston, 225 Ga. 447, 169 S.E.2d 167 (1969).

Purpose of Appellate Practice Act, O.C.G.A. § 5-6-30 et seq., is to simplify procedure for bringing cases to the appellate court, and nothing therein should be construed as changing time honored and fundamental rule stemming from very nature of appellate jurisdiction that neither this court nor the Supreme Court will consider, nor do they in fact have jurisdiction to consider, any question unless the question has been raised in the first instance in the trial court. Taylor v. ROA Motors, Inc., 114 Ga. App. 671, 152 S.E.2d 631 (1966).

Legislative intent of section. — Legislature in enacting subsections (a) and (b) of this section intended to follow federal procedure, and commensurate policy, of precluding piecemeal appeals. Lee v. Smith, 119 Ga. App. 808, 168 S.E.2d 880 (1969).

Certificate of immediate review is not "surplusage." The certificate is an essential component of a trial court's power to control litigation. Scruggs v. Georgia Dep't of Human Resources, 261 Ga. 587, 408 S.E.2d 103 (1991).

Statutes dealing with appellate practice in conflict with this section

were impliedly repealed by Ga. L. 1965, p. 18. — Georgia L. 1965, p. 18 was intended as a comprehensive revision of appellate and other post-trial procedure, and failure to specifically enumerate in repealing clauses thereof any statute, Code section, or Act dealing with subject of appellate practice and procedure shall not be construed as continuing in effect such Code section, statute, or Act as may be in conflict with this section. Parker v. Averett, 113 Ga. App. 576, 149 S.E.2d 199 (1966).

Conditional pleas. — Conditional plea procedures established in Mims v. State 201 Ga. App. 277, 410 S.E.2d 824, are disapproved and will no longer be allowed by this court; 30 days after the date this opinion is published in the official advance sheets, pleas in which the accused attempts to condition upon the preservation of the rights to raise non-jurisdictional errors by the trial court will not be considered by this court. Hooten v. State, 212 Ga. App. 770, 442 S.E.2d 836 (1994).

Direct appeal appropriate. — As no claims remained, and the case was no longer pending in the court below, a judge's order was a final judgment as contemplated by O.C.G.A. § 5-6-34(a)(1); thus, a direct appeal was appropriate, and children could raise any issues in the direct appeal from the order that were ruled upon in all previous non-final orders. Sotter v. Stephens, 291 Ga. 79, 727 S.E.2d 484 (2012).

Right to appeal. — When a defendant sentenced to life in prison asserted that his failure to file a timely appeal was not due to any negligence on the defendant's part, and wished to exercise the defendant's right to appeal, the defendant's motion for out-of-time appeal was improperly denied without further inquiry or a hearing. Randolph v. State, 220 Ga. App. 769, 470 S.E.2d 300 (1996).

2. Construction in General

There can be no effective appeal from anything but a judgment; a final judgment without a certificate, or an interlocutory judgment with a certificate, reduced to writing and entered by filing with the clerk. G.M.J. v. State, 130 Ga. App. 420, 203 S.E.2d 608 (1973).

When the appellate court assumed, without deciding, that a pending commercial lease controversy authorized a declaratory judgment directing the defendant would not be in breach of the lease by paying future rent according to an amendment, it held that, because a controversy remained pending below, the order granting that declaration was not a final judgment, and therefore that portion of the order granting declaratory judgment was not directly appealable, and the denial of the defendant's motion for summary judgment was also not independently directly appealable. Yeazel v. Burger King Corp., 236 Ga. App. 110, 511 S.E.2d 237 (1999).

In a legal malpractice action, the appeals court held that the appeals lacked jurisdiction to hear a lawyer's appeal from the trial court's order striking an untimely response to a motion for summary judgment, as: (1) no final judgment had been entered against the lawyer, who remained a defendant in the trial court; and (2) the lawyer failed to follow the procedures for appealing the interlocutory ruling on the motion to strike. Stubbs v. Pickle, 287 Ga. App. 246, 651 S.E.2d 171 (2007).

Subsection (d) is broad enough to permit a party to raise on the appeal of a directly appealable order issues regarding an order that, standing alone, is subject to the application requirements of O.C.G.A. § 5-6-35. American Car Rentals, Inc. v. Walden Leasing, Inc., 220 Ga. App. 314, 469 S.E.2d 431 (1996).

O.C.G.A. § 5-6-34(d) grants the Court of Appeals of Georgia authority to review all judgments or rulings rendered in a case without regard to the appealability of that judgment or ruling. Bradford v. State, 283 Ga. App. 75, 640 S.E.2d 630 (2006).

Because the Court of Appeals of Georgia had jurisdiction to hear appeals filed after punishment was imposed pursuant to a contempt order, any other non-final rulings entered in the case could also be raised as part of such a direct appeal, pursuant to O.C.G.A. § 5-6-34(d). Harrell v. Fed. Nat'l Payables, Inc., 284 Ga. App. 395, 643 S.E.2d 875 (2007).

Compared with O.C.G.A. § 5-6-35. — O.C.G.A. § 5-6-35 applies to all appeals

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specified therein, whether the judgment be final, interlocutory, or summary. Thus, in an action to modify support obligations, the wife, whose motion to dismiss was denied, was correct in following the discretionary-application procedure, within the 30-day period of O.C.G.A. § 5-6-35(d), rather than the procedures set out in O.C.G.A. § 5-6-34. Straus v. Straus, 260 Ga. 327, 393 S.E.2d 248 (1990).

While O.C.G.A. § 5-6-35(h) provides that the filing of an application for appeal shall act as a supersedeas to the extent that a notice of appeal acts as a supersedeas, that section applies only to discretionary appeals. O.C.G.A. § 5-6-34(b), which applies to interlocutory appeals, does not so provide, but states that if the appellate court issues an order granting an appeal, the applicant may then timely file a notice of appeal and the notice of appeal shall act as a supersedeas, as provided in O.C.G.A. § 5-6-46. Nelson v. Haugabrook, 282 Ga. App. 399, 638 S.E.2d 840 (2006).

Construed with § 5-6-35(a). — Phrase "following cases" in O.C.G.A. § 5-6-35(a) is construed to exclude those cases in which subsection (d) of O.C.G.A. § 5-6-34 is applicable; thus, since the appellants filed a motion styled as both a motion for a new trial and a motion to set aside the judgment, but it was clearly only a motion for new trial since it raised issues relating to the verdict but none relating to a motion to set aside under O.C.G.A. § 9-11-60(d), the Court of Appeals erred in dismissing the appeal. Martin v. Williams, 263 Ga. 707, 438 S.E.2d 353 (1994).

Underlying subject matter generally controls over the relief sought in determining the proper procedure to follow to appeal; thus, when a trial court issues a judgment listed in the direct appeal statute in a case whose subject matter is covered under the discretionary appeal statute, the discretionary application procedure must be followed when the party is appealing a judgment or order that is procedurally subject to a direct appeal. Rebich v. Miles, 264 Ga. 467, 448 S.E.2d 192 (1994).

In plaintiff's appeal of the denial of plaintiff's request for a declaratory judgment, the plaintiff could add issues relating to other rulings which might affect the proceedings below without regard to whether the issues were appealable standing alone. Smith v. Department of Human Resources, 214 Ga. App. 508, 448 S.E.2d 372 (1984).

While a judgment or an order denying an application for injunctive relief, mandamus, or other extraordinary relief is a judgment or order subject to direct appellate review, it is subject to the discretionary application procedure if the underlying subject matter of the appeal is one contained in O.C.G.A. § 5-6-35. Prison Health Servs., Inc. v. Georgia Dep't of Admin. Servs., 265 Ga. 810, 462 S.E.2d 601 (1995).

Unless subject to O.C.G.A. § 5-6-35, all rulings and judgments are directly appealable when they dispose of all matters before the court; after entry of final judgment in a criminal matter and the filing of a notice of appeal, a motion for the trial court to appoint appellate counsel raises a new matter and when disposed of, the new ruling disposes of all matters before the court, and therefore the ruling may be directly appealed. Spear v. State, 271 Ga. App. 845, 610 S.E.2d 642 (2005).

Underlying subject matter of a resident's suit seeking a writ of mandamus and other relief arising from the issuance of a building permit for the construction of a school building in the neighborhood concerned the review of an administrative zoning decision and, therefore, the appellate court had jurisdiction to address the merits only in the context of a discretionary appeal; while the trial court's order ruling against the resident was appealable under O.C.G.A § 5-6-34(a), the resident was required to obtain permission to file the appeal, and could not circumvent the discretionary application requirements of O.C.G.A. § 5-6-35. Ladzinske v. Allen, 280 Ga. 264, 626 S.E.2d 83 (2006).

O.C.G.A. § 5-6-35(a)(8) requires that review of an order denying a motion to set aside be preceded by an application for discretionary review. When both O.C.G.A.

§§ 5-6-34(a) and 5-6-35(a) are involved, an application for appeal is required when the underlying subject matter of the appeal is listed in § 5-6-35(a), even though the party may be appealing a judgment or order that is procedurally subject to a direct appeal under § 5-6-34(a). Avren v. Garten, 289 Ga. 186, 710 S.E.2d 130 (2011).

Construction with O.C.G.A. § 9-10-53. — Although O.C.G.A. § 9-10-53 addresses the general conduct of further proceedings following a case transfer, O.C.G.A. § 5-3-34(b) sets forth the more specific rule governing the issuance of a certificate of immediate review for interlocutory appeals; it thus follows that the general provisions of O.C.G.A. § 9-10-53 cannot override the clear and specific provisions of O.C.G.A. § 5-6-34(b) mandating that the certificate of immediate review be issued by the trial judge who entered the order in question. Mauer v. Parker Fibernet, LLC, 306 Ga. App. 160, 701 S.E.2d 599 (2010).

Effect of 1986 amendment of § 40-13-28. — The 1986 amendment to O.C.G.A. § 40-13-28 that changed the scope of review in the superior court from a de novo investigation to a review of the record was not also intended to change the method of appeal from the superior court in such cases from discretionary appeals under O.C.G.A. § 5-6-35(a)(1) to direct appeals under subsection (a) of O.C.G.A. § 5-6-34. Brown v. City of Marietta, 214 Ga. App. 840, 449 S.E.2d 540 (1994).

Entry of judgment question not appealable. — There is no authority for the trial court to grant an appellant the right to file an "extraordinary appeal" to determine whether or not judgment should be entered in a case. Robbins v. State, 193 Ga. App. 5, 387 S.E.2d 18 (1989).

In appeal from verdict, mere mention in notice of a final judgment is insufficient. — When appeal was taken from verdict and ruling which was not an appealable judgment, mere mention in notice of appeal of judgment overruling motion for new trial does not constitute appeal from final judgment so as to satisfy requirements of this article. Davis v. Davis, 224 Ga. 740, 164 S.E.2d 816 (1968).

Section allows review by appeal as a matter of right as to all final judgments. Harwell v. State, 127 Ga. App. 204, 193 S.E.2d 257 (1972).

What orders, decisions, or judgments are directly appealable. — To be subject to direct appeal, an order, decision, or judgment must be final such that the cause is no longer pending in the court below, or involving an issue specified as directly appealable under subsection (a) of this section. Stallings v. Chance, 239 Ga. 567, 238 S.E.2d 327 (1977).

No direct appeal from interlocutory order in probate court. — Appeal from the probate court to a superior court is for the purpose of conducting a de novo investigation in the superior court, and not for the purpose of correcting errors of law committed in the probate court. Thus, there can be no direct appeal to the superior court from an interlocutory ruling in the probate court. Driver v. State, 198 Ga. App. 643, 402 S.E.2d 524, cert. denied, 198 Ga. App. 897, 402 S.E.2d 524 (1991).

When an order appealed from was for a partial accounting, and thus not directly appealable, it was interlocutory; thus, as claims remained below, when the appealing parties failed to follow the interlocutory appeal procedures, dismissal was warranted. Geeslin v. Sheftall, 263 Ga. App. 827, 589 S.E.2d 601 (2003).

Absent final ruling by trial court, there is nothing for appellate court to pass upon. Cole v. Frostgate Whses., Inc., 150 Ga. App. 320, 257 S.E.2d 309, rev'd on other grounds, 244 Ga. 782, 262 S.E.2d 99 (1979).

When decision is not appealable under section. — Decision is not an appealable judgment when (1) case is still pending in court below; (2) record contains no certificate of trial judge certifying that decision appealed from is of such importance to case that immediate review should be had; and (3) decision is not one of those specifically described judgments from which appeal is permitted by subsection (a) of this section. Dowdy v. White, 119 Ga. App. 793, 168 S.E.2d 595 (1969).

Appeals court rejected an employee's claim that because the trial court had previously signed a certificate of immediate review of the trial court's original order denying summary judgment on the employee's claim for intentional infliction

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of emotional distress, the trial court lacked jurisdiction over the case at the time the trial court amended the order by granting summary judgment in favor of the former employer and the former manager; as the trial court's order was not appealable, the trial court retained jurisdiction and thus was authorized to amend the court's order. Wilcher v. Confederate Packaging, Inc., 287 Ga. App. 451, 651 S.E.2d 790 (2007).

Appeals from superior courts in traffic cases. — All appeals from judgments of superior courts in traffic cases under O.C.G.A. § 40-13-28 must follow the procedures in O.C.G.A. § 5-6-35(a). Accordingly, 30 days after the date this decision is published in the official advance sheets any direct appeals in these cases filed under subsection (a) of O.C.G.A. § 5-6-34 will be dismissed. Brown v. City of Marietta, 214 Ga. App. 840, 449 S.E.2d 540 (1994).

Any appeal from a superior court review under O.C.G.A. § 40-13-28 of any lower court, except the probate court, shall be under O.C.G.A. § 5-6-35(a); however, an appeal from the superior court review under § 40-13-28 of a traffic case from the probate court shall be by direct appeal under paragraph (a)(1) O.C.G.A. § 5-6-34. Power v. State, 231 Ga. App. 335, 499 S.E.2d 357 (1998).

No direct appeal from recorder's court to Supreme Court. — Direct appeal from the recorder's court to the Supreme Court was not available in a case challenging the constitutionality of an ordinance. Instead, the proper method of review was by certiorari to the superior court. Russell v. City of E. Point, 261 Ga. 213, 403 S.E.2d 50 (1991), cert. denied, 502 U.S. 971, 112 S. Ct. 448, 116 L. Ed. 2d 466 (1991).

Section inapplicable to cases arising under Administrative Procedure Act. — Interlocutory appeal procedure set forth in O.C.G.A. § 5-6-34 does not apply to cases arising under the Administrative Procedure Act because that Act does not authorize appellate court review of such cases unless the reviewing superior court has rendered a "final judgment." State Health Planning Review Bd. v. Piedmont Hosp., 173 Ga. App. 450, 326 S.E.2d 814 (1985).

Discretion of trial judge. — Broad discretion is given a trial judge in determining whether interlocutory application is appropriate. Brown v. State, 177 Ga. App. 146, 338 S.E.2d 718 (1985).

Criminal defendants cannot cross appeal suits brought by state. — Despite resultant justice and judicial economy, court will not allow criminal defendants to cross appeal suits brought before the court by the state pursuant to O.C.G.A. § 5-7-1; O.C.G.A. § 5-6-38 limits that right to civil parties and the court will not encroach upon the legislature's prerogative by extending that right. State v. Crapse, 173 Ga. App. 100, 325 S.E.2d 620 (1984), overruled in part on other grounds, Hubbard v. State, 176 Ga. App. 622, 337 S.E.2d 60 (1985).

What constitutes final judgment. — Even though an order does not specify that it is a grant of final judgment, it nevertheless constitutes a final judgment within the meaning of O.C.G.A. § 5-6-34 when the order leaves no issues remaining to be resolved, constitutes the court's final ruling on the merits of the action, and leaves the parties with no further recourse in the trial court. Caswell v. Caswell, 157 Ga. App. 710, 278 S.E.2d 452 (1981); Vurgess v. State, 187 Ga. App. 700, 371 S.E.2d 191 (1988); Decubas v. Norfolk S. Corp., 193 Ga. App. 387, 388 S.E.2d 336 (1989), rev'd on other grounds, 260 Ga. 136, 390 S.E.2d 216 (1990); Spring-U Bonding Co. v. State, 200 Ga. App. 533, 408 S.E.2d 831 (1991).

Finality for res judicata purposes is measured by the same standard as finality for appealability purposes. Gresham Park Community Org. v. Howell, 652 F.2d 1227 (5th Cir. 1981).

Absent final judgment or certificate of immediate review, appeal is premature and must be dismissed. Marsh v. Allgood, 118 Ga. App. 773, 165 S.E.2d 479 (1968); Moore v. Georgia Power Co., 122 Ga. App. 54, 176 S.E.2d 236 (1970); Foskey v. Bank of Alapaha, 147 Ga. App. 541, 249 S.E.2d 346 (1978); Ward v. Charles D. Hardwick Co., 149 Ga. App. 546, 254 S.E.2d 872 (1979).

When there is no certificate of review and the case does not fall within the class of exceptions found in section, the appeal must be dismissed. Thompson v. Consumer Credit of Valdosta, Inc., 123 Ga. App. 281, 180 S.E.2d 595 (1971).

When a final judgment has not been entered nor a certificate of immediate review granted, either by the trial court or the appellate court, an appeal is premature and must be dismissed. Bowers v. Price, 168 Ga. App. 125, 308 S.E.2d 420 (1983).

As to judgments that are not final, compliance with subsection (b) is a prerequisite to an appeal. Harwell v. State, 127 Ga. App. 204, 193 S.E.2d 257 (1972).

Party seeking appellate review from an interlocutory order must follow the interlocutory-application subsection, subsection (b) of O.C.G.A. § 5-6-34, seek a certificate of immediate review from the trial court, and comply with the time limitations therein. Scruggs v. Georgia Dep't of Human Resources, 261 Ga. 587, 408 S.E.2d 103 (1991); Collier v. Evans, 205 Ga. App. 764, 423 S.E.2d 704 (1992).

Interlocutory rulings are not appealable absent following procedure outlined in subsection (b). Insurance Co. of N. Am. v. Fowler, 148 Ga. App. 509, 251 S.E.2d 594 (1978), overruled on other grounds, Seaboard Coast Line R.R. v. Mobil Chem. Co., 172 Ga. App. 543, 323 S.E.2d 849 (1984).

Interlocutory appeal is cognizable only if trial judge issues certificate of immediate review and appellate court grants permission for direct appeal pursuant to application filed in accordance with subsection (b). Becker v. Bishop, 151 Ga. App. 224, 259 S.E.2d 209 (1979); Wolf v. Richmond County Hosp. Auth., 169 Ga. App. 68, 311 S.E.2d 507 (1983).

Failure to comply with the interlocutory appeal procedure set forth in subsection (b), the appeal causes the appeal to be premature and it must be dismissed. English v. Tucker Fed. Sav. & Loan Ass'n, 175 Ga. App. 69, 332 S.E.2d 365 (1985).

Effect of failure to appeal from interlocutory order. — Although the Court of Appeals has considered orders on motions to set aside condemnations on direct appeal, when an appeal is taken from a final judgment, all judgments, rulings, or orders rendered in the case which are raised on appeal will be considered, whether or not the earlier ruling was appealable. Skipper v. DOT, 197 Ga. App. 634, 399 S.E.2d 538 (1990).

Term "court below" is construed to be court whose judgment is sought to be appealed. J.T.M. v. State, 142 Ga. App. 635, 236 S.E.2d 764 (1977).

Paragraph (a)(1) of former Code 1933, § 6-701 and subsection (b) were to be construed together so that determination of finality under latter satisfied the finality requirement of the former. Thompson v. Clarkson Power Flow, Inc., 149 Ga. App. 284, 254 S.E.2d 401, aff'd, 244 Ga. 300, 260 S.E.2d 9 (1979).

Interpretation of intended relationship among individual paragraphs and subsections of section. — See Springtime, Inc. v. Douglas County, 228 Ga. 753, 187 S.E.2d 874 (1972) (decided under former Code 1933, § 6-701 as it read prior to rearrangement of paragraphs and subsections to present form).

This section's definition of final judgment applies to § 15-11-64. — Ga. L. 1977, p. 1237, § 7 (see O.C.G.A. § 15-11-64) provided for appeals from final judgments of juvenile court judge, without defining final judgments, former Code 1933, § 6-701 (see O.C.G.A. § 5-6-34) for appeals when judgment was final — that was to say — when cause was no longer pending in court below. J.T.M. v. State, 142 Ga. App. 635, 236 S.E.2d 764 (1977).

Former Code 1933, § 6-701 (see O.C.G.A. § 5-6-34) was determinative as to finality of judgments entered under former Code 1933, § 67-701 (see O.C.G.A. T. 44, Ch. 14, Art. 7, Part 4). Jordan v. Ford Motor Credit Co., 147 Ga. App. 515, 249 S.E.2d 327 (1978).

Defendants could not challenge the ruling. — Defendants could not challenge the ruling from which the defendants now seek relief because the ruling was not entered until after the prior appeal was concluded. Turner Constr. Co. v. Electrical Distribs., Inc., 202 Ga. App. 726, 415 S.E.2d 325 (1992).

When court grants motion to dismiss and denies another defendant's

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motion to dismiss, filed on other grounds, and the plaintiff appeals, but the dismissal order contains no express determination that there is no just reason for delay, and there is no express direction for the entry of such judgment, the appeal is premature and must be dismissed, even when the trial court grants a certificate for immediate review. All Risk Ins. Agency, Inc. v. Rockbridge San. Co., 166 Ga. App. 728, 305 S.E.2d 390 (1983).

Denial of judgment n.o.v. appealable, even when new trial granted. — Denial of a judgment notwithstanding the verdict can be considered on appeal even though a motion for a new trial has been granted, if an appeal is taken from a final judgment entered pursuant to O.C.G.A. § 9-11-54(b) (judgments upon multiple claims or multiple parties). GMAC v. Bowen Motors, Inc., 167 Ga. App. 463, 306 S.E.2d 675 (1983).

Appeal from "motion to compel settlement" was dismissed since the appeal was actually intended to be taken from an interlocutory order rather than from the "final outcome" of the case, and no amendment had been filed to correct this defect. Martin v. Farrington, 179 Ga. App. 227, 346 S.E.2d 5 (1986).

Filing of motion to set aside summary judgment is ineffective as extender of time for filing notice of appeal. Gulf Oil Co. v. Mantegna, 167 Ga. App. 844, 307 S.E.2d 732 (1983).

Discretionary appeal. — Trial court's order upholding the constitutionality of Georgia's Child Support Guidelines was erroneously certified by the trial court since the order did not dispose of any claim. However, since the appellate court had granted a father's application for discretionary appeal, the appellate court proceeded to a consideration of the merits of the constitutional issue. Keck v. Harris, 277 Ga. 667, 594 S.E.2d 367 (2004).

Cited in Gibson v. Hodges, 221 Ga. 779, 147 S.E.2d 329 (1966); Birdwell v. Pippen, 113 Ga. App. 202, 147 S.E.2d 673 (1966); Seaton v. Redisco, Inc., 113 Ga. App. 256, 147 S.E.2d 828 (1966); Williams v. Shaffer, 222 Ga. 334, 149 S.E.2d 668 (1966); Knopp v. Knopp, 222 Ga. 388, 149 S.E.2d 680 (1966); Dawn Mem. Park v. Southern Cem. Consultants of Ga., Inc., 113 Ga. App. 814, 149 S.E.2d 760 (1966); White Oak Acres, Inc. v. Campbell, 113 Ga. App. 833, 149 S.E.2d 870 (1966); Algernon Blair, Inc. v. National Sur. Corp., 222 Ga. 672, 151 S.E.2d 724 (1966); Undercofler v. Grantham Transf. Co., 222 Ga. 654, 151 S.E.2d 765 (1966); Hartsfield Co. No. 3, Inc. v. Williams, 114 Ga. App. 547, 151 S.E.2d 908 (1966); Kahn v. Graper, 114 Ga. App. 572, 152 S.E.2d 10 (1966); State Hwy. Dep't v. Kirchmeyer, 114 Ga. App. 433, 152 S.E.2d 17 (1966); Richmond County Bus. Ass'n v. Richmond County, 222 Ga. 772, 152 S.E.2d 738 (1966); Undercofler v. Grantham Transf. Co., 114 Ga. App. 868, 152 S.E.2d 900 (1966); Wiggin v. Wiggin, 223 Ga. 63, 153 S.E.2d 306 (1967); Nunn v. National Life & Accident Ins. Co., 115 Ga. App. 131, 153 S.E.2d 730 (1967); Norbo Trading Corp. v. Wohlmuth, 223 Ga. 258, 154 S.E.2d 224 (1967); Dudley v. Sears, Roebuck & Co., 115 Ga. App. 411, 154 S.E.2d 699 (1967); Garnto v. German, 115 Ga. App. 418, 154 S.E.2d 742 (1967); Griffith v. Morgan, 115 Ga. App. 518, 154 S.E.2d 822 (1967); Hulsey v. Smith, 223 Ga. 522, 156 S.E.2d 353 (1967); Nye v. Murcel Mfg. Co., 116 Ga. App. 44, 156 S.E.2d 383 (1967); Kirkman v. Miller, 116 Ga. App. 78, 156 S.E.2d 558 (1967); Hayes v. State, 116 Ga. App. 260, 157 S.E.2d 30 (1967); Rogers v. Johnson, 116 Ga. App. 295, 157 S.E.2d 48 (1967); State Hwy. Dep't v. Thomason, 116 Ga. App. 330, 157 S.E.2d 503 (1967); Biddinger v. Fletcher, 116 Ga. App. 532, 157 S.E.2d 764 (1967); Graves v. State, 116 Ga. App. 494, 157 S.E.2d 801 (1967); Wilbanks v. State, 116 Ga. App. 698, 158 S.E.2d 274 (1967); Harrington v. Frye, 116 Ga. App. 755, 159 S.E.2d 84 (1967); Passmore v. Truman & Smith Inst., Inc., 116 Ga. App. 803, 159 S.E.2d 92 (1967); Peacock Constr. Co. v. Turner Concrete, Inc., 116 Ga. App. 822, 159 S.E.2d 114 (1967); Whitus v. Georgia, 385 U.S. 545, 87 S. Ct. 643, 17 L. Ed. 2d 599 (1967); Veal v. Paulk, 117 Ga. App. 109, 159 S.E.2d 304 (1968); Davis v. Holt, 224 Ga. 55, 159 S.E.2d 403 (1968); Titshaw v. Carnes, 224 Ga. 57, 159 S.E.2d 420 (1968); Watson v. Parke, Davis & Co., 117 Ga. App. 162, 159

S.E.2d 446 (1968); Williams v. State, 117 Ga. App. 79, 159 S.E.2d 454 (1968); Wright v. Collins, 117 Ga. App. 105, 159 S.E.2d 468 (1968); Robert Chuckrow Constr. Co. v. Gough, 117 Ga. App. 140, 159 S.E.2d 469 (1968); First Fed. Sav. & Loan Ass'n v. First Nat'l Bank, 224 Ga. 150, 160 S.E.2d 372 (1968); Lloyd Indus., Inc. v. O'Neal Steel, Inc., 117 Ga. App. 328, 160 S.E.2d 433 (1968); Zappa v. Ewing, 117 Ga. App. 362, 160 S.E.2d 640 (1968); Whitus v. State, 117 Ga. App. 359, 160 S.E.2d 839 (1968); Woods v. State, 117 Ga. App. 546, 160 S.E.2d 922 (1968); Housing Auth. v. Hindman, 224 Ga. 246, 161 S.E.2d 292 (1968); McLeod v. Westmoreland, 117 Ga. App. 659, 161 S.E.2d 335 (1968); Graham v. Haley, 224 Ga. 498, 162 S.E.2d 346 (1968); Howard v. Thomas, 224 Ga. 515, 162 S.E.2d 721 (1968); Vulcan Life & Accident Ins. Co. v. United Banking Co., 118 Ga. App. 36, 162 S.E.2d 798 (1968); Young v. Reese, 118 Ga. App. 114, 162 S.E.2d 831 (1968); Wells v. Johnson, 118 Ga. App. 168, 162 S.E.2d 837 (1968); George v. Lee, 118 Ga. App. 302, 163 S.E.2d 262 (1968); Califon Constr. Co. v. Highland Apts., 224 Ga. 610, 163 S.E.2d 744 (1968); Collins v. Southside Lumber Co., 118 Ga. App. 342, 163 S.E.2d 755 (1968); Rockmart Fin. Co. v. High, 118 Ga. App. 351, 163 S.E.2d 758 (1968); Berg v. Berg, 118 Ga. App. 353, 163 S.E.2d 888 (1968); Nugent v. Willis, 118 Ga. App. 335, 163 S.E.2d 891 (1968); Babb v. International Shoe Co., 118 Ga. App. 346, 163 S.E.2d 893 (1968); Lloyd Indus., Inc. v. O'Neal Steel, Inc., 118 Ga. App. 377, 163 S.E.2d 894 (1968); Greene v. Atlantis Realty Co., 118 Ga. App. 400, 163 S.E.2d 895 (1968); Goldberg v. Monroe, 224 Ga. 693, 164 S.E.2d 123 (1968); Lamas Co. v. Baldwin, 118 Ga. App. 437, 164 S.E.2d 236 (1968); State Hwy. Dep't v. Rosenfeld, 118 Ga. App. 524, 164 S.E.2d 259 (1968); Clarke v. Robinson, 118 Ga. App. 525, 164 S.E.2d 260 (1968); Tenneco Oil Co. v. Mullis, 118 Ga. App. 540, 164 S.E.2d 312 (1968); Mize v. Rampey, 224 Ga. 806, 164 S.E.2d 816 (1968); Davis v. Dixon, 118 Ga. App. 587, 164 S.E.2d 875 (1968); Nevels v. Engram, 118 Ga. App. 644, 164 S.E.2d 916 (1968); Georgia Hwy. Express Co. v. Do-All Chem. Co., 118 Ga. App. 736, 165 S.E.2d 429 (1968); Terry v. Warner Robins Supply Co., 225 Ga. 5, 165 S.E.2d 731 (1969); Harris v. State, 118 Ga. App. 848, 166 S.E.2d 94 (1969); Housing Auth. v. Baker, 119 Ga. App. 109, 166 S.E.2d 437 (1969); D.G. Mach. & Gage Co. v. Hardy, 119 Ga. App. 194, 166 S.E.2d 580 (1969); Dorsey v. Hood, 119 Ga. App. 237, 166 S.E.2d 635 (1969); Nalley v. Aiken, 119 Ga. App. 406, 167 S.E.2d 239 (1969); McKinnon v. Neugent, 225 Ga. 215, 167 S.E.2d 593 (1969); Brundage v. Wilkins, 119 Ga. App. 529, 167 S.E.2d 612 (1969); Lowery v. Adams, 225 Ga. 248, 167 S.E.2d 636 (1969); D. Davis & Co. v. Plunkett, 119 Ga. App. 453, 167 S.E.2d 663 (1969); Davis v. Roper, 119 Ga. App. 442, 167 S.E.2d 685 (1969); McKenzie v. McKenzie, 225 Ga. 314, 168 S.E.2d 152 (1969); Knight v. William Summerlin Co., 119 Ga. App. 575, 168 S.E.2d 179 (1969); Carden v. LaGrone, 225 Ga. 365, 169 S.E.2d 168 (1969); Hobgood v. Mitchell, 119 Ga. App. 827, 169 S.E.2d 173 (1969); Shepherd v. Shepherd, 225 Ga. 455, 169 S.E.2d 314 (1969); O'Neal Steel, Inc. v. Smith, 120 Ga. App. 106, 169 S.E.2d 827 (1969); Floyd v. Floyd, 120 Ga. App. 292, 170 S.E.2d 310 (1969); Eastland v. Candler, 225 Ga. 585, 170 S.E.2d 422 (1969); Peacock Constr. Co. v. Turner Concrete, Inc., 120 Ga. App. 357, 170 S.E.2d 440 (1969); State Hwy. Dep't v. Rosenfeld, 120 Ga. App. 439, 170 S.E.2d 837 (1969); Glynn Plymouth, Inc. v. Davis, 120 Ga. App. 475, 170 S.E.2d 848 (1969); Hammock v. Hammock, 225 Ga. 698, 171 S.E.2d 314 (1969); Aikens v. State, 226 Ga. 34, 172 S.E.2d 430 (1970); Skylark Enters., Inc. v. Marsh & McLennan, Inc., 121 Ga. App. 235, 173 S.E.2d 421 (1970); Grimes v. Clark, 226 Ga. 195, 173 S.E.2d 686 (1970); Chrysler Motors Corp. v. Davis, 226 Ga. 221, 173 S.E.2d 691 (1970); Strayhorn v. Forsyth County Dep't of Family & Children Servs., 121 Ga. App. 444, 174 S.E.2d 216 (1970); Campbell v. Carroll, 121 Ga. App. 497, 174 S.E.2d 375 (1970); Veal v. Paulk, 121 Ga. App. 575, 174 S.E.2d 465 (1970); Barber v. Dunn, 226 Ga. 303, 174 S.E.2d 898 (1970); Brooks v. Holman, 121 Ga. App. 720, 175 S.E.2d 131 (1970); Merchants & Mfrs. Transf. Co. v. Auto Rental & Leasing, Inc., 121 Ga. App. 729, 175 S.E.2d 156 (1970); Thomas v. State, 226 Ga. 529, 175 S.E.2d 874 (1970); Pilgreen's Airport, Inc. v. Gold,

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285 S.E.2d 199 (1981); Coffey Enter. Realty & Dev. Co. v. DOT, 159 Ga. App. 903, 286 S.E.2d 44 (1981); Grantham v. Nelson, 160 Ga. App. 68, 286 S.E.2d 59 (1981); Atlanta News Agency, Inc. v. MacConochie Constr. Co., 160 Ga. App. 306, 287 S.E.2d 314 (1981); Theo v. DOT, 160 Ga. App. 518, 287 S.E.2d 333 (1981); City of Atlanta v. West, 160 Ga. App. 609, 287 S.E.2d 558 (1981); Georgia Farm Bureau Mut. Ins. Co. v. Stevenson, 160 Ga. App. 805, 287 S.E.2d 662 (1982); Cohran v. Jones, 160 Ga. App. 761, 288 S.E.2d 80 (1981); Cohran v. Carlin, 160 Ga. App. 762, 288 S.E.2d 81 (1981); Underhill v. Barnes, 161 Ga. App. 776, 288 S.E.2d 905 (1982); Teledyne Indus., Inc. v. Patron Aviation, Inc., 161 Ga. App. 596, 288 S.E.2d 911 (1982); Wiley v. Williams, 161 Ga. App. 601, 289 S.E.2d 27 (1982); Small v. Auto Rental & Leasing, Inc., 248 Ga. 665, 289 S.E.2d 246 (1981); Widener v. Ravenscroft, 161 Ga. App. 12, 289 S.E.2d 257 (1982); Fagala v. Morrison, 161 Ga. App. 655, 289 S.E.2d 528 (1982); Calloway v. Calloway, 161 Ga. App. 752, 289 S.E.2d 559 (1982); Lockman v. Catawba Ins. Co., 162 Ga. App. 244, 291 S.E.2d 99 (1982); In re L.B.B., 162 Ga. App. 257, 291 S.E.2d 108 (1982); Cohran v. Carlin, 249 Ga. 510, 291 S.E.2d 538 (1982); Equitable Life Assurance Soc'y v. Sullivan, 164 Ga. App. 552, 292 S.E.2d 567 (1982); Thomas v. Waldrup, 162 Ga. App. 721, 293 S.E.2d 354 (1982); Smiley v. State, 164 Ga. App. 12, 296 S.E.2d 209 (1982); Marshall Erdman & Assocs. v. Georgia State Bd. for Examination, Qualification & Registration of Architects, 164 Ga. App. 283, 296 S.E.2d 219 (1982); Northside Cleaners, Inc. v. Paleologou, 163 Ga. App. 827, 296 S.E.2d 361 (1982); Echols v. State, 163 Ga. App. 905, 296 S.E.2d 366 (1982); Wallace v. Scott, 164 Ga. App. 129, 296 S.E.2d 423 (1982); Westberry v. Saunders, 250 Ga. 240, 296 S.E.2d 596 (1982); Chadwick v. Frix, 165 Ga. App. 20, 299 S.E.2d 93 (1983); Fast Freight Transf., Inc. v. Buffington, 165 Ga. App. 138, 299 S.E.2d 422 (1983); Equitable Life Assurance Soc'y v. Sullivan, 165 Ga. App. 223, 299 S.E.2d 615, cert. denied, Wills v. McAuley, 166 Ga. App. 4, 303 S.E.2d 26, 251 Ga. 41, 305 S.E.2d 120 (1983); Georgia Farm Bureau Mut. Ins. Co. v. Ritchie, 165 Ga. App. 298, 300 S.E.2d 550 (1983); Whatley v. Blue Cross of Ga./Columbus, Inc., 165 Ga. App. 340, 301 S.E.2d 60 (1983); Smith v. Smith, 162 Ga. App. 532, 301 S.E.2d 696 (1983); Phillips Constr. Co. v. Cowart Iron Works, Inc., 165 Ga. App. 605, 302 S.E.2d 142 (1983); Porter v. Calhoun County Bd. of Comm'rs, 167 Ga. App. 53, 306 S.E.2d 58 (1983); Union Indem. Ins. Co. v. Cherokee Ins. Co., 168 Ga. App. 82, 308 S.E.2d 238 (1983); Regante v. Reliable-Triple Cee of N.J., Inc., 251 Ga. 629, 308 S.E.2d 372 (1983); Scott v. Liberty Mut. Ins. Co., 168 Ga. App. 815, 310 S.E.2d 772 (1983); Jones v. Singleton, 253 Ga. 41, 316 S.E.2d 154 (1984); Beckman v. Black, 170 Ga. App. 193, 316 S.E.2d 784 (1984); Howard v. Collins, 170 Ga. App. 362, 317 S.E.2d 630 (1984); Miller v. State, 171 Ga. App. 222, 319 S.E.2d 79 (1984); Schieffelin & Co. v. Strickland, 253 Ga. 385, 320 S.E.2d 358 (1984); United Food & Com. Workers Union v. Amberjack Ltd., 253 Ga. 438, 321 S.E.2d 736 (1984); Carter v. Landel/Arundel, Inc., 172 Ga. App. 115, 322 S.E.2d 108 (1984); Life for God's Stray Animals, Inc. v. New N. Rockdale County Homeowners Ass'n, 253 Ga. 551, 322 S.E.2d 239 (1984); State v. Cook, 172 Ga. App. 433, 323 S.E.2d 634 (1984); Welch v. State, 172 Ga. App. 654, 324 S.E.2d 488 (1984); Calhoun Clinic, P.C. v. Raju, 173 Ga. App. 320, 326 S.E.2d 529 (1985); Cable Holdings of Battlefield, Inc. v. Lookout Cable Serv., Inc., 173 Ga. App. 355, 326 S.E.2d 552 (1985); James v. Allen, 173 Ga. App. 636, 327 S.E.2d 501 (1985); Collier v. Rogers, 173 Ga. App. 621, 327 S.E.2d 588 (1985); Malpass v. State, 173 Ga. App. 690, 327 S.E.2d 753 (1985); Robinson v. Robinson, 174 Ga. App. 656, 331 S.E.2d 8 (1985); Olympic Dev. Group, Inc. v. American Druggists' Ins. Co., 175 Ga. App. 425, 333 S.E.2d 622 (1985); State v. Thomas, 176 Ga. App. 106, 335 S.E.2d 697 (1985); Pinyan v. Hamby, 176 Ga. App. 411, 336 S.E.2d 331 (1985); Boatright v. Sunshine Toyota, Inc., 177 Ga. App. 332, 339 S.E.2d 275 (1985); Brown v. Associates Fin. Servs. Corp., 255 Ga. 457, 339 S.E.2d 590 (1986); All Am. Assurance Co. v. Brown, 177 Ga. App. 402, 339 S.E.2d 611 (1985);

Butler v. Gray, 177 Ga. App. 498, 339 S.E.2d 769 (1986); Barikos v. Vanderslice, 177 Ga. App. 884, 341 S.E.2d 513 (1986); Nazerian v. City of McCaysville, 178 Ga. App. 27, 342 S.E.2d 11 (1986); Days Inn of Am., Inc. v. Sharkey, 178 Ga. App. 718, 344 S.E.2d 518 (1986); Sidwell v. Wheeler, 178 Ga. App. 732, 344 S.E.2d 527 (1986); Preferred Risk Mut. Ins. Co. v. Laube, 181 Ga. App. 579, 353 S.E.2d 203 (1987); Crolley v. State, 182 Ga. App. 2, 354 S.E.2d 864 (1987); Neal v. State, 182 Ga. App. 37, 354 S.E.2d 664 (1987); Powell v. State, 182 Ga. App. 123, 355 S.E.2d 72 (1987); Travelers Indem. Co. v. Schenden, 182 Ga. App. 735, 356 S.E.2d 761 (1987); Williams v. Natalie Townhouses of Inman Park Condominium Ass'n, 182 Ga. App. 815, 357 S.E.2d 156 (1987); Georgia Am. Ins. Co. v. Mills, 183 Ga. App. 707, 359 S.E.2d 697 (1987); Isaacs v. State, 257 Ga. 798, 364 S.E.2d 567 (1988); Hardman v. Hardman, 185 Ga. App. 519, 364 S.E.2d 645 (1988); Stewart v. State, 185 Ga. App. 647, 365 S.E.2d 498 (1988); Gourmet Delights, Inc. v. Edgewater Country Club, Inc., 185 Ga. App. 660, 365 S.E.2d 514 (1988); Crolley v. Johnson, 185 Ga. App. 671, 365 S.E.2d 277 (1988); Jonquil City Contractors v. Augustine, 186 Ga. App. 915, 369 S.E.2d 55 (1988); Leeks v. State, 188 Ga. App. 625, 373 S.E.2d 777 (1988); Atlanta Dev. Co. v. Peel & Sons, 189 Ga. App. 453, 377 S.E.2d 552 (1988); Baynes v. State, 189 Ga. App. 797, 377 S.E.2d 708 (1989); Simons v. Equitec Properties Co., 190 Ga. App. 804, 380 S.E.2d 90 (1989); Reese v. Georgia Power Co., 191 Ga. App. 125, 381 S.E.2d 110 (1989); Klein v. Standard Fire Ins. Co., 191 Ga. App. 417, 382 S.E.2d 158 (1989); LDS Social Servs. Corp. v. Richins, 191 Ga. App. 695, 382 S.E.2d 607 (1989); Abercrombie v. Miller, 191 Ga. App. 858, 383 S.E.2d 358 (1989); Camelback Mgt. Co. v. Phoenix Periodicals, Inc., 192 Ga. App. 101, 383 S.E.2d 651 (1989); Mitchell v. Wyatt, 192 Ga. App. 127, 384 S.E.2d 227 (1989); Friedman v. Friedman, 259 Ga. 530, 384 S.E.2d 641 (1989); McClure v. Gower, 259 Ga. 678, 385 S.E.2d 271 (1989); Pettus v. Paylay, Frank & Brown, 193 Ga. App. 335, 387 S.E.2d 613 (1989); DOT v. B & G Realty, Inc., 193 Ga. App. 649, 388 S.E.2d 749 (1989); First Union Nat'l Bank v. Cumberland Creek Country Club, 194 Ga. App. 332, 390 S.E.2d 422 (1990) ; Lewis v. McDowell, 194 Ga. App. 429, 390 S.E.2d 605 (1990); Barber v. Collins, 194 Ga. App. 385, 390 S.E.2d 633 (1990); Raymer v. Foster & Cooper, Inc., 195 Ga. App. 200, 393 S.E.2d 49 (1990); Monroe v. Brooks, 195 Ga. App. 310, 393 S.E.2d 463 (1990); Wallace v. Meyer, 260 Ga. 253, 394 S.E.2d 350 (1990); Miller v. Jeff Davis Apts., Ltd. II, 196 Ga. App. 600, 396 S.E.2d 494 (1990); Atlantic Wood Indus., Inc. v. Lumbermen's Underwriting Alliance, 196 Ga. App. 503, 396 S.E.2d 541 (1990); Acme Fence Co. v. DOT, 197 Ga. App. 187, 397 S.E.2d 622 (1990); International Serv. Ins. Co. v. Harter, 197 Ga. App. 481, 398 S.E.2d 705 (1990); Aetna Cas. & Sur. Co. v. Cantrell, 197 Ga. App. 672, 399 S.E.2d 237 (1990); Landor Condominium Consultants, Inc. v. Bankers First Fed. Sav. & Loan Ass'n, 198 Ga. App. 274, 401 S.E.2d 305 (1991); Williams v. Opriciu, 198 Ga. App. 663, 402 S.E.2d 744 (1991); Artis v. Gaither, 199 Ga. App. 114, 404 S.E.2d 322 (1991); Wood v. State, 199 Ga. App. 252, 404 S.E.2d 589 (1991); Hunter v. Roberts, 199 Ga. App. 318, 404 S.E.2d 645 (1991); Gillis v. Goodgame, 199 Ga. App. 413, 404 S.E.2d 815 (1991); In re J.B., 199 Ga. App. 593, 405 S.E.2d 574 (1991); Serco Co. v. Choice Bumper, Inc., 199 Ga. App. 846, 406 S.E.2d 276 (1991); Lawson v. Athens Auto Supply & Elec., Inc., 200 Ga. App. 609, 409 S.E.2d 60 (1991); Sorrentino v. Boston Mut. Life Ins. Co., 206 Ga. App. 771, 426 S.E.2d 594 (1992); Lumbermen's Underwriting Alliance v. Atlantic Wood Indus., Inc., 207 Ga. App. 392, 427 S.E.2d 861 (1993); Wilson v. Southern Ry., 208 Ga. App. 598, 431 S.E.2d 383 (1993); Commerce Properties, Inc. v. Linthicum, 209 Ga. App. 853, 434 S.E.2d 769 (1993); Fairburn Banking Co. v. Gafford, 263 Ga. 792, 439 S.E.2d 482 (1994); Marshall v. Ricmar, Inc., 215 Ga. App. 470, 451 S.E.2d 515 (1994); Richardson v. GMC, 221 Ga. App. 583, 472 S.E.2d 143 (1996); Gist v. DeKalb Tire Co., 223 Ga. App. 397, 477 S.E.2d 616 (1996); Gray v. Springs, 224 Ga. App. 427, 481 S.E.2d 3 (1997); Andemeskel v. Waffle House, Inc., 227 Ga. App. 887, 490 S.E.2d 550 (1997); Postell v. State, 233 Ga. App. 800, 505 S.E.2d 782 (1998); Fulton County Tax Comm'r v.

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GMC, 234 Ga. App. 459, 507 S.E.2d 772 (1998); Reliance Ins. Co. v. Cobb County, 235 Ga. App. 685, 510 S.E.2d 129 (1998); Simmons Co. v. Deutsche Fin. Servs. Corp., 243 Ga. App. 85, 532 S.E.2d 436 (2000); Cobb Ctr. Pawn & Jewelry Brokers, Inc. v. Gordon, 242 Ga. App. 73, 529 S.E.2d 138 (2000); Keller v. State, 242 Ga. App. 150, 529 S.E.2d 167 (2000); Sprayberry v. Dougherty County, 273 Ga. 503, 543 S.E.2d 29 (2001); ARA Health Servs. v. Stitt, 250 Ga. App. 420, 551 S.E.2d 793 (2001); Chambers v. Gwinnett Community Hosp., Inc., 253 Ga. App. 25, 557 S.E.2d 412 (2001); Benedict v. Snead, 253 Ga. App. 749, 560 S.E.2d 278 (2002); St. Paul Fire & Marine Ins. Co. v. Clark, 255 Ga. App. 14, 566 S.E.2d 2 (2002); S. Healthcare Sys. v. Health Care Capital Consol., Inc., 275 Ga. 247, 563 S.E.2d 132 (2002); The Ltd., Inc. v. Learning Childbirth Ctr., Inc., 255 Ga. App. 688, 566 S.E.2d 411 (2002); DeKalb County v. Adams, 262 Ga. App. 243, 585 S.E.2d 178 (2003); Minor v. Barwick, 264 Ga. App. 327, 590 S.E.2d 754 (2003); Swanson v. Swanson, 276 Ga. 566, 580 S.E.2d 526 (2003); TJW Enters. v. Henry County, 261 Ga. App. 547, 583 S.E.2d 144 (2003); Frantz v. Piccadilly Place Condo. Ass'n, 278 Ga. 103, 597 S.E.2d 354 (2004); Williams v. Trammell, 281 Ga. App. 590, 636 S.E.2d 757 (2006); DaimlerChrysler v. Ferrante, 281 Ga. 273, 637 S.E.2d 659 (2006); Dierkes v. Crawford Orthodontic Care, P.C., 284 Ga. App. 96, 643 S.E.2d 364 (2007); Langfitt v. Jackson, 284 Ga. App. 628, 644 S.E.2d 460 (2007); Humphrey v. Wilson, 282 Ga. 520, 652 S.E.2d 501 (2007); McKesson Corp. v. Green, 286 Ga. App. 110, 648 S.E.2d 457 (2007); In the Interest of E.W., 290 Ga. App. 95, 658 S.E.2d 854 (2008); Ansley Marine Constr., Inc. v. Swanberg, 290 Ga. App. 388, 660 S.E.2d 6 (2008); Korowotny v. Outback Prop. Owners Ass'n, 291 Ga. App. 236, 661 S.E.2d 857 (2008); Ayer v. Norfolk Timber Inv., LLC, 291 Ga. App. 409, 662 S.E.2d 221 (2008); Spinner v. City of Dallas, 292 Ga. App. 251, 663 S.E.2d 815 (2008); Bunn v. State, 284 Ga. 410, 667 S.E.2d 605 (2008); City of Decatur v. DeKalb County, 284 Ga. 434, 668 S.E.2d 247 (2008); White v. Shamrock Bldg. Sys., 294 Ga. App. 340, 669 S.E.2d 168 (2008); Sampler v. State, 294 Ga. App. 174, 669 S.E.2d 195 (2008); Haygood v. Tilley, 295 Ga. App. 90, 670 S.E.2d 800 (2008); Treu v. Humanism Inv., Inc., 284 Ga. 657, 670 S.E.2d 409 (2008); Century Ctr. at Braselton, LLC v. Town of Braselton, 285 Ga. 380, 677 S.E.2d 106 (2009); State, DOT v. Douglas Asphalt Co., 297 Ga. App. 511, 677 S.E.2d 728 (2009); Anthony Hill Grading, Inc. v. SBS Invs., LLC, 297 Ga. App. 728, 678 S.E.2d 174 (2009); Croft v. Croft, 298 Ga. App. 303, 680 S.E.2d 150 (2009); State v. Burks, 285 Ga. 781, 684 S.E.2d 269 (2009); Harris v. Williams, 304 Ga. App. 390, 696 S.E.2d 131 (2010); Avery Enters. v. Lyndhurst Builders, LLC, 304 Ga. App. 353, 696 S.E.2d 389 (2010); Lumsden v. Williams, 307 Ga. App. 163, 704 S.E.2d 458 (2010); Nelson v. Bd. of Regents of the Univ. Sys. of Ga., 307 Ga. App. 220, 704 S.E.2d 868 (2010); Burnett v. State, 309 Ga. App. 422, 710 S.E.2d 624 (2011); Pierce v. State, 289 Ga. 893, 717 S.E.2d 202 (2011); Blackmore v. Blackmore, 311 Ga. App. 885, 717 S.E.2d 504 (2011); Ellington v. State, 292 Ga. 109, 735 S.E.2d 736 (2012); Heidt v. State, 292 Ga. 343, 736 S.E.2d 384 (2013).

What Are Final, Appealable Judgments

Constitutionality of law appealable from oral ruling. — Distinct, oral ruling, reflected in a transcript is sufficient and need not be reduced to writing in order to invoke the Supreme Court of Georgia's exclusive appellate jurisdiction in cases in which the constitutionality of a law has been drawn into question. Jenkins v. State, 284 Ga. 642, 670 S.E.2d 425 (2008).

Dismissal of complaint against one of two defendants for failure to set forth facts establishing venue as to that defendant not a final, appealable judgment, as the action remained pending against the other defendant. Coley Fertilizer Co. v. Gold Kist, Inc., 174 Ga. App. 471, 330 S.E.2d 597 (1985).

Dismissal of complaint against one of two defendants. — Order entered by a county superior court which stated that the plaintiff had no claim against a county sheriff but allowed the filing of the plain-

tiff's complaint against a county law enforcement employee does not constitute a final order of disposition from which the plaintiff may appeal. Howard v. Wilkes, 191 Ga. App. 239, 382 S.E.2d 434 (1989).

Because an insured could not use a voluntary dismissal of one of the defendants as the vehicle for appellate review of rulings entered by the trial court more than 30 days from the filing of the notice of appeal, and no other final appealable ruling existed in the record, the insured's appeal was dismissed based on the appellate court's lack of jurisdiction. Waye v. Continental Special Risks, Inc., 289 Ga. App. 82, 656 S.E.2d 150 (2007), cert. denied, 2008 Ga. LEXIS 392 (Ga. 2008).

Dismissal of complaint without dismissal of counterclaim. — Voluntary dismissal of a complaint by a party is not a final judgment within the meaning of O.C.G.A. § 5-6-34 where a counterclaim filed by the other side was never actually dismissed. Memorial Medical Ctr., Inc. v. Moore, 184 Ga. App. 176, 361 S.E.2d 49 (1987); Chatham County Hosp. Auth. v. Mack, 185 Ga. App. 13, 363 S.E.2d 264 (1987).

Dismissal of claims when other claims pending not appealable order. — Trial court's order dismissing claims was not an appealable final order because claims remained pending in the trial court, and the trial court did not direct entry of final judgment; additionally, there was no compliance with interlocutory appeals procedure. Church v. Bell, 213 Ga. App. 44, 443 S.E.2d 677 (1994); Financial Inv. Group, Inc. v. Cornelison, 238 Ga. App. 223, 516 S.E.2d 844 (1999).

Dismissal of complaint without prejudice for failure to file an expert's affidavit was a final judgment as to the defendants and was appealable under paragraph (a)(1) of O.C.G.A. § 5-6-34. Jordan, Jones & Goulding, Inc. v. Balfour Beatty Constr., Inc., 246 Ga. App. 93, 539 S.E.2d 828 (2000).

Verdict form was not an appealable final judgment. — "Verdict form" entered by the trial court in April 2008 did not constitute an appealable final judgment under O.C.G.A. § 5-6-34 so that a notice of appeal was untimely. The trial court specifically entered final judgment in July 2008, and the notice of appeal was filed within 30 days of that date. Sunstate Indus. v. VP Group, Inc., 298 Ga. App. 269, 679 S.E.2d 824 (2009).

Denial of a protective order. — Granting of a protective order denying the defendant's discovery motion left the defendant with no further recourse entitling the defendant to a direct appeal. R.J. Reynolds Tobacco Co. v. Fischer, 207 Ga. App. 292, 427 S.E.2d 810 (1993).

Partial taking condemnation order. — Because a partial taking condemnation order was not otherwise a final appealable judgment within the meaning of O.C.G.A. § 5-6-34(a), and the parties could have appealed by complying with the relevant interlocutory appeal requirements, but did not do so, the appeals court lacked jurisdiction to consider either the appeal or the cross-appeal; moreover, the superior court's rulings on the admissibility of certain evidence constituted no judgment on the merits of any part of the appealing party's claim for just and adequate compensation. Forest City Gun Club v. Chatham County, 280 Ga. App. 219, 633 S.E.2d 623 (2006).

New trial for fewer than all defendants. — Both the order granting the plaintiffs a new trial as to one defendant and the order denying the defendants' motion for a new trial as to the other defendant were nonfinal and interlocutory orders and, as such, did not otherwise finally dispose of the plaintiffs' motion for new trial so as to render the underlying judgment in favor of both defendants final and directly appealable by those defendants. Crumbley v. Wyant, 183 Ga. App. 802, 360 S.E.2d 276, cert. denied, 183 Ga. App. 905, 360 S.E.2d 276 (1987).

Lack of notice of trial. — Ruling on a motion to set aside the verdict and judgment for a new trial based on a lack of notice of trial is subject to direct review as a motion for a new trial when the lack of notice is based on a defect not appearing upon the face of the record. Hill v. Bailey, 187 Ga. App. 413, 370 S.E.2d 520 (1988).

In absence of any judgment, ruling, or order rendered by court on motions for summary judgment and for certification of the action as a class action, the motions and other enumerations of

What Are Final, Appealable Judgments (Cont'd)

alleged error dependent upon rulings on the motions are not yet ripe for review by the appellate courts. Stoddard v. Board of Tax Assessors, 173 Ga. App. 467, 326 S.E.2d 827 (1985).

Because the notice of appeal divested the trial court of jurisdiction, and thereby established the permissible parameters of the case on appeal, the order denying the motion for reconsideration was ineffective and did not constitute a judgment, ruling, or order rendered in the case within the meaning of O.C.G.A. § 5-6-34(d). State v. White, 282 Ga. 859, 655 S.E.2d 575 (2008).

Denial of a motion to intervene is not a final judgment; thus, it is reviewable under the interlocutory appeal procedure. Morman v. Board of Regents, 198 Ga. App. 544, 402 S.E.2d 320 (1991).

Trial court's order denying a motion to recuse was not a "final judgment," and required an application for interlocutory review. Rolleston v. Glynn County Bd. of Tax Assessors, 213 Ga. App. 552, 445 S.E.2d 345 (1994).

Denial of request for appellate counsel. — Because the defendant failed to file a timely direct appeal of the denial of the defendant's request for appellate counsel, the defendant was precluded from raising the same issue again; further, the defendant had withdrawn from the appellate court the record from the original appeal, and therefore the appellate court did not know whether the defendant attempted to raise the issue of appellate counsel during the defendant's initial appeal; as the initial appeal had been decided, the issue was moot under O.C.G.A. § 5-6-48(b)(3). Spear v. State, 271 Ga. App. 845, 610 S.E.2d 642 (2005).

Grant of motion to set aside judgment, like grant of motion for new trial, leaves case still pending in court below and thus is not a final judgment. Franklin v. Collins, 162 Ga. App. 755, 293 S.E.2d 364 (1982); Hooper v. Taylor, 230 Ga. App. 128, 495 S.E.2d 594 (1998).

When default judgment is set aside by trial court based on finding that the trial court never acquired jurisdiction over nonresident defendants but when no dismissal motion has in fact been filed and no dismissal ordered, and there is no compliance with interlocutory appeal procedures, the appeal is premature and must be dismissed. Walton v. Collins, 172 Ga. App. 736, 324 S.E.2d 574 (1984).

Grant of an application to compel arbitration is not equitable in nature, but operates merely to stay further proceedings in a pending action when entered by the court in which the action is pending and is incidental to the power inherent in every court to control the disposition of the causes on the court's docket with economy of time and effort for itself, for counsel, and for litigants. Consequently, the order granting motion to compel arbitration did not constitute an equitable injunction directly appealable pursuant to paragraph (a)(4) of O.C.G.A. § 5-6-34, but resolves an interlocutory matter reviewable pursuant to subsection (b) of this section. McAllister v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 212 Ga. App. 697, 443 S.E.2d 9 (1994).

Grant of an application to compel arbitration is not directly appealable pursuant to paragraph (a)(4) of O.C.G.A. § 5-6-34, but is instead an interlocutory matter reviewable pursuant to subsection (b) which requires obtaining a certificate of immediate review from the trial court. Pace Constr. Corp. v. Northpark Assocs., 215 Ga. App. 438, 450 S.E.2d 828 (1994); Goshayeshi v. Mehrabian, 232 Ga. App. 81, 501 S.E.2d 265 (1998).

Superior court's order dismissing an action by homeowners for the appointment of an arbitrator and referring the parties to arbitration before an entity specified in the homeowners' arbitration agreement with the homeowners' builders was a final order dismissing the original action in the action's entirety, and the case was no longer pending in the superior court. Therefore, the judgment was directly appealable under O.C.G.A. § 5-6-34(a)(1). Torres v. Piedmont Builders, Inc., 300 Ga. App. 872, 686 S.E.2d 464 (2009).

Appeal from mandamus directly appealable. — Court order requiring a county to approve a landfill did not involve zoning, but the county's decision under O.C.G.A. § 12-8-25 to prevent a landfill

close to its border, and an appeal from the order was considered an appeal from the grant of a writ of mandamus, which is a direct appeal. Long v. FSL Corp., 268 Ga. 479, 490 S.E.2d 102 (1997).

Denial of motion for acquittal based on § 17-7-170 appealable. — Although not technically a final judgment, the denial of a motion to dismiss (more properly, a motion for acquittal) based upon O.C.G.A. § 17-7-170 is directly appealable under subsection (a) of O.C.G.A. § 5-6-34. Cook v. State, 183 Ga. App. 720, 359 S.E.2d 716 (1987).

Denial of motion to set aside is appealable as a matter of right. Dudley v. Monsour, 155 Ga. App. 269, 270 S.E.2d 686 (1980).

Denial of a motion to set aside is not a final appealable judgment when a counterclaim is still pending. The appeal must be dismissed, notwithstanding a final judgment has since been entered in the case, when no appeal has been filed thereafter. Gulf Oil Co. v. Mantegna, 167 Ga. App. 844, 307 S.E.2d 732 (1983).

Although the denial of a motion to set aside a judgment was ordinarily subject to the discretionary appeal procedure, O.C.G.A. § 5-6-35(a)(8), the denial of a stepson's motion to set aside was reviewable in conjunction with the stepson's appeal from the superior court's judgment reviewing the probate court's decision because the superior court's judgment reviewing the probate court's decision was directly appealable under O.C.G.A. § 5-6-34(a)(1). Bocker v. Crisp, 313 Ga. App. 585, 722 S.E.2d 186 (2012).

Order setting aside default judgment is final in establishing liability of appellee, and it is appealable notwithstanding the fact that there was no final adjudication of the case in the lower court. Byrd v. Moore Ford Co., 116 Ga. App. 292, 157 S.E.2d 41 (1967).

Judgment on complaint in equity setting aside default judgment is a final judgment, and appeals from it are not subject to dismissal when the appeals emanate from the same court, involve the same parties, and pertain to the same default judgment. Cochran v. Levitz Furn. Co., 249 Ga. 504, 291 S.E.2d 535 (1982).

Order granting a motion for entry of a default judgment against the grantee of property transferred by a judgment debtor, setting aside the deed from the debtor to the grantee, and placing the property back in the name of the debtor, was a final judgment within the meaning of O.C.G.A. § 5-6-34. Forrister v. Manis Lumber Co., 232 Ga. App. 370, 501 S.E.2d 606 (1998).

Order denying a motion for entry of a default judgment. — Appeal of an order denying a motion for a default judgment was reviewable because the order denying the motion for default judgment made findings of fact which barred the relief requested by the movant. The order left no issues remaining to be resolved, and constituted the trial court's final ruling on the merits of the action; the trial court left the parties with no further recourse in that court, in such circumstances, the order was a final judgment and the appeal was within the jurisdiction of the Court of Appeals of Georgia. Standridge v. Spillers, 263 Ga. App. 401, 587 S.E.2d 862 (2003).

Appeal from order denying motion to dismiss indictment was dismissed. — Because the trial court's order denying the defendant's motion to dismiss an indictment on immunity grounds under O.C.G.A. § 16-3-24.2 was not a final appealable order, the criminal matter was still pending below, and no other reason under O.C.G.A. § 5-6-34 was presented allowing an appeal from the order, the defendant's appeal was dismissed. Crane v. State, 281 Ga. 635, 641 S.E.2d 795 (2007).

Post-judgment interrogatories. — Direct appeal of an order to respond to post-judgment interrogatories was improper, since the disputed discovery remained unanswered, and therefore, matters remained pending, so that the trial court's order was not final, and therefore appealable only by compliance with subsection (b) of O.C.G.A. § 5-6-34. Cornelius v. Finley, 204 Ga. App. 299, 418 S.E.2d 815 (1992); Dial v. Bent Tree Nat'l Bank, 215 Ga. App. 620, 451 S.E.2d 533 (1994).

Declaratory judgments have the force and effect of final judgments and are reviewable as such. Sunstates Refrigerated Servs., Inc. v. Griffin, 215 Ga. App. 61, 449 S.E.2d 858 (1994).

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Order directing accounting. — Paragraph (a)(3) of O.C.G.A. § 5-6-34, allowing direct appeal of a judgment or order "directing that an accounting be had," does not provide for a direct appeal of all orders appointing an auditor; thus, the relief requested in the complaint must be reviewed to determine the appropriateness of a direct appeal. Parmar v. Khera, 215 Ga. App. 71, 449 S.E.2d 894 (1994).

In a declaratory judgment action for dissolution of a partnership, an accounting, and damages, direct appeal of a sua sponte order for the appointment of an auditor was appropriate. Parmar v. Khera, 215 Ga. App. 71, 449 S.E.2d 894 (1994).

Order denying application for leave to file quo warranto is an appealable judgment under subsection (a) of this section. Thibadeau v. Henley, 233 Ga. 884, 213 S.E.2d 657 (1975).

Order finding contempt. — Direct appeal may be taken from an order holding one in contempt of court. Manning v. MNC Consumer Disct. Co., 212 Ga. App. 824, 442 S.E.2d 919 (1994).

Refusal to grant written motion for speedy trial. — Refusal by judge of superior court to grant to the defendant in a criminal case not affecting the defendant's life the defendant's written motion for speedy trial pursuant to a constitutional right thereto is an appealable judgment. Reid v. State, 116 Ga. App. 640, 158 S.E.2d 461 (1967).

Overruling of general demurrer (now motion to dismiss) to election contest proceeding is appealable. Blackburn v. Hall, 115 Ga. App. 235, 154 S.E.2d 392 (1967).

Voluntary dismissal. — Plaintiff's own voluntary dismissal with prejudice of counts of the plaintiff's complaint did not constitute a final, appealable judgment for purposes of appellate review of rulings on the partial grant of summary judgment entered by the trial court more than 30 days from the filing of the notice of appeal. Studdard v. Satcher, Chick, Kapfer, Inc., 217 Ga. App. 1, 456 S.E.2d 71 (1995).

Order denying motion to strike voluntary dismissal is appealable. Pizza Ring Enters., Inc. v. Mills Mgt. Sources, Inc., 154 Ga. App. 45, 267 S.E.2d 487 (1980).

Order merely stating "defendant's motion to dismiss is granted." — When court did not use language "dismissed," or "petition is dismissed," but merely "defendant's motion to dismiss is hereby granted," this was a final judgment within meaning of section. Lawler v. Georgia Mut. Ins. Co., 156 Ga. App. 265, 276 S.E.2d 646 (1980); Becker v. Fairman, 167 Ga. App. 708, 307 S.E.2d 520 (1983), overruled on other grounds.

Denial of motion authorized by Ga. L. 1967, p. 226, §§ 26, 27, 30 (see O.C.G.A. § 9-11-60) to set aside and vacate judgment was final and appealable under former Code 1933, § 6-701 (see O.C.G.A. § 5-6-34). Farr v. Farr, 120 Ga. App. 762, 172 S.E.2d 158 (1969).

Judgment on petition for writ of habeas corpus is a final judgment from which appeal can and must be taken within 30 days after judgment is rendered. Dismuke v. State, 229 Ga. 347, 190 S.E.2d 915 (1972).

Judgment that no compensation is to be paid to condemnor in condemnation proceeding. — When property is condemned and judgment provides that no compensation is to be paid by the condemnor, there is no question to be presented to the jury as to value, and such judgment is final and subject to review without certificate. City of Atlanta v. Turner Adv. Co., 234 Ga. 1, 214 S.E.2d 501 (1975).

Dismissal of appeal by trial court from order granting interlocutory injunction. — Because this section allows direct appeal from order granting interlocutory injunction, dismissal of such appeal by trial court is likewise appealable without certificate of review. Azar v. Baird, 232 Ga. 81, 205 S.E.2d 273 (1974).

Deferred ruling on request for interlocutory relief. — Trial court's decision to defer a ruling until a jury determined issues of fact effectively denied the plaintiff's request for interlocutory relief and was equivalent to a refusal to grant an application for an interlocutory injunction, and the decision was directly appealable. Georgia Power Co. v. Hunt, 266 Ga.

331, 466 S.E.2d 846 (1996).

Denial of injunctive relief against zoning board. — Appeal from denial of injunction filed to enforce a zoning ordinance was not a superior court review of an administrative decision; it was therefore directly appealable under paragraph (a)(4) of O.C.G.A. § 5-6-34, and did not fall under the purview of O.C.G.A. § 5-6-35(a)(1) so as to require the grant of an application for discretionary appeal. Harrell v. Little Pup Dev. & Constr., Inc., 269 Ga. 143, 498 S.E.2d 251 (1998).

Denial of a motion to compel arbitration. — Although the denial of a motion to compel arbitration is subject to interlocutory appeal under subsection (b) of O.C.G.A. § 5-6-34, the denial may also be appealed after final judgment. Choate Constr. Co. v. Ideal Elec. Contractors, 246 Ga. App. 626, 541 S.E.2d 435 (2000).

Lender's direct appeal from an order denying the lender's motion to compel arbitration of a dispute under a loan agreement as to a borrower's spouse and the borrower's cross-appeal from the same order were dismissed because such an order was not appealable except as an interlocutory appeal under O.C.G.A. § 5-6-34(b), which was not preempted by 9 U.S.C. § 16(a)(1)(B) of the Federal Arbitration Act, 9 U.S.C. §§ 1-16; therefore, the order was not directly appealable and the appellate court lacked jurisdiction over both appeals. American Gen. Fin. Servs. v. Vereen, 282 Ga. App. 663, 639 S.E.2d 598 (2006).

Georgia's procedural prohibition on the direct appeal of an order denying a motion to compel arbitration is not preempted by the provisions for direct appeal in 9 U.S.C. § 16(a)(1)(B) of the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16, because Georgia's prohibition on the direct appeal of such an order does not undermine the purposes or objectives of the FAA to enforce arbitration agreements; the certification of such an order for immediate appeal pursuant to O.C.G.A. § 5-6-34(b) provides parties with an avenue for seeking appellate review that is not inconsistent with the objectives of the FAA to enforce legitimate arbitration agreements, and while the denial of an application for interlocutory appeal may delay arbitration, such a delay is not tantamount to the failure to enforce valid arbitration agreements contrary to the objectives of the FAA. American Gen. Fin. Servs. v. Vereen, 282 Ga. App. 663, 639 S.E.2d 598 (2006).

Order requiring action that can affect rights of parties. — Order is appealable if the order requires action that can affect rights of parties to the litigation. Such order is in nature of interlocutory mandatory injunction which is appealable. Padgett v. Cowart, 232 Ga. 633, 208 S.E.2d 455 (1974).

Denial of motion to vacate class determination arbitration award. — Trial court's order denying a company's motion to vacate a class determination arbitration award was a final one under O.C.G.A. § 5-6-34(a)(1). Once the trial court concluded that the company did not comply with the limitation period set forth in O.C.G.A. § 9-9-13(a), nothing remained for the trial court's consideration; therefore, an appeal could not be considered interlocutory, and the company was not required to file an application for discretionary appeal as a prerequisite to the appellate court obtaining jurisdiction. Cypress Communs., Inc. v. Zacharias, 291 Ga. App. 790, 662 S.E.2d 857 (2008).

Judgment of reversal by the superior court is not a final judgment within the meaning of paragraph (a)(1) of O.C.G.A. § 5-6-34 when the case is remanded to the lower tribunal for further consideration. Mayor of Hinesville v. Gastin, 178 Ga. App. 776, 344 S.E.2d 744 (1986).

Denial of a plea in bar asserting immunity from prosecution pursuant to O.C.G.A. § 19-7-5(d) does not constitute a final judgment, nor is the order otherwise directly appealable. Austin v. State, 179 Ga. App. 235, 345 S.E.2d 688 (1986).

Order overruling defendant's traverse in garnishment proceedings was a final judgment when the court ordered funds paid into the court to be distributed. Perry v. Freeman, 163 Ga. App. 186, 293 S.E.2d 381 (1982).

Pretrial order granting a motion to cancel a notice of lis pendens falls within the small class of cases beyond the confines of the final-judgment rule and is

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directly appealable. Scroggins v. Edmondson, 250 Ga. 430, 297 S.E.2d 469 (1982).

Denial of motion to enter valid judgment of sentence. — Trial court's denial of a defendant's motion to enter a valid judgment of sentence is subject to appeal to the Court of Appeals under O.C.G.A. § 5-6-34(a). Barraco v. State, 252 Ga. App. 25, 555 S.E.2d 244 (2001).

Sentence prerequisite to appeal. — Appellate court erred in dismissing the defendant's appeal of a multi-count case since the case was not final and subject to appeal until a sentence had been entered on each count of the indictment for which the defendant was found guilty. Keller v. State, 275 Ga. 680, 571 S.E.2d 806 (2002).

Because the trial court did not either enter a written sentence or enter a written notation that the count merged into another for purposes of sentencing, the defendant's case was not ripe for appeal, even though the trial court did enter a written judgment of conviction and sentence on other counts of the indictment. Bass v. State, 284 Ga. App. 331, 643 S.E.2d 851 (2007).

Denial of timely filed plea of double jeopardy is appealable without resort to the interlocutory appeal procedures of subsection (b) of O.C.G.A. § 5-6-34, when the plea is filed sufficiently in advance of trial so as not to constitute a delaying device. Patterson v. State, 248 Ga. 875, 287 S.E.2d 7 (1982).

Timely filed plea of double jeopardy is directly appealable without resort to the interlocutory appeal procedures set forth in O.C.G.A. § 5-6-34. Rogers v. State, 166 Ga. App. 299, 304 S.E.2d 108 (1983).

Denial of the defendant's double jeopardy pleas may be appealed without application and certification, which otherwise would be required under subsection (b) of O.C.G.A. § 5-6-34. Young v. State, 251 Ga. 153, 303 S.E.2d 431 (1983).

Timely filed appeal from the denial of a plea of former jeopardy may be made directly to the Court of Appeals. Nave v. State, 166 Ga. App. 466, 304 S.E.2d 491 (1983).

Denial of a plea of former jeopardy is directly appealable without resort to interlocutory appeal procedures. Bishop v. State, 176 Ga. App. 357, 335 S.E.2d 742 (1985).

Denial of double jeopardy claim without written order. — Appeal from the denial of a claim of former jeopardy regarding which there was no written order was subject to dismissal, since there was no entry of judgment. Bishop v. State, 176 Ga. App. 357, 335 S.E.2d 742 (1985).

State has a right to appeal the grant of a plea in bar based on double jeopardy. State v. Stowe, 167 Ga. App. 65, 306 S.E.2d 663 (1983).

Denial of motion to dismiss based on speedy trial statute. — Denial of a motion to dismiss based upon O.C.G.A. § 17-7-170 is directly appealable under subsection (a) of O.C.G.A. § 5-6-34. Hubbard v. State, 254 Ga. 694, 333 S.E.2d 827 (1985).

Criminal defendant is not required to follow the interlocutory procedures of subsection (b) of O.C.G.A. § 5-6-34 when appealing, prior to the conclusion of a trial on the merits, from the denial of a plea in bar based on O.C.G.A. § 17-7-170. Hubbard v. State, 254 Ga. 694, 333 S.E.2d 827 (1985).

Complaint terminated by grant of motion for summary judgment. — When the plaintiff's complaint for an order setting aside or modifying the investigative demand under subsection (c) of O.C.G.A. § 10-1-403 has been terminated by the grant of the motion for summary judgment of Administrator of the Office of Consumer Affairs, the judgment upon this statutory complaint is final and therefore is appealable. Tri-State Bldg. & Supply, Inc. v. Reid, 251 Ga. 38, 302 S.E.2d 566 (1983).

Trial court's denial of the defendant's motion to dismiss the plaintiff's appeal, following a grant of summary judgment to the defendant, was not interlocutory but was directly appealable. ITT Terryphone Corp. v. Modems Plus, Inc., 171 Ga. App. 710, 320 S.E.2d 784 (1984).

Court's supplemental order was the grant of a mandatory injunction and was appealable. — Court's supplemen-

tal order directing a county to place an employee in another position was the grant of a mandatory injunction and was directly appealable, even though the entire case lacked finality because of a pending claim for lost wages. Glynn County v. Waters, 268 Ga. 500, 491 S.E.2d 370 (1997).

Order finding children deprived. — When the juvenile court entered an order finding certain children deprived, but made no final disposition with regard to the custody of the children, no final order has been entered in the case, there is nothing for the Court of Appeals to review, and the appeal must be dismissed. In re M.K.C., 166 Ga. App. 261, 304 S.E.2d 430 (1983).

Order within a deprivation proceeding awarding temporary custody of a child to the child's paternal grandmother for a period of 24 months was a "final order" within the meaning of O.C.G.A. § 5-6-34(a)(1), from which the mother properly took a direct appeal within 30 days from the entry thereof; deprivation proceedings did not fall within the scope of O.C.G.A. § 5-6-35(a)(2), so no application for appellate review was required. In the Interest of S.J., 270 Ga. App. 598, 607 S.E.2d 225 (2004).

Temporary order changing custody directly appealable. — Mother was permitted to appeal a temporary order changing custody of the parties' children to the father without complying with O.C.G.A. §§ 5-6-34(b) and 5-6-35 because § 5-6-34 provided that all modifications of child custody orders filed on or after January 1, 2008 were directly appealable and were no longer subject to the interlocutory appeal procedures. Taylor v. Curl, 298 Ga. App. 45, 679 S.E.2d 80 (2009).

Because an order modified the custody of a mother's children, the order was directly appealable under O.C.G.A. § 5-6-34(a)(11) and was not subject to the interlocutory or discretionary appeal procedures. Long v. Long, 303 Ga. App. 215, 692 S.E.2d 811 (2010).

Order discontinuing reunification between parent and child was appealable. — In a deprivation case, an order of the juvenile court authorizing a county department of family and children services to discontinue efforts to reunite a child and her mother was a final appealable judgment. In re S.A.W., 228 Ga. App. 197, 491 S.E.2d 441 (1997).

Ruling on petition to modify visitation was child custody case. — As a parent's petition to modify a visitation schedule was a "child custody case" for purposes of O.C.G.A. § 5-6-34(a)(11), and as the legislature intended to remove child custody cases from the operation of O.C.G.A. § 5-6-35(a)(2) when the legislature excised references to such cases from that statute, the parent was entitled to file a direct appeal from the trial court's final judgment on the petition. Moore v. Moore-McKinney, 297 Ga. App. 703, 678 S.E.2d 152 (2009).

Court had jurisdiction to hear appeal of child support modification. — Appellate court believed that the father was entitled to appeal the child support portion of the order that modified both visitation and child support. While the appeal in this case strictly dealt with the child support award, this award was rendered in a child custody case and was directly appealable under O.C.G.A. § 5-6-34(11). Collins v. Davis, 318 Ga. App. 265, 733 S.E.2d 798 (2012).

Dismissal of petition to change custody different proceeding from case involving family violence petitions. — Appellate court lacked jurisdiction to review the trial court's order dismissing the father's petition to change custody because the order was a final judgment issued in a separate case from that involving the family violence petitions and the father failed to file the application for review within the required time period. Perlman v. Perlman, 318 Ga. App. 731, 734 S.E.2d 560 (2012).

Judgment granting plea of insanity. — When a plea of insanity was granted and the defendant was transferred to the Department of Human Resources (DHR), the DHR could appeal directly without following the interlocutory appeal procedure. Georgia Dep't of Human Resources v. Drust, 264 Ga. 514, 448 S.E.2d 364 (1994).

Fieri facias is not an order of final judgment tolling the time for appeal. Newton v. K.B. Property Mgt. of Ga., Inc.,

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166 Ga. App. 901, 306 S.E.2d 5 (1983).

Superior court order remanding a case back to the administrative tribunal does not constitute a final judgment. State Health Planning Review Bd. v. Piedmont Hosp., 173 Ga. App. 450, 326 S.E.2d 814 (1985).

Order declaring that defendants had not defaulted with respect to a settlement agreement and ordering the parties to comply with the terms of the agreement did not constitute a final judgment when the order did not expressly provide either that the action was dismissed or that the plaintiffs receive judgment in accordance with the terms of the agreement. Zeitman v. McBrayer, 201 Ga. App. 767, 412 S.E.2d 287 (1991).

Appeal of order finding no further unresolved issues. — Under O.C.G.A. § 5-6-34(a)(1), all prior rulings of the trial court were reviewable because the first partner timely appealed from the trial court's order finding that there were no further unresolved issues in a partnership dissolution case. Barnaby v. Scott, 299 Ga. App. 691, 683 S.E.2d 333 (2009), cert. denied, No. S10C0027, 2010 Ga. LEXIS 51 (Ga. 2010).

Imposition of first-offender status. — Court of Appeals lacks jurisdiction to entertain an appeal from a conviction upon imposition of first-offender status absent a written trial court order imposing first offender status upon the defendant or a written judgment of conviction and sentence. Littlejohn v. State, 185 Ga. App. 31, 363 S.E.2d 327 (1987).

Request for clarification. — Trial court order expressing uncertainty as to the meaning of an appellate court's opinion in remanding a case was not a directly appealable final judgment, since it did not address a pending motion for judgment but only constituted a request by the trial court for clarification. Nationwide Mut. Ins. Co. v. Glaccum, 200 Ga. App. 108, 407 S.E.2d 90 (1991).

Trial court's order remanding case for hearing before the county board of equalization to allow the taxpayer to participate at the hearing regarding a property assessment was not a "final judgment," and required an application for interlocutory review. Rolleston v. Glynn County Bd. of Tax Assessors, 213 Ga. App. 552, 445 S.E.2d 345 (1994).

Materialman's action on a lien against property was not an action for damages necessitating a discretionary appeal from a judgment on the pleadings and the fact that the property owners chose to post a bond to satisfy any judgment on the lien did not change the nature of the underlying action. Kelly v. Pierce Roofing Co., 220 Ga. App. 391, 469 S.E.2d 469 (1996).

Order to pay rent pending appeal. — Similar to a postjudgment order requiring the posting of a supersedeas bond, a postjudgment order requiring the payment of rent pending appeal under O.C.G.A. § 44-7-56 is subject to direct appeal, as there is nothing left to be decided in the trial court. Owens v. Green Tree Servicing LLC, 300 Ga. App. 22, 684 S.E.2d 99 (2009).

Failure of superior court to fully adjudicate case on appeal from probate court. — When, in an appeal from an order of the probate court denying an executor's petition for compensation under O.C.G.A. § 53-6-143, the superior court's judgment, holding that the commission allowed as compensation was two and one half percent of the value of the property delivered in kind but not setting forth the property's value, was not final, as no final award of compensation was made, and the executor was required to follow interlocutory appeal procedures. Clark v. Davis, 242 Ga. App. 425, 530 S.E.2d 49 (2000).

Order denying substitution was not a final appealable order. — Trial court's order denying substitution of the decedent's administrator as a party, in place of the decedent, was not a final appealable order and as such did not dismiss the complaint, but left issues remaining to be resolved. Williams v. City of Atlanta, 263 Ga. App. 113, 587 S.E.2d 261 (2003).

State could directly appeal from an order granting defendant's post-conviction motion for deoxyribonucleic acid (DNA) testing by an uncertified laboratory because the defen-

dant filed only a post-conviction motion and did not file an extraordinary motion for new trial; the trial court ruled on the merits of the only pending motion, there was no issue remaining, and a direct appeal would not create absurd results. State v. Clark, 273 Ga. App. 411, 615 S.E.2d 143 (2005).

Juvenile court's recommendations as to custody not appeallable. — When a juvenile court's finding as to custody is in the nature of a recommendation to the superior court, the custody issue remains pending below and is not before the appellate court on appeal. In the Interest of M.E., 265 Ga. App. 412, 593 S.E.2d 924 (2004).

Ruling on will construction. — Because a superior court's ruling in a probate matter was directed solely to the will construction issue placed before the court by a removal proceeding pursuant to O.C.G.A. § 53-7-75, after which the superior court returned the case to the probate court, because the administration of the estate remained pending, the superior court order was not a final judgment, and since the decedent's daughter failed to comply with the interlocutory procedures in O.C.G.A. § 5-6-34(b), the appellate court was without jurisdiction to hear an appeal brought by the daughter. Bandy v. Elmo, 280 Ga. 221, 626 S.E.2d 505 (2006).

Delinquency adjudication. — Defendant juvenile's appeal of an order denying a motion to reconsider, vacate, or modify the delinquent adjudication was proper because the denial of the motion was a final judgment and was directly appealable; therefore, the defendant could appeal the ruling on disposition as well as on the original finding of delinquency. An order denying a motion under O.C.G.A. § 15-11-40(b) seeking a modification based on changed circumstances in a delinquency matter is a final judgment directly appealable under O.C.G.A. §§ 5-6-34(a)(1) and 15-11-3. In the Interest of J. L. K., 302 Ga. App. 844, 691 S.E.2d 892 (2010).

Order of disposition entered upon revocation of a juvenile's probation. — Provisions of O.C.G.A. § 5-6-35(a)(5) and (d) do not apply to appeals from orders revoking juveniles' probation because orders of disposition under O.C.G.A. § 15-11-65(a) are final judgments, directly appealable under O.C.G.A. § 5-6-34(a)(1); therefore, an order of disposition entered upon the revocation of a juvenile's probation was directly appealable and the Court of Appeals of Georgia had jurisdiction over such an appeal. In the Interest of N.M., 316 Ga. App. 649, 730 S.E.2d 127 (2012).

Compliance with the requirement of subsection (b). — In reviewing cases on appeal the court will not pass upon questions on which no final ruling has ever been made by the trial judge or when there is no compliance with the requirement of O.C.G.A. § 5-6-34(b) that the trial court certify the court's order for immediate review. Smith & Wesson v. City of Atlanta, 273 Ga. 431, 543 S.E.2d 16 (2001).

Opposing party's failure to appeal any alleged error regarding the sanctions order entered against the opposing party after a final judgment was entered in the declaratory judgment action in which the sanctions order was entered precluded the opposing party from challenging an error regarding entry of the sanctions order when the opposing party later appealed the contempt order entered against the opposing party for willfully violating the sanctions order by admittedly not paying the amount specified in that order. Franklin v. Gude, 259 Ga. App. 521, 578 S.E.2d 170 (2003).

No requirement to appeal within 30 days when order appealed from not final judgment. — Trial court erred in denying the children's petition for writ of mandamus to compel a judge to allow the children to appeal from the order dismissing the children's appeals because the judge's prior orders were not final judgments within the meaning of O.C.G.A. § 5-6-34(a)(1); thus, the children were not required to appeal from the rulings within 30 days after entry in order to preserve the children's right to pursue appellate review under O.C.G.A. § 5-6-38(a). Sotter v. Stephens, 291 Ga. 79, 727 S.E.2d 484 (2012).

Rulings Not Appealable Without Certificate

1. In General

Refusal to stay proceedings in another case. — When, in a ruling on a request for a restraining order, interlocutory injunction, and stay of proceedings in another case, the court simply refused to stay the proceedings in the other case, concluding that the court had no jurisdiction to do so, such order was not one which refused an interlocutory injunction and the interlocutory appeal procedure of O.C.G.A. § 5-6-34 applied. Grange Mut. Cas. Co. v. Riverdale Apts., 218 Ga. App. 685, 463 S.E.2d 46 (1995).

Dismissal proper as judgment not final. — Appeal taken from two orders that appeared to be non-final, was dismissed; moreover, as no certificate of immediate review was obtained, and since no amendment was filed to correct the defect in the notice of appeal, no other recourse remained. Southwest Health & Wellness, LLC v. Work, 282 Ga. App. 619, 639 S.E.2d 570 (2006).

Order denying motion to suppress evidence is not a final judgment within subsection (a) of this section. Cody v. State, 116 Ga. App. 331, 157 S.E.2d 496 (1967); Holton v. State, 173 Ga. App. 249, 326 S.E.2d 240 (1985); Genter v. State, 218 Ga. App. 311, 460 S.E.2d 879 (1995).

Denial of motion for change of venue is not a final judgment and there is no provision for appeal therefrom without certificate of immediate review. Brooks v. State, 229 Ga. 593, 194 S.E.2d 256 (1972).

Order transferring a case from one county's superior court to another county's superior court is not a final judgment because the case is still pending in the court below. The order is thus interlocutory and not appealable without a certificate of immediate review from the lower court and an appropriate application to the Court of Appeals. Griffith v. Georgia Bd. of Dentistry, 175 Ga. App. 533, 333 S.E.2d 647 (1985).

Grant of motions for change of venue. — Insureds were authorized to bring the insureds' action against an insurer, seeking uninsured motorist coverage, in the county of insured's residence pursuant to O.C.G.A. § 33-4-1(4) and, accordingly, the trial court erred in transferring their case to another county pursuant to the insurer's motion alleging improper venue; the matter of whether venue was proper was reviewable by the appellate court pursuant to O.C.G.A. § 5-6-34(d) when the insureds' matter had been dismissed by the trial court and the insureds' sought review thereof. Morton v. Fuller, 264 Ga. App. 799, 592 S.E.2d 460 (2003).

Grant of motion to set aside judgment, like grant of motion for new trial, leaves case still pending in court and thus is not a final judgment. Mayson v. Malone, 122 Ga. App. 814, 178 S.E.2d 806 (1970).

Orders regarding garnishment judgments. — Neither order overruling, nor order granting motion to set aside judgment against garnishee is final. Finch v. Kilgore, 120 Ga. App. 320, 170 S.E.2d 304 (1969).

Pretrial bail order. — When the defendant failed to follow the requisite interlocutory procedures to appeal the order setting the defendant's pretrial bond, the defendant's direct appeal was dismissed for lack of jurisdiction. Wimberly v. State, 235 Ga. App. 388, 508 S.E.2d 699 (1998).

Order denying motion to require that garnishment bond be strengthened is not a final judgment from which appeal will lie under subsection (a) of this section, and a review of order can be had only under certificate of trial judge as is provided in subsection (b) of this section. Wilson v. Wilson, 130 Ga. App. 175, 202 S.E.2d 681 (1973).

Order vacating prior order substituting parties is not a final judgment since the order merely leaves issues therein involved open for further determination. Thus, absent certificate of immediate review question will not be considered by court. Franklin v. Sea Island Bank, 120 Ga. App. 654, 171 S.E.2d 866 (1969).

When a court order expressly provided that attorney fees were awarded for the cost of bringing a motion for sanctions, and that damages for bad faith were yet to be determined, it was not an appealable judgment within the meaning of O.C.G.A. § 5-6-34 and, absent a certificate of reviewability, the notice of appeal as to

that order was premature and properly dismissed. Northen v. Mary Anne Frolick & Assocs., 235 Ga. App. 804, 510 S.E.2d 122 (1998).

Order granting writ of possession is not final within meaning of subsection (a) of this section. Golden v. Gray, 156 Ga. App. 596, 275 S.E.2d 162 (1980).

Directed verdict or order sustaining motion for directed verdict is not appealable as judgment and not verdict is the appealable decision. Roderiguez v. Newby, 130 Ga. App. 139, 202 S.E.2d 565 (1973).

Order overruling motion relating to temporary alimony. — Appeal from order overruling the husband's motion to declare as null and void any further proceedings in matter relating to temporary alimony and child custody is not one which may be appealed to the Supreme Court or the Court of Appeals without a certificate for immediate review. Hatcher v. Hatcher, 229 Ga. 252, 190 S.E.2d 535 (1972).

Appeal from temporary alimony order. — Party seeking appellate review of an order awarding temporary alimony must comply with the interlocutory appeal procedure of O.C.G.A. § 5-6-34. Bailey v. Bailey, 266 Ga. 832, 471 S.E.2d 213 (1996).

Order dismissing party. — When there has been no express determination of no just reason for delay or direction that order for entry of judgment is final, providing for immediate appeal, or issuance of certificate as provided for by subsection (b) of this section, an appeal is premature. Dismissal of a party is no different from order precluding intervenor from becoming a party. American Mut. Liab. Ins. Co. v. Moore, 120 Ga. App. 624, 171 S.E.2d 751 (1969).

Unless court in order dismissing one of multiple defendants makes express determination of finality as set out in Ga. L. 1966, p. 609, § 54 (see O.C.G.A. § § 9-11-54(b)), case was still pending in trial court and procedure for interlocutory appeals must be followed. Home Mart Bldg. Centers, Inc. v. Wallace, 139 Ga. App. 49, 228 S.E.2d 22 (1976).

Order granting one codefendant's motion to dismiss and an order denying the plaintiff's motion to vacate the order of dismissal were not appealable as final orders because the case remained pending against the other codefendants. Knowles v. Old Spartan Life Ins. Co., 213 Ga. App. 204, 444 S.E.2d 136 (1994).

Order disqualifying counsel. — Order disqualifying the plaintiff's counsel was not directly appealable. Lassiter Properties, Inc. v. Davidson Mineral Properties, Inc., 230 Ga. App. 216, 495 S.E.2d 663 (1998).

Overruling special demurrer. — Objections to overruling a special demurrer are reviewable by the appellate courts under the interlocutory appeal procedures of subsection (b) of O.C.G.A. § 5-6-34, or after conviction. Ivey v. State, 210 Ga. App. 782, 437 S.E.2d 810 (1993).

Order interpreting settlement agreement. — Wife did not file a declaratory judgment action since the wife sought guidance with respect to provisions in a settlement agreement in order to compel a husband to provide the wife with additional funds; as the trial court's decision was interlocutory and the wife did not secure a certificate of immediate review, the discretionary appeal to resolve whether the trial court's declaratory ruling was appealable as a final judgment was dismissed. Gelfand v. Gelfand, 281 Ga. 40, 635 S.E.2d 770 (2006).

When ex contractu and ex delicto actions are joined, dismissal of one leaves other pending. — When ex contractu and ex delicto actions are joined in the same complaint, but ex delicto count is dismissed by trial judge, ex contractu count still remains; therefore, cause is still pending in court below, and appeal would be premature. Stephens v. United Trust Life Ins. Co., 118 Ga. App. 514, 164 S.E.2d 335 (1968).

Order sustaining or overruling objections to interrogatories. — While orders denying or requiring answers to interrogatories are reviewable on appeal after final judgment if they have affected final judgment and are not moot, an order sustaining or overruling objections to interrogatories is merely interlocutory and not being a final judgment such order is not an appealable judgment. Louisville & N.R.R. v. Clark, 114 Ga. App. 755, 152 S.E.2d 694 (1966).

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1. In General (Cont'd)

Order for interrogatories or depositions is an interlocutory order. General Recording Corp. v. Chadwick, 136 Ga. App. 213, 220 S.E.2d 697 (1975).

Order compelling a party to answer interrogatories and requests to produce, with sanctions, is not subject to direct appeal and requires a certificate of immediate review. American Express Co. v. Yondorf, 169 Ga. App. 498, 313 S.E.2d 756 (1984).

Appeal from superior court's review of use and enforcement of investigative powers of the board of medical examiners required discretionary appeal procedures. Rankin v. Composite State Bd. of Medical Exmrs., 220 Ga. App. 421, 469 S.E.2d 500 (1996).

Judgment denying intervention is not an appealable judgment and a motion to dismiss an appeal must be granted. Henderson v. Atlanta Transit Sys., 233 Ga. 82, 210 S.E.2d 4 (1974); Prison Health Servs., Inc. v. Georgia Dep't of Admin. Servs., 265 Ga. 810, 462 S.E.2d 601 (1995).

Appeal which merely challenges party's right to intervene in action falls within subsection (b) of this section which allows appeal from order, decision, or judgment not otherwise subject to direct appeal only when trial judge certifies it for immediate review. Harrison v. Hawkins, 228 Ga. 522, 186 S.E.2d 779 (1972).

Because the great-grandparents failed to follow the interlocutory appeal procedure outlined in O.C.G.A. § 5-6-34(b) in appealing an order denying their motion to intervene in a deprivation action, the case remained pending below, and no final order had been entered, the great-grandparent's appeal from that denial was dismissed. In the Interest of H.E.M., 283 Ga. App. 354, 641 S.E.2d 597 (2007).

Judgment sustaining or dismissing plea in abatement is not such a final judgment as can be made subject of appeal within meaning of section. Peach v. State, 116 Ga. App. 703, 158 S.E.2d 701 (1967).

Ruling on plea of abatement on ground that similar suit between same parties is pending. — Sustaining or overruling of plea in abatement on ground that there is another suit pending between same parties on same cause of action is not a final judgment from which an appeal can be taken. Richard's Buick, Inc. v. Sease, 116 Ga. App. 232, 156 S.E.2d 365, aff'd, 223 Ga. 754, 158 S.E.2d 402 (1967).

Judgment overruling plea to jurisdiction is not included in those named in this section, from which appeal may be taken. Carlisle v. Carlisle, 227 Ga. 221, 179 S.E.2d 769 (1971).

Judgment denying plea of insanity is not subject to direct appeal unless trial judge certifies judgment for immediate review. Spell v. State, 120 Ga. App. 398, 170 S.E.2d 701 (1969); Spell v. State, 225 Ga. 705, 171 S.E.2d 285 (1969).

Order of court overruling and dismissing plea of res judicata is not such an order, judgment, or ruling from which an appeal may be taken, without trial judge certifying matter to be of such importance that immediate review should be had. General Shoe Corp. v. Hood, 119 Ga. App. 648, 168 S.E.2d 326 (1969).

Overruling of defendant's plea in bar which leaves case pending for trial is not a final judgment from which an appeal can be taken, absent certificate for immediate review. Bruce v. State, 122 Ga. App. 159, 176 S.E.2d 515 (1970); Partain v. State, 138 Ga. App. 171, 225 S.E.2d 736 (1976).

Denial of motion for judgment notwithstanding mistrial is not a judgment or decision from which an appeal may be taken without first obtaining a certificate for immediate review from the trial judge. Phillips v. State, 153 Ga. App. 410, 265 S.E.2d 293 (1980).

Denial of prayers of traverse. — When the trial court denies prayers of traverse and the defendant attempts to appeal this order, but fails to obtain a certificate of review as required by subsection (b) of this section, the appeal shall be dismissed. Southern Cross Disct. Co. v. W.R. Bean & Son, 123 Ga. App. 363, 180 S.E.2d 926 (1971).

Failure of court to declare act of legislature unconstitutional is not a final judgment and, therefore, in absence

of certificate of trial court, is not appealable. Lane v. Morrison, 226 Ga. 526, 175 S.E.2d 830 (1970).

Orders subject to revision. — When orders are subject to revision, appeals are premature. Davis v. Transairco, Inc., 141 Ga. App. 544, 234 S.E.2d 134 (1977).

Grant of relief from supersedeas of permanent injunction is not an appealable judgment. Fulford v. Fulford, 225 Ga. 510, 170 S.E.2d 27 (1969).

Order entered following delinquency adjudicatory hearing under Code 1933, § 24-2409 (see O.C.G.A. § 15-11-15) was not a final judgment appealable under former Code 1933, § 6-701 (see O.C.G.A. § 5-6-34), but was instead merely an order entered in a pretrial hearing similar to an arraignment. D.C.E. v. State, 130 Ga. App. 724, 204 S.E.2d 481 (1974).

Appeal from deprivation hearing rulings absent entry of final written order. — When the appellant brought a direct appeal from the juvenile court's rulings on the issues of the appellant's delinquency and a transfer for the appellant's prosecution in the superior court made in the context of a deprivation hearing, and the record showed that no final written order as to the appellant's deprivation had ever been entered, the deprivation case is still pending in the juvenile court so that any rulings made in that case are interlocutory and, accordingly, the appellant's appeal was dismissed for lack of jurisdiction. In re J.B., 191 Ga. App. 797, 383 S.E.2d 184 (1989).

Divorce granted on pleadings by order leaving other issues for decision in trial court, is an interlocutory, not a final, order. Carr v. Carr, 238 Ga. 197, 232 S.E.2d 69 (1977).

Entry of judgment as to one or more but fewer than all claims or parties is not a final judgment under subsection (a) of this section and lacks res judicata effect unless the trial court makes express direction for entry of final judgment and determination that no just reason for delaying finality of judgment exists. Culwell v. Lomas & Nettleton Co., 242 Ga. 242, 248 S.E.2d 641 (1978); Wise v. Georgia State Bd. for Examination, Qualification & Registration of Architects, 244 Ga. 449, 260 S.E.2d 477 (1979); Gresham Park Community Org. v. Howell, 652 F.2d 1227 (5th Cir. 1981).

Orders or judgments which do not address all claims not appealable. — In absence of express determination by court that there is no just reason for delay and express direction for entry of judgment, no order or decision which adjudicates with respect to fewer than all claims or all parties is final or appealable. Roderiguez v. Newby, 130 Ga. App. 139, 202 S.E.2d 565 (1973).

When there is a case involving multiple parties or multiple claims, a decision adjudicating fewer than all the claims or the rights and liabilities of less than all the parties is not a final judgment. In such circumstances, there must be an express determination under O.C.G.A. § 9-11-54(b) (judgments), or there must be compliance with the requirements of subsection (b) of O.C.G.A. § 5-6-34. When neither of these sections are followed, an appeal is premature and must be dismissed. Spivey v. Rogers, 167 Ga. App. 729, 307 S.E.2d 677 (1983); Johnson v. Hospital Corp. of Am., 192 Ga. App. 628, 385 S.E.2d 731, cert. denied, 192 Ga. App. 902, 385 S.E.2d 731 (1989); King v. Bishop, 198 Ga. App. 622, 402 S.E.2d 307, cert. denied, 198 Ga. App. 898, 402 S.E.2d 307 (1991).

Because an order transferring venue entered judgment as to fewer than all of the claims or parties in the action, it was not a final judgment under paragraph (a)(1) of O.C.G.A. § 5-6-34, and as a result, in order for an appeal to be possible, it would have been necessary for the plaintiffs to request certification from the trial judge, within ten days of entry of the order, that it was of such importance to the case that immediate review should be had. Jenkins v. National Union Fire Ins. Co., 650 F. Supp. 609 (N.D. Ga. 1986).

Judgment against defendant with right in plaintiff to present evidence as to unliquidated damages, leaves case pending, and appeal is premature. Black v. Sturdivant, 131 Ga. App. 698, 206 S.E.2d 526 (1974).

Judgment of condemnation not final while appeal to jury as to value is pending. — When appeal to jury as to

Rulings Not Appealable Without Certificate (Cont'd)
1. In General (Cont'd)

value is pending, judgment of condemnation under special master's condemnation procedure is not a final judgment subject to review in absence of certificate as provided for by subsection (b) of this section. City of Atlanta v. Turner Adv. Co., 234 Ga. 1, 214 S.E.2d 501 (1975).

Ruling on motion to purge jury is interlocutory and outside definition of those judgments or orders listed in this section which entitle party to an appeal. Ruth v. Kennedy, 117 Ga. App. 632, 161 S.E.2d 410 (1968).

When trial of suit results in mistrial, there is no final judgment in case. Selman's Express, Inc. v. Wright, 119 Ga. App. 752, 168 S.E.2d 658 (1969).

Trial court's rulings declaring a mistrial and making pretrial rulings for a new trial involving a judgment debtor did not fall within the provisions of O.C.G.A. § 5-6-34(d) and were not appealable; the case against the debtor remained pending below, although other claims involving the debtor's transferees had been resolved by a jury and were final. Chapman v. Clark, 313 Ga. App. 820, 723 S.E.2d 51 (2012).

Verdict is not an appealable decision or judgment within purview of section. Williams v. Keebler, 222 Ga. 437, 150 S.E.2d 674, answer conformed to, 114 Ga. App. 332, 151 S.E.2d 483 (1966); Teppenpaw v. Blalock, 121 Ga. App. 320, 173 S.E.2d 442, aff'd, 226 Ga. 619, 176 S.E.2d 711 (1970).

When there is only an appeal from a jury verdict, and no description of an appealable judgment or order, there is nothing to review, and the Court of Appeals has no jurisdiction since it is a court for corrections of errors of law alone. Interstate Fire Ins. Co. v. Chattam, 222 Ga. 436, 150 S.E.2d 618, answer conformed to, 114 Ga. App. 332, 151 S.E.2d 486 (1966).

Verdict of jury is not an appealable judgment under section, regardless of whether the verdict resulted from direction or was by deliberation. Hurst v. Starr, 226 Ga. 42, 172 S.E.2d 604 (1970).

Appeal from judgment on verdict brought while motion for new trial is pending is premature and will be dismissed. Smith v. Smith, 128 Ga. App. 29, 195 S.E.2d 269 (1973).

Case remains pending where no ruling on motions, defenses and counterclaims. — When the appellant has filed motions, defenses, and counterclaims pursuant to Ga. L. 1975, p. 1213, § 3 (see O.C.G.A. §§ 44-14-267 and 44-14-268) and no ruling by trial judge had been made thereon, such issues have not been finally determined and case was still pending in court below. Golden v. Gray, 156 Ga. App. 596, 275 S.E.2d 162 (1980).

Letter from an official within the office of the commissioner of the department of revenue was not an agency "decision" within the meaning of paragraph (a)(1) of O.C.G.A. § 5-6-34. Ford Motor Co. v. Collins, 257 Ga. 310, 357 S.E.2d 567 (1987).

Allegations of fraud. — When there are no allegations of fraud in the complaint paragraph (a)(5) of O.C.G.A. § 5-6-34 does not apply. Thomas v. Barnett Bank, 203 Ga. App. 472, 416 S.E.2d 902 (1992).

Determination of liability without determination of damages. — There having been no compliance with interlocutory appeal procedures of subsection (b) of O.C.G.A. § 5-6-34, a judgment is not final, and hence not appealable, either with respect to the codefendant's case or with respect to the case as a whole when the underlying issue of liability has been determined against only the codefendant, but the determination of damages is unsettled. Havischak v. Neal, 176 Ga. App. 203, 335 S.E.2d 469 (1985).

Order to pay past due rent. — In dispossessory proceeding, order requiring appellant to pay to appellee certain past due rent was not a final judgment when, although the trial court indicated that if stipulated sums were not paid a writ of possession would be issued, the record did not reveal actual entry of a writ of possession. Rivera v. Housing Auth., 163 Ga. App. 648, 295 S.E.2d 336 (1982), cert. denied, 250 Ga. 461, 299 S.E.2d 39 (1983).

Trial court's denial of the defendant's demurrer making a constitutional challenge to the method of notifi-

cation used by the Department of Public Safety in revoking a driver's license will not be reviewed when the defendant fails to make an application for interlocutory appeal. Webster v. State, 251 Ga. 465, 306 S.E.2d 916 (1983).

Denial of a motion for pretrial bail is an interlocutory matter requiring a defendant to follow the interlocutory procedure set forth in subsection (b) of O.C.G.A. § 5-6-34. Howard v. State, 194 Ga. App. 857, 392 S.E.2d 562 (1990); Mullinax v. State, 271 Ga. 112, 515 S.E.2d 839 (1999).

Order denying discovery is premature in the absence of a certificate of immediate review; therefore, the interlocutory appeal procedure set forth in subsection (b) of O.C.G.A. § 5-6-34 is mandated. Rogers v. Department of Human Resources, 195 Ga. App. 118, 392 S.E.2d 713 (1990); Hayes v. State, 207 Ga. App. 520, 428 S.E.2d 425 (1993).

Orders denying state's motions to allow similar transaction evidence and for reconsideration not directly appealable. — Supreme court could not review the trial court's denial of the state's motion to allow similar transaction evidence and its motion for reconsideration because neither of these rulings was directly appealable; when the state appeals from one or more orders listed in O.C.G.A. § 5-7-1(a), O.C.G.A. § 5-6-34(d) does not authorize appellate review of any other ruling in the case because § 5-6-34(d) was not intended to apply to appeals pursuant to § 5-7-1 et seq. since the General Assembly deliberately omitted from § 5-6-34(d) appeals taken or authorized under § 5-7-1. State v. Lynch, 286 Ga. 98, 686 S.E.2d 244 (2009).

Order denying motion for reconsideration is interlocutory order that, just as any other interlocutory order, can be the subject of an application for interlocutory appeal if a certificate of immediate review is obtained from the trial court. Mayor of City of Savannah v. Norman J. Bass Constr. Co., 264 Ga. 16, 441 S.E.2d 63 (1994).

Orders on the basis of qualified immunity. — Except in clear cases, trial courts should issue a certificate of immediate review under subsection (b) of O.C.G.A. § 5-6-34for interlocutory orders denying dismissal or judgment on the basis of qualified immunity. Turner v. Giles, 264 Ga. 812, 450 S.E.2d 421 (1994), cert. denied, 514 U.S. 1108, 115 S. Ct. 1959, 131 L. Ed. 2d 851 (1995).

Application to appeal required. — Defendant's direct appeal from a trial court's grant of partial summary judgment in favor of the plaintiff was dismissed for lack of jurisdiction because an application to appeal under O.C.G.A. § 5-6-35(a) was required but not submitted. Bullock v. Sand, 260 Ga. App. 874, 581 S.E.2d 333 (2003).

Order granting a criminal defendant a new trial. — Upon an appeal by the state from an order granting the defendant a new trial, because the state failed to obtain a certificate of immediate review pursuant to O.C.G.A. § 5-7-2, the state's attempted appeal was nugatory and did not activate the appellate jurisdiction of the Supreme Court of Georgia. Accordingly, that appeal was dismissed. State v. Ware, 282 Ga. 676, 653 S.E.2d 21 (2007).

2. Motions to Dismiss

Judgments overruling motions to dismiss and motions for judgment on pleadings are not final or appealable judgments without certificate for immediate review, and such certificate must be obtained within ten-day period from entry of judgment or judgments sought to be appealed. Turner v. Harper, 231 Ga. 175, 200 S.E.2d 748 (1973).

Motion to dismiss accusation was not a final judgment from which appeal could be taken, absent a certificate of immediate review. — When the defendant was charged with abandoning the defendant's two minor children and filed a motion to dismiss the accusation, asserting general grounds, the trial court properly denied the motion to dismiss, because the defendant did not comply with the interlocutory appeal procedure prescribed by subsection (b) of O.C.G.A. § 5-6-34; the overruling of the defendant's motion to dismiss the accusation, leaving the case pending for trial, was not a final judgment from which an appeal could be taken, absent a certificate of immediate review. Boyd v. State, 191 Ga. App. 435,

Rulings Not Appealable Without Certificate (Cont'd)
2. Motions to Dismiss (Cont'd)

383 S.E.2d 906 (1989).

Overruling of motion to dismiss for failure to state claim leaves action pending in trial court for further proceedings and, therefore, is not appealable. Padgett v. Cowart, 232 Ga. 633, 208 S.E.2d 455 (1974).

In absence of certificate for immediate review, an appeal, from orders of trial court overruling defendant's motion to dismiss for failure to state a claim and motion to dismiss complaint on pleadings, is premature and must be dismissed. Osborne v. Welch, 119 Ga. App. 853, 168 S.E.2d 897 (1969).

Denial of motion to dismiss as final appealable order. — In a declaratory judgment action, when the trial court entered an order denying a motion to dismiss the actions in effect granting partial summary judgment, a direct appeal could be taken from what appeared to be a final order addressing the issues raised in the petition for declaratory judgment. Spivey v. Safeway Ins. Co., 210 Ga. App. 775, 437 S.E.2d 641 (1993).

Order denying motion to dismiss for lack of jurisdiction is an interlocutory order, which is not appealable without certificate of immediate review. Davis v. Davis, 242 Ga. 322, 249 S.E.2d 90 (1978).

Denial of motion to dismiss when case still pending. — Interlocutory appeal procedures must be followed to appeal from the denial of a motion to dismiss when the case is still pending below. Pace Constr. Corp. v. Northpark Assocs., 215 Ga. App. 438, 450 S.E.2d 828 (1994).

Motion to dismiss based on speedy trial violation. — Trial court properly denied the defendant's motion to dismiss the indictment because the defendant failed to follow the interlocutory appeal procedures of O.C.G.A. § 5-6-34(b), the defendant waited over five years to assert the defendant's right to a speedy trial, and failed to show that the defendant had been prejudiced by the delay. Sosniak v. State, 292 Ga. 35, 734 S.E.2d 362 (2012).

Denial of motion to dismiss appointment of auditor. — Subsection (a) of this section makes no provision for appealing denial of motion to dismiss appointment of auditor. Roberts v. Roberts, 228 Ga. 293, 185 S.E.2d 376 (1971).

Judgment denying motion to reconsider order overruling motions to dismiss. — Judgment denying the defendant's motion to reconsider a previous order of court overruling the defendant's demurrers (now motions to dismiss) to the plaintiff's petition is not an appealable judgment. LeCraw v. L.P.D., Inc., 114 Ga. App. 281, 150 S.E.2d 927 (1966).

Dismissal based on a motion not supported by evidence is not final and directly appealable unless, as a result, the case is no longer pending in the court below. McGregor v. Stachel, 200 Ga. App. 324, 408 S.E.2d 118 (1991).

Order sustaining motion to dismiss plea of nudum pactum. — Order sustaining general demurrer (now motion to dismiss) to defendant's plea of nudum pactum is not a final judgment and is therefore not appealable. Parish v. Georgia R.R. Bank & Trust Co., 115 Ga. App. 540, 154 S.E.2d 750 (1967).

Order granting motion to dismiss prayer of petition. — When demurrer (now motion to dismiss) to one of the prayers of petition is sustained and prayer is ordered deleted from the petition and the petition redrawn, such order is not a final judgment or such other ruling, judgment, or order as will support an appeal. Strickland v. English, 114 Ga. App. 731, 152 S.E.2d 705 (1966).

Judgment sustaining motion to dismiss and allowing time to amend. — While judgment sustaining general demurrer (now motion to dismiss) operates as a dismissal in absence of provision allowing time in which to amend, such dismissal, when time to amend is allowed, does not become effective until time for amendment has elapsed, and appeal prior thereto is premature. Black v. Miller, 113 Ga. App. 10, 147 S.E.2d 57, later appeal, 114 Ga. App. 208, 150 S.E.2d 466 (1966).

Orders dismissing defendant's third-party complaint and denying motion to add third-party defendant as party defendant are neither final nor appealable without certificate for immediate review. Von Waldner v. Baldwin/

Cheshire, Inc., 133 Ga. App. 23, 209 S.E.2d 715 (1974).

Order granting dismissal when counterclaim remained pending. — Because an order dismissing a complaint, which left a counterclaim pending before the trial court, was not subject to the exception to the final judgment rule for grants of partial summary judgment, and the plaintiffs failed to follow the procedures for obtaining a certificate of immediate review under O.C.G.A. § 5-6-34(b), the plaintiffs' appeal from the dismissal had to be dismissed as well. First Christ Holiness Church, Inc. v. Owens Temple First Christ Holiness Church, Inc., 282 Ga. 883, 655 S.E.2d 605 (2008).

Appealability of dismissal as to some defendants. — When several defendants are sued jointly on joint cause of action, and there is a final dismissal as to some of the defendants, judgment of dismissal cannot be reviewed until final termination of the action; but when several defendants are sued jointly, but not on a joint cause of action, judgment of dismissal is such a final judgment as can be reviewed immediately. Sanders v. Culpepper, 226 Ga. 598, 176 S.E.2d 83 (1970).

Appeal from order dismissing or striking party to joint action will lie, without obtaining a certificate of appealability from trial judge, when cause of action is either several or joint and several. Robinson v. Bomar, 122 Ga. App. 564, 177 S.E.2d 815 (1970), overruled on other grounds, Leggett v. Benton Bros. Drayage & Storage Co., 138 Ga. App. 761, 227 S.E.2d 397 (1976).

Appeal from order dismissing claim is premature when counterclaim is pending in court below. Cleveland v. Watkins, 159 Ga. App. 885, 285 S.E.2d 546 (1981).

Dismissal of uninsured motorist coverage carrier. — Order dismissing an action against a driver's uninsured motorist insurance carrier for failure to serve the carrier within the two-year statute of limitations was not directly appealable, when the claim against the alleged tortfeasor remained pending and the trial court had not certified the order as final. Carlisle v. Travelers Ins. Co., 195 Ga. App. 21, 392 S.E.2d 344 (1990).

Alleged violation of Interstate Agreement on Detainers not successfully appealed. — When the defendant alleged that the defendant's temporary removal from federal custody for arraignment on state charges, after which the defendant was returned to federal custody, violated Article IV(e) of the Interstate Agreement on Detainers, O.C.G.A. § 42-6-20, and sought dismissal of the state charges, a direct appeal of the trial court's denial of the defendant's motion was not authorized as a certificate of immediate review and a petition for interlocutory appeal were required, under O.C.G.A. § 5-6-34(b), and neither were present, and the defendant was not appealing an alleged violation of the constitutional right to a speedy trial, under O.C.G.A. § 17-7-170. Thomas v. State, 276 Ga. 853, 583 S.E.2d 848 (2003).

Partial grant of executor's motion to dismiss a caveat. — Executor's appeal was dismissed because the executor's motion to dismiss a caveat by the decedent's widow was not fully sustained and O.C.G.A. § 5-6-34(a)(9) did not allow direct appeals from judgments or orders that partially sustained a motion to dismiss a caveat. The executor was required to have sought review of the order by following the procedures set forth in § 5-6-34(b), but did not follow those procedures. Mays v. Rancine-Kinchen, 291 Ga. 283, 729 S.E.2d 321 (2012).

Defendants must follow the interlocutory appeal procedures of O.C.G.A. § 5-6-34(b) when pursuing appellate review in speedy trial violation cases. Sosniak v. State, 292 Ga. 35, 734 S.E.2d 362 (2012).

3. Motions Regarding Default Judgments

Denial of plaintiff's motion for default judgment was not a final adjudication but an interlocutory ruling which was not directly appealable. Ware v. Handy Storage, 222 Ga. App. 339, 474 S.E.2d 240 (1996).

Because a trial court declined to issue a certificate of immediate review to a former inmate in the inmate's request to appeal the trial court's grant of county defen-

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3. Motions Regarding Default Judgments (Cont'd)

dants' motion to open a default, pursuant to O.C.G.A. § 5-6-34(b), that issue remained pending below and, accordingly, the appellate court had no jurisdiction to review that matter under O.C.G.A. § 9-11-54. Camp v. Coweta County, 271 Ga. App. 349, 609 S.E.2d 695 (2005), vacated in part, 280 Ga. App. 852, 635 S.E.2d 234 (2006).

Order allowing motion to open default. — Appeal from order allowing a motion to open default when no certificate of review under subsection (b) of this section is filed is premature and must be dismissed. North Ga. Hous., Inc. v. Pressley, 123 Ga. App. 273, 180 S.E.2d 607 (1971).

When default judgment is vacated and set aside, jurisdiction remains in trial court and judgment is neither final within meaning of subsection (a), nor directly appealable. Absent a certificate of immediate review, as provided by subsection (b), an appeal is premature and must be dismissed. Notrica v. Southern Bell Tel. & Tel. Co., 147 Ga. App. 737, 250 S.E.2d 196 (1978).

Order vacating and setting aside default judgment which has effect of continuing pendency of case in trial court, judgment was not final. First Nat'l Bank v. Hudson, 139 Ga. App. 629, 229 S.E.2d 109 (1976).

Appeal from grant of motion to set aside judgment and open default, leaving case pending below is premature and should be dismissed if there is no certificate for immediate review from the trial judge nor petition to the appellate court for allowance of an appeal. Thigpen v. Futura Constr., Inc., 140 Ga. App. 65, 230 S.E.2d 92 (1976).

Order vacating and setting aside default judgment and allowing defendant to file defensive pleadings leaves case still pending in court below, and in absence of certificate of immediate review appeal is premature and subject to being dismissed. Lee v. Smith, 119 Ga. App. 808, 168 S.E.2d 880 (1969).

Judgment granting motion to set aside default judgment entered against garnishee is not a final judgment. Davis v. Davis, 139 Ga. App. 599, 229 S.E.2d 81 (1976).

Default opened as of right by filing defenses within 15 days is not final. — Default which is opened as a matter of right by filing of defenses within 15 days of day of default upon payment of costs is not a final judgment and case is still pending in trial court if no certificate for immediate review is signed or entered within ten days of order complained of. Shuford v. Jackson, 139 Ga. App. 469, 228 S.E.2d 605 (1976).

4. Rulings Concerning Counterclaims and Cross Actions

Dismissal of counterclaim is not a final order. Lowe v. Payne, 130 Ga. App. 337, 203 S.E.2d 309 (1973).

Dismissal of counterclaim is not such judgment as leaves cause no longer pending in trial court. Absent certificate of immediate review, appeal is premature. Register v. Kandlbinder, 132 Ga. App. 435, 208 S.E.2d 565 (1974).

Order dismissing an insured's counterclaim for personal injury protection benefits was neither a final judgment nor otherwise directly appealable, when the dismissal was not intended to constitute a ruling on the merits of the counterclaim, although the ruling was characterized as a dismissal for failure to state a claim. Denney v. Shield Ins. Co., 183 Ga. App. 280, 358 S.E.2d 628, cert. denied, 183 Ga. App. 905, 358 S.E.2d 628 (1987).

Dismissal of counterclaim while case remains pending. — As appeal from order dismissing counterclaim is not a final judgment because case remains pending in trial court, such appeal is premature and must be dismissed in absence of requisite immediate review certificate. Kilgore v. Kennesaw Fin. Co., 128 Ga. App. 120, 195 S.E.2d 799 (1973).

Ruling sustaining motion to dismiss various counts of counterclaim is not final. Huff v. Rogers, 129 Ga. App. 897, 202 S.E.2d 243 (1973).

Order while complaint and counterclaim still pending. — Trial court's

order cannot be considered a final judgment while the complaint and counterclaim are still pending. Cotton v. Broad River Realty, Inc., 216 Ga. App. 306, 454 S.E.2d 183 (1995).

Judgment rendered while defendant's counterclaim remains pending. — Judgment is not final if case is still pending in lower court in form of defendant's counterclaim. Conte Enterprises, Inc. v. Romax Constr. Co., 128 Ga. App. 121, 195 S.E.2d 798 (1973).

Pendency of counterclaim plus absence of determination by the trial judge that there is no just reason for delay and express direction for entry of judgment under O.C.G.A. § 9-11-54 prevents order from being final and appealable. This, coupled with failure to follow the applicable procedure for review under O.C.G.A. § 5-6-34, subjects the appeal to dismissal. Cleveland v. Watkins, 159 Ga. App. 885, 285 S.E.2d 546 (1981).

When the defendant's counterclaim is still pending in the trial court, an order of that court dismissing the main complaint against such defendant is not appealable, absent proper certification from the trial judge, accompanied by an application for immediate review. Wrip, Inc. v. Sledger, 162 Ga. App. 727, 292 S.E.2d 871 (1982).

Order dismissing claim while counterclaim or cross action remains pending. — When there was no express determination that there was no just reason for delay nor an express direction for entry of judgment under Ga. L. 1966, p. 609, § 54 (see O.C.G.A. § 9-11-54(b)), nor was there a certificate for immediate review under subsection (b) of former Code 1933, § 6-701 (see O.C.G.A. § 5-6-34), appeal from anorder dismissing the plaintiff's claim was premature when there was a counterclaim pending in the court below. Campbell v. George, 129 Ga. App. 644, 200 S.E.2d 503 (1973).

When answer of the defendant contains prayer for affirmative legal relief germane to the plaintiff's suit, dismissal of the plaintiff's suit on general demurrer (now motion to dismiss) does not carry with it defendant's cross action (now counterclaim), so cross action is still pending and there is no final judgment within the contemplation of the Appellate Practice Act. Brown v. Elliott, 115 Ga. App. 89, 153 S.E.2d 665 (1967).

When the plaintiff's suit is dismissed, but defendant's cross action (now counterclaim) seeking a money judgment against the plaintiff is still pending, the appeal by the plaintiff must be dismissed. O'Kelley v. Evans, 223 Ga. 512, 156 S.E.2d 450 (1967).

When the defendant's counterclaims against the plaintiff are still pending in the trial court, a judgment dismissing the plaintiff's complaint is not such a final judgment as may be directly appealed. Farmers Coop. Ins. Co. v. Hicks, 227 Ga. 755, 182 S.E.2d 895 (1971).

Cash distribution order while counterclaims remained pending. — In action to dissolve partnership, because the final dissolution remained pending, the defendant partner's counterclaim for fees and litigation expenses remained pending, and there was no express determination of finality; therefore, the plaintiff was required to follow the procedures of O.C.G.A. § 5-6-34 in order to appeal the trial court's order directing certain cash payments and distributions based on the court's custodial evaluation of the firm's assets. Eckland v. Hale & Eckland, 231 Ga. App. 278, 498 S.E.2d 358 (1998).

Order of court overruling plaintiff's oral motion to dismiss defendant's cross action (now counterclaim) is not a final judgment. Birdwell v. Pippen, 113 Ga. App. 202, 147 S.E.2d 673 (1966).

Order striking answer and cross action (now counterclaim) of defendants and refusing to open default. — In action seeking property damages resulting from automobile collision, order striking answer and cross action of the defendants and refusing to open default is not an order which can be directly appealed from under this section without certification of trial judge. Melton v. Grider, 119 Ga. App. 376, 166 S.E.2d 915 (1969).

Order striking answer and cross action (now counterclaim) as barred by statute of limitations leaves case pending. — Order of trial judge sustaining the plaintiff's oral motion to strike an amended answer and cross action as barred by the statute of limitations, leaves

Rulings Not Appealable Without Certificate (Cont'd)
4. Rulings Concerning Counterclaims and Cross Actions (Cont'd)

case pending in court below and is not a final judgment from which an appeal will lie. Hood v. Akins, 114 Ga. App. 733, 152 S.E.2d 704 (1966).

Striking of counterclaim after consideration of proposed pretrial orders of plaintiff and defendant, pleadings, evidence and arguments of counsel is tantamount to grant of summary judgment motion and appealable without certificate of immediate review even though interlocutory. Aiken v. Citizens & S. Bank, 249 Ga. 481, 291 S.E.2d 717, cert. denied, 459 U.S. 973, 103 S. Ct. 307, 74 L. Ed. 2d 287 (1982).

Summary Judgments

1. Grants

Grant of summary judgment is an exception to rule requiring final judgment in order to appeal. Whisenhunt v. Allen Parker Co., 119 Ga. App. 813, 168 S.E.2d 827 (1969).

Dismissal of caveat to probate of will. — When, on appeal by caveators from summary judgment in favor of the proponents of a will, the decision was affirmed and, after remittitur, the superior court entered an order admitting the will to probate, final disposition of the action for the purposes of the time to request attorney fees under O.C.G.A. § 9-15-14 occurred when that order was entered, not when the summary judgment motion was granted. McConnell v. Moore, 232 Ga. App. 700, 503 S.E.2d 593 (1998).

Dismissal for late filing. — Motion to dismiss an appeal on grounds that the appealing party failed to timely appeal an order granting summary judgment pursuant to O.C.G.A. § 5-6-38(a) was granted; moreover, the appeal was not taken from the final judgment entered in the case. Patterson v. Bristol Timber Co., 286 Ga. App. 423, 649 S.E.2d 795 (2007).

One may appeal grant of summary judgment on any issue or as to any party. Whisenhunt v. Allen Parker Co., 119 Ga. App. 813, 168 S.E.2d 827 (1969).

Grant of codefendant's motion. — Only if codefendants are sued as joint tortfeasors does the grant of summary judgment as to one potentially affect the other's rights of contribution. Therefore, it is only in this situation that the codefendant would be deemed a losing party and have standing to appeal the grant of summary judgment to another codefendant. C.W. Matthews Contracting Co. v. Studard, 201 Ga. App. 741, 412 S.E.2d 539 (1991).

Party may appeal grant of summary judgment after rendition of final judgment in case, and summary judgment is not res judicata as to any other claims which remained pending. Ramseur v. American Mgt. Ass'n, 155 Ga. App. 340, 270 S.E.2d 880 (1980).

Motion to dismiss an appeal from an order granting partial summary judgment to some of the claims was not untimely filed, as the appealing party had the option to wait until a final judgment was entered in order to file an appeal, and they exercised that option; hence, the opposing party's motion to dismiss the appeal as untimely filed was denied. Perrett v. Sumner, 286 Ga. App. 379, 649 S.E.2d 545 (2007).

Effect of granting appellee's motion on appellant's motion for same. — Grant of appellee's motion for summary judgment disposed of entire case in court below, and had effect of making appellant's denial of summary judgment a final judgment, directly appealable. Stallings v. Chance, 239 Ga. 567, 238 S.E.2d 327 (1977).

In action when cross motions for summary judgments are made, grant of one party's motion disposes of entire case in trial court, and no issue is left pending for decision. This has effect of making opposing party's denial of summary judgment a final judgment and directly appealable under subsection (a). Baker v. NEI Corp., 144 Ga. App. 165, 241 S.E.2d 4 (1977).

Grant of motion for summary judgment in the Civil Court of Bibb County can be appealed directly to the Court of Appeals. Middle Ga. Bank v. Continental Real Estate & Assocs., 168 Ga. App. 611, 309 S.E.2d 893 (1983).

2. Denials

Overruling of motion for summary judgment may be reviewed only upon direct appeal from that judgment. Hood v. General Shoe Corp., 119 Ga. App. 649, 168 S.E.2d 326 (1969).

Appealability of denial of summary judgment. — Party against whom summary judgment is granted may appeal either after grant of summary judgment or after rendition of final judgment. Surgent v. Surgent, 153 Ga. App. 100, 264 S.E.2d 568 (1980).

Direct appeal is not available from the denial of a motion for summary judgment. Rolleston v. Cherry, 237 Ga. App. 733, 521 S.E.2d 1, cert. denied, 528 U.S. 1046, 120 S. Ct. 580, 145 L. Ed. 2d 482 (1999).

Denial of summary judgment not rendered moot by entry of judgment. — In an action against an insurer to recover damages under a policy issued to a county board of education on behalf of a child injured by a backfiring school bus, the insurer's appeal from the denial of the insurer's motion for summary judgment was not rendered moot by the subsequent entry of a verdict and a judgment in favor of the child in a trial limited to damages; the denial of the motion could be reviewed as part of the insurer's direct appeal from the final judgment because the trial court's determination in denying the motion that the policy's medical payments provision did not satisfy O.C.G.A. § 20-2-1090 and that the policy's liability provision provided the requisite coverage was not considered at trial. Coregis Ins. Co. v. Nelson, 282 Ga. App. 488, 639 S.E.2d 365 (2006).

Compliance with requirements of section. — Denial of motion for summary judgment not reviewable by direct appeal except as provided in section. Carroll v. Campbell, 226 Ga. 700, 177 S.E.2d 83 (1970); Belt v. Allstate Ins. Co., 140 Ga. App. 740, 231 S.E.2d 831 (1976); Johnston-Willis Hosp. v. Cain, 142 Ga. App. 305, 236 S.E.2d 374 (1977); Garrett v. Heisler, 149 Ga. App. 240, 253 S.E.2d 863 (1979).

There is no provision for review of denial of summary judgment except by direct appeal with certificate of trial judge and application for review to appropriate appellate court as provided by this section. Marietta Yamaha, Inc. v. Thomas, 237 Ga. 840, 229 S.E.2d 753 (1976); American Mut. Fire Ins. Co. v. Llewellyn, 142 Ga. App. 824, 237 S.E.2d 227 (1977).

Denial of motion for summary judgment is not reviewable by appellate courts in absence of timely certificate of immediate review or granting of interlocutory appeal by appellate court unless there is a final judgment in the case and the cause is no longer pending in the lower court. Barlow v. Yenkosky, 146 Ga. App. 872, 247 S.E.2d 519 (1978); Weldon v. Southeastern Fid. Ins. Co., 157 Ga. App. 698, 278 S.E.2d 500 (1981); Sharpe's Appliance Store, Inc. v. Anderson, 161 Ga. App. 112, 289 S.E.2d 312 (1982).

Ordinarily, a denial of a motion for partial summary judgment would be appealable only if an application for interlocutory review were granted after the trial court certified the matter for immediate review. E.H. Crump Co. v. Miller, 200 Ga. App. 598, 409 S.E.2d 235, cert. denied, 200 Ga. App. 896, 409 S.E.2d 235 (1991).

When order denying the appellants' motion for summary judgment is certified by the trial court, but no application is made in accordance with subsection (b), an appeal must be dismissed. Century Bldrs., Inc. v. Carter, 243 Ga. 14, 252 S.E.2d 507 (1979).

Denial of a motion for summary judgment must be appealed in accordance with the interlocutory appeal provisions of subsection (b) of O.C.G.A. § 5-6-34. Pace Constr. Corp. v. Northpark Assocs., 215 Ga. App. 438, 450 S.E.2d 828 (1994).

Because the Court of Appeals of Georgia granted an application for interlocutory appeal to the Department of Transportation in a slip and fall case, a city's cross-appeal was properly before the court. Ga. DOT v. Strickland, 279 Ga. App. 753, 632 S.E.2d 416 (2006).

Although the repair company did not obtain a certificate of immediate review from the trial court's order denying a renewed motion for summary judgment under O.C.G.A. § 9-11-56, the appellate court had jurisdiction to address an order denying the renewed motion for summary judgment under O.C.G.A. § 5-6-34(d); the

Summary Judgments (Cont'd)
2. Denials (Cont'd)

appellate court had jurisdiction to address the trial court's order denying the company's motion for reconsideration under § 5-6-34(b), since the company had obtained a timely certificate of immediate review from the trial court's order denying the court's motion for reconsideration. Gulfstream Aero. Servs. Corp. v. United States Aviation Underwriters, Inc., 280 Ga. App. 747, 635 S.E.2d 38 (2006).

Order dismissing an unauthorized appeal of an interlocutory order denying the defendant's motion for summary judgment was not appealable absent compliance with interlocutory appeal procedures. Rolleston v. Cherry, 233 Ga. App. 295, 504 S.E.2d 504 (1998).

As the losing party on cross-motions for summary judgment, defendant was entitled to proceed under subsection (b) of O.C.G.A. § 5-6-34 to seek an interlocutory appeal from the denial of its motion or, in the alternative, to file a direct appeal from the grant of plaintiff's motion pursuant to O.C.G.A. § 9-11-56(h); when the defendant elected to invoke the interlocutory appeal procedure, the mere availability of the alternative of the direct appeal procedure would not be a factor in determining whether to grant an interlocutory appeal. Southeastern Sec. Ins. Co. v. Empire Banking Co., 268 Ga. 450, 490 S.E.2d 372 (1997).

Subsection (b) does not provide exclusive means of appealing denial. — When summary judgment is denied, it may be appealed after certification by trial judge and granting of application by appropriate appellate court; but this is not the exclusive means of appealing denial of motion for summary judgment. Southeast Ceramics, Inc. v. Klem, 246 Ga. 294, 271 S.E.2d 199 (1980).

Appealing denial of summary judgment when there is final judgment. — Law now permits review of denial of summary judgment without necessity of making application for interlocutory appeal when there is a final judgment — such as the grant of a motion for summary judgment. Mahler v. Paquin, 143 Ga. App. 773, 240 S.E.2d 185 (1977).

Denial of a motion for summary judgment can be appealed without application when it is tied to appeal of an appealable order or judgment. Southeast Ceramics, Inc. v. Klem, 246 Ga. 294, 271 S.E.2d 199 (1980).

Denial of summary judgment may be tied to appeal from grant of summary judgment by opposite party. Southeast Ceramics, Inc. v. Klem, 246 Ga. 294, 271 S.E.2d 199 (1980).

When direct appeal is taken from grant of summary judgment, appellee may cross-appeal the denial of the appellee's motion for summary judgment. Hall v. Richardson Homes, Inc., 168 Ga. App. 593, 309 S.E.2d 825 (1983).

Premature appeal. — When the defendant obtained a certificate for immediate review from the trial judge within ten days of the denial of the defendant's motion for summary judgment in accordance with O.C.G.A. § 5-6-34, but failed to apply to and obtain an order from the Court of Appeals granting an appeal, the defendant's appeal is premature. Hargraves v. Turner, 160 Ga. App. 807, 287 S.E.2d 664 (1982).

Denial of the state's motion for summary judgment or dismissal based on sovereign immunity was not a final judgment subject to direct appeal under the collateral order doctrine. State v. Gober, 229 Ga. App. 700, 494 S.E.2d 724 (1998).

Judgments on Motions for New Trial

1. Grants

Not appealable without certificate of review. — When judgment appealed from is one granting motion for new trial, and there is no certificate of trial judge as required by section, appeal must be dismissed. Stewart v. Church, 119 Ga. App. 58, 166 S.E.2d 436 (1969).

Judgment granting new trial is not a final judgment, and because it is not a final judgment, an interlocutory appeal cannot be prosecuted unless the trial judge grants a certificate for immediate review. Henderson v. Henderson, 231 Ga. 208, 200 S.E.2d 867 (1973).

When no certificate of immediate review was obtained from the trial court nor application made to the Court of Appeals

for interlocutory review, an appeal from grant of the extraordinary motion for new trial on special grounds was premature. Moore v. Williams, 163 Ga. App. 595, 295 S.E.2d 866 (1982).

Grant of a motion for new trial is not a final order from which a direct appeal may be taken, and if the appellant did not comply with the interlocutory appeal provisions of subsection (b), the appeal must be dismissed for lack of jurisdiction. Murray v. Rozier, 186 Ga. App. 184, 367 S.E.2d 886 (1988).

Grant of a motion for new trial is not a final judgment within the meaning of paragraph (a)(1) of O.C.G.A. § 5-6-34; therefore, an application for interlocutory review is required to be filed in order to give the Court of Appeals jurisdiction to entertain an appeal. Rockdale Awning & Iron Co. v. Kerbow, 210 Ga. App. 119, 435 S.E.2d 619 (1993).

Denial of interlocutory appeal does not prevent eventual review. — Denial of interlocutory appeal by statute does not prevent a litigant from eventually seeking review in an appellate court of a judgment granting a new trial; this is so because upon conclusion of the case in the trial court and entry of final judgment, an appeal can then be taken from the final judgment, and in such appeal legality of judgment granting new trial can be attached. Henderson v. Henderson, 231 Ga. 208, 200 S.E.2d 867 (1973).

State could not appeal order granting new trial. — State's appeal of an order granting the defendant's motion for new trial was dismissed because the state could not appeal the order granting the new trial under the Appellate Practice Act, O.C.G.A. § 5-6-34(d); no appeal was taken here under subsections (a), (b), or (c) of § 5-6-34. State v. Caffee, 291 Ga. 31, 728 S.E.2d 171 (2012).

2. Denials

Judgment overruling motion for new trial is an appealable judgment. Thornton v. State Hwy. Dep't, 113 Ga. App. 351, 148 S.E.2d 66 (1966).

Judgment overruling motion for new trial based on appealable judgment is appealable. — Using liberal construction as required by O.C.G.A. § 5-6-30, it would be incongruous to declare unappealable a judgment overruling motion for new trial which is based upon an admittedly appealable judgment. Munday v. Brissette, 113 Ga. App. 147, 148 S.E.2d 55, rev'd on other grounds, 222 Ga. 162, 149 S.E.2d 110 (1966).

Judgment overruling motion for new trial is a final judgment since no subsequent judgment disposing of case is necessary. Munday v. Brissette, 113 Ga. App. 147, 148 S.E.2d 55, rev'd on other grounds, 222 Ga. 162, 149 S.E.2d 110 (1966).

Denied motion final although rendered before judgment entered on verdict. — Order denying motion for new trial from general verdict is final and appealable, even though no judgment has been entered on verdict. This is so even though under federal practice an order granting or overruling motion for new trial is not a final judgment from which an appeal may be taken. Munday v. Brissette, 113 Ga. App. 147, 148 S.E.2d 55, rev'd on other grounds, 222 Ga. 162, 149 S.E.2d 110 (1966).

Order denying motion appealable although opposing party's motion for same remains pending. — Fact that one party's motion for new trial is still pending below does not deprive other party of right to independently press the party's motion to a proper conclusion and test the conclusion by appeal. Munday v. Brissette, 113 Ga. App. 147, 148 S.E.2d 55, rev'd on other grounds, 222 Ga. 162, 149 S.E.2d 110 (1966).

Effect of suggested forms in § 5-6-51. — Forms contained in Ga. L. 1965, p. 18, § 20 (see O.C.G.A. § 5-6-51) are merely suggested forms which are apparently intended for use in appeals from orders or judgments other than rulings on motions for new trial and do not, of themselves, make such rulings unappealable. The suggested forms of appeal are not exclusive. Their purpose is to have appeal show on its face the tolling of time for appeal when appeal is from original judgment. Munday v. Brissette, 113 Ga. App. 147, 148 S.E.2d 55, rev'd on other grounds, 222 Ga. 162, 149 S.E.2d 110 (1966).

Injunctions and Restraining Orders

Interlocutory order. — Subsection (b) of O.C.G.A. § 5-6-34 changed the method by which an interlocutory order was appealed, providing not only for a certificate by the trial court but for application to and approval by the proper appellate court. State v. Blosfield, 165 Ga. App. 111, 299 S.E.2d 588 (1983).

Because a trial court denied a property owner's request for interlocutory injunctive relief against a county tax commissioner, that order was directly appealable pursuant to O.C.G.A. § 5-6-34(a)(4); accordingly, the commissioner's motion to dismiss the appeal was denied. E-Lane Pine Hills, LLC v. Ferdinand, 277 Ga. App. 566, 627 S.E.2d 44 (2005).

On an appeal filed pursuant to O.C.G.A. § 5-6-34(a)(4) from an order enjoining a city from imposing a tax against a utility pursuant to an ordinance, the appeals court found that the interlocutory injunction was erroneously ordered, given that the ordinance had not yet posed any imminent danger to that utility's financial interest, but, only a demand for the tax had been issued. City of Willacoochee v. Satilla Rural Elec. Mbrshp. Corp., 283 Ga. 137, 657 S.E.2d 232 (2008).

Nature of order. — Nature of the order containing the underlying contested issues of law will govern the appellate path in the Court of Appeals under subsection (b) of O.C.G.A. § 5-6-34. Saxton v. Coastal Dialysis & Medical Clinic, Inc., 220 Ga. App. 805, 470 S.E.2d 252 (1996), aff'd, 267 Ga. 177, 476 S.E.2d 587 (1996).

Temporary injunction is appealable in absence of a certificate of immediate review. Springtime, Inc. v. Douglas County, 228 Ga. 753, 187 S.E.2d 874 (1972).

Grant of a temporary injunction is appealable. Pizza Hut of Am., Inc. v. Kesler, 254 Ga. 360, 329 S.E.2d 133 (1985).

Jurisdiction over direct appeal of case involving injunctive relief not otherwise an "equity" case. — When a case involved the grant or denial of an injunction as an ancillary matter, the Supreme Court's transfer of an interlocutory appeal application to the Court of Appeals was a binding determination that the case was not an "equity" case in the Supreme Court's general jurisdiction and the Court of Appeals had jurisdiction over direct appeal of the case; overruling Auto Cash. Inc. v. Hunt, 216 Ga. App. 239, 454 S.E.2d 162 (1995). Saxton v. Coastal Dialysis & Medical Clinic, Inc., 267 Ga. 177, 476 S.E.2d 587 (1996).

Jurisdiction for appeal was proper. — Georgia Supreme Court found that O.C.G.A. § 5-6-34(a)(4) provided that appeals could be taken from all judgments or orders granting or refusing applications for receivers or for interlocutory or final injunctions. As such, the trial court's injunctive order fell into the category of direct appeals allowed pursuant to § 5-6-34(a)(4) and the case was properly before the court. State v. Singh, 291 Ga. 525, 731 S.E.2d 649 (2012).

Denial of motion to dismiss, accompanied by grant of permanent injunction. — If judgment does no more than deny the motion to dismiss complaint, it, of course, is not an appealable judgment in absence of certificate of review, but when the judgment does not stop there but goes on to award permanent injunction to plaintiffs, granting to the plaintiffs all relief which plaintiffs seek in the plaintiffs' complaint, judgment is final and subject to direct appeal. City of Jesup v. Bennett, 226 Ga. 606, 176 S.E.2d 81 (1970).

Basis for appealability of permanent injunctions. — Although a permanent injunction is directly appealable, it is not so because it is a final order for appealability purposes, but because of a special statutory provision. Gresham Park Community Org. v. Howell, 652 F.2d 1227 (5th Cir. 1981).

Continuance of restraining order is appealable as an exception to doctrine of finality of judgments. Spell v. Blalock, 243 Ga. 459, 254 S.E.2d 842 (1979).

Judgment regarding dissolution of temporary restraining order must be on merits. — Issue of dissolution of temporary restraining order must have been heard and determined on its merits before judgment dissolving or refusing to dissolve it is subject to interlocutory appeal. Clements v. Kushinka, 233 Ga. 273, 210 S.E.2d 804 (1974).

Automatic dissolution of temporary restraining order is not an appealable judgment. Clements v. Kushinka, 233 Ga. 273, 210 S.E.2d 804 (1974).

Denial of ex parte temporary restraining order is not a final judgment or one appealable under this section. Williams v. Ware, 240 Ga. 601, 242 S.E.2d 108 (1978).

Trial court order indefinitely extending a temporary restraining order against a party is the equivalent of a judgment granting an interlocutory injunction and is directly appealable. Matrix Fin. Servs. v. Dean, 288 Ga. App. 666, 655 S.E.2d 290 (2007).

Effect of pending jury trial on damages. — Denial of injunctive relief is immediately appealable under O.C.G.A. § 5-6-34, even though there is a jury trial pending on the question of damages. Earth Mgt., Inc. v. Heard County, 248 Ga. 442, 283 S.E.2d 455 (1981).

Absent manifest abuse, trial court's discretion not interfered with. — Discretion of the trial court in granting or denying interlocutory injunctive relief will not be interfered with in the absence of a showing of manifest abuse. Mark Smith Constr. Co. v. Fulton County, 248 Ga. 694, 285 S.E.2d 692 (1982).

Reversal required where court abused court's discretion by not balancing equities. — Because an order granting the interlocutory injunction did not reflect that the trial court balanced the relative equities of the parties, which the party seeking the relief would have had to demonstrate entitlement to, the order had to be reversed, as the trial court abused the court's discretion. Bernocchi v. Forcucci, 279 Ga. 460, 614 S.E.2d 775 (2005).

Restraining order in divorce case. — Since the "underlying subject matter" of the case was divorce, case involving order temporarily restraining husband from selling, transferring, or encumbering certain property was to be brought to the Supreme Court by application pursuant to O.C.G.A. § 5-6-35 rather than by direct appeal. Rolleston v. Rolleston, 249 Ga. 208, 289 S.E.2d 518 (1982).

Divorce decree also involving child custody. — Right to a direct appeal in child custody cases in O.C.G.A. § 5-6-34(a)(11) did not apply to a divorce decree in which child custody was an issue, even though the only relief sought on appeal pertained to the custody decision; the underlying subject matter was still the divorce action. Therefore, a parent was required to follow the discretionary appeal procedure of O.C.G.A. § 5-6-35, and the parent's direct appeal was dismissed. Todd v. Todd, 287 Ga. 250, 696 S.E.2d 323 (2010).

Order denying motion for stay to conduct arbitration is not appealable except under interlocutory appeal provisions of O.C.G.A. § 5-6-34. Tasco Indus., Inc. v. Fibers & Fabrics, 162 Ga. App. 593, 292 S.E.2d 439 (1982).

There is no direct appeal from order denying motion to stay proceedings pending arbitration. Phillips Constr. Co. v. Cowart Iron Works, Inc., 162 Ga. App. 861, 293 S.E.2d 355 (1982), aff'd, 250 Ga. 488, 299 S.E.2d 538 (1983).

Stay pending arbitration. — Because of the unnecessary delay and expenses to parties of an incorrect determination of whether judicial proceedings should be stayed pending arbitration, trial courts, except in clearest cases, should certify orders granting or denying such stays for immediate appeal. Phillips Constr. Co. v. Cowart Iron Works, Inc., 250 Ga. 488, 299 S.E.2d 538 (1983).

Grant or denial of a stay under the Soldiers' and Sailors' Civil Relief Act is a final judgment on the collateral matter of the stay and is directly appealable. Vlasz v. Schweikhardt, 178 Ga. App. 512, 343 S.E.2d 749 (1986).

Trial court lacked authority to issue injunction. — Trial court lacked authority to grant a property owner's request for an injunction because the owner had no further recourse in the trial court and could not properly petition for injunctive relief two years after entry of a judgment awarding the owner damages in a trespass action; because the trespass action did not involve any other judgments or rulings deemed directly appealable under O.C.G.A. § 5-6-34(a), the exercise of jurisdiction by the Court of Appeals necessarily required a determination that the damages judgment was a final judgment

Injunctions and Restraining Orders (Cont'd)

within the meaning of that statute, that no issues remained to be resolved, and that the parties had no further recourse in the trial court, and those findings were binding in all subsequent proceedings in the trial court and in the appellate courts. Paine v. Nations, 301 Ga. App. 97, 686 S.E.2d 876 (2009).

Judgments of Contempt

Order adjudging one in contempt is a final judgment. — Order adjudging one in contempt means trial court has passed upon merits of cases and the order, in effect, is a final disposition of the contempt matter by that court, whether it involves an interlocutory order or a final judgment. Ramsey v. Ramsey, 231 Ga. 334, 201 S.E.2d 429 (1973).

When individual is adjudged in contempt, trial court is done with the matter and to require an application for discharge, as a condition precedent to appeal, is usually a futile and empty gesture. Ramsey v. Ramsey, 231 Ga. 334, 201 S.E.2d 429 (1973).

Order finding one in contempt of court is a subject for direct appeal. In re Booker, 186 Ga. App. 614, 367 S.E.2d 850 (1988).

Direct appeals may be taken from contempt orders even if the contemnor is given the opportunity to purge the contempt before punishment is imposed. Hamilton Capital Group, Inc. v. Equifax Credit Info. Servs., 266 Ga. App. 1, 596 S.E.2d 656 (2004).

Judgment rendered under court's own motion which authorizes holding persons named in contempt. — Judgment rendered sua sponte by superior court which mandates actions and which, if valid, would authorize court to hold persons named in such judgment in contempt of court is an appealable judgment. Darden v. Ravan, 232 Ga. 756, 208 S.E.2d 846 (1974).

Dismissal of one of two counts of cause of action does not permit case to be carried to appellate court while other count is left pending. Georgia Cas. Co. v. McRitchie, 42 Ga. App. 488, 156 S.E. 458 (1931).

Dismissal of crossbill on general demurrer (now motion to dismiss) is not a final disposition of cause under provisions of section. Sanders v. Sanders, 212 Ga. 244, 91 S.E.2d 604 (1956).

Supreme Court of Georgia declined to address error attached to a contempt finding in a wholly separate matter; moreover, the presented pointed to no evidence in the record that tied that case to the instant prosecution. Hill v. State, 281 Ga. 795, 642 S.E.2d 64 (2007).

Judgment in contempt case is appealable without applying for discharge. — Use of conjunctive word "and" between categories of bail trover and contempt cases in paragraph (a)(2) suggests that it was the intent of the legislature to separate these two types of cases in statute so as to authorize an appeal in a contempt case without first requiring an application for discharge. Ramsey v. Ramsey, 231 Ga. 334, 201 S.E.2d 429 (1973).

Order finding appellant in contempt but not imposing punishment is not final. — When the trial court issues an order finding the appellant in contempt of court but does not impose punishment, no final judgment has been entered and the case is still pending in the court below and the appellate court cannot review the lower court's decision. In re Crudup, 149 Ga. App. 214, 253 S.E.2d 802 (1979).

Order to produce documents or face contempt not final order. — When the trial court orders the defendant to permit subpoenaed documents to be copied and orders that upon any failure of the defendant to comply with the terms of the order, the defendant shall be cited to appear before the court to show cause why the defendant should not be held guilty of contempt, the contempt proceeding is pending in the court below and the trial court's order is not final and therefore can be appealed only by compliance with the interlocutory appeal provision in subsection (b) of O.C.G.A. § 5-6-34. Payne v. Presley, 169 Ga. App. 36, 311 S.E.2d 849 (1983).

Dismissal of citation for contempt is not an appealable judgment. Fulford v. Fulford, 225 Ga. 510, 170 S.E.2d 27 (1969).

Dismissal of father's motion for contempt in visitation hearing was directly appealable. — Under O.C.G.A. § 5-6-34(a)(11), a father had the right to a direct appeal from the trial court's dismissal of a motion for contempt against the mother for interference with the father's visitation with the children. Dennis v. Dennis, 302 Ga. App. 791, 692 S.E.2d 47 (2010).

No jurisdiction to consider contempt order. — Supreme court had no jurisdiction to consider a trial court's order holding a common law husband in contempt because the enumeration that addressed the contempt order was not predicated upon a proper and timely appeal from that order or from any other appealable order that encompassed that subsequent ruling since the contempt order was not prior to or contemporaneous with that final judgment such that it can be enumerated in the case pursuant to O.C.G.A. § 5-6-34(d) but was a subsequent ruling that the husband was not entitled to enumerate; a separate appeal was not proper in the absence of compliance with the discretionary appeal procedures set forth in O.C.G.A. § 5-6-35(a)(2), no application seeking discretionary review of the contempt order had ever been filed, and the record did not contain any transcript of the contempt hearing. Norman v. Ault, 287 Ga. 324, 695 S.E.2d 633 (2010).

Review of Collateral Judgments, Rulings, or Orders

When collateral order directly appealable. — Collateral order is directly appealable if the order: (1) completely and conclusively resolves the issue appealed; (2) concerns an issue which is "substantially separate" from the basic issues presented in the complaint; and (3) would result in the loss of an important right and is "effectively unreviewable on appeal." Department of Transp. v. Hardaway Co., 216 Ga. App. 262, 454 S.E.2d 167 (1995).

Because plaintiffs' claim under the Declaratory Judgment Act was independent of their claim under the Administrative Procedure Act (APA) and was directly appealable, plaintiffs could include their APA claim in their appeal under O.C.G.A. § 5-6-34(d) and were not required to file an application for appeal under O.C.G.A. § 5-6-35(a)(1). Zitrin v. Ga. Composite State Bd. of Med. Examiners, 288 Ga. App. 295, 653 S.E.2d 758 (2007), cert. denied, 2008 Ga. LEXIS 285 (Ga. 2008).

Other orders reviewable on direct appeal from denial of appeal from state to superior court. — On a debtor's appeal from a state court's denial of the debtor's appeal to the superior court, the Court of Appeals had jurisdiction of all the state court's rulings pursuant to O.C.G.A. § 5-6-34(d), which allowed review of other orders rendered in the case that may affect the proceedings and that were raised on appeal. Roberts v. Windsor Credit Servs., 301 Ga. App. 393, 687 S.E.2d 647 (2009).

Having filed a notice of appeal from the grant of summary judgment, the plaintiff could also appeal an order denying a motion to strike. Pierce v. Wendy's Int'l, Inc., 233 Ga. App. 227, 504 S.E.2d 14 (1998).

Reporter's privilege. — Non-parties engaged in news gathering may file a direct appeal of an order denying those parties the statutory reporter's privilege under the collateral order exception to the final judgment rule. In re Paul, 270 Ga. 680, 513 S.E.2d 219 (1999).

Review only of orders which are raised on appeal of appealable order is afforded by subsection (d). Vowell v. Carmichael, 235 Ga. 410, 219 S.E.2d 735 (1975).

When no enumeration of error is made to an order appealable under subsection (a) or (b), the court will not review an order which would have been reviewed under subsection (d). Gano v. Gano, 243 Ga. 564, 255 S.E.2d 59 (1979).

Matters not properly presented. — Nothing in subsection (c) requires the court to pass upon a matter not properly presented for decision. Freeman v. City of Valdosta, 119 Ga. App. 345, 167 S.E.2d 170 (1969).

Order requiring county to pay defendant's expenses. — County may file a direct appeal from an order requiring a county to pay a defendant's expenses in a murder case under the collateral order

Review of Collateral Judgments, Rulings, or Orders (Cont'd)

exception to the final judgment rule in O.C.G.A. § 5-6-34. Fulton County v. State, 282 Ga. 570, 651 S.E.2d 679 (2007).

Orders not appealable — An order placing a freeze on a stroke victim's bank accounts did not fall under the collateral order exception to the final judgment rule, since it was not one of those types of orders to which the exception has been applied, and because it did not completely and conclusively resolve the issue appealed, did not concern an issue substantially separate from the basic issues presented in the complaint, and would not result in the loss of an important right. Parker v. Kennon, 235 Ga. App. 272, 509 S.E.2d 152 (1998).

Appealability of prior orders. — Although a condominium unit owner appealed from a trial court denial of a motion to extend time to file a notice of appeal, and the owner failed to file a notice of appeal from the trial court judgment on the jury verdict and from a prior order of contempt, the appellate court was able to address errors raised on appeal therefrom, to the extent discernable, under O.C.G.A. § 5-6-34(d). Schroder v. Murphy, 282 Ga. App. 701, 639 S.E.2d 485 (2006), cert. denied, 2007 Ga. LEXIS 220 (Ga. 2007).

Subsection (c) is inapplicable to nonappealable orders entered by trial court subsequent to appeal. Vowell v. Carmichael, 235 Ga. 410, 219 S.E.2d 735 (1975).

In a suit between a church and a minister, the trial court's order striking a portion of the minister's complaint was not a final adjudication of all claims, thereby entitling the minister to appeal. It was only a determination that the minister had waived the right to a jury trial under O.C.G.A. § 23-3-66 by not filing a jury demand before a hearing was held by a special master, and not that any of the claims themselves had been waived or otherwise disposed of. Rhymes v. E. Atlanta Church of God, Inc., 284 Ga. 145, 663 S.E.2d 670 (2008).

State's ability to appeal defendant's choice to proceed without jury. — Although a petition for a writ of prohibition was a separate civil proceeding which allowed for a final and appealable ruling regarding it, the determination of whether the state had a right to appeal a ruling was determined by the underlying subject matter, not the relief sought, and since the state was not statutorily authorized to appeal the denial of its objection to the defendant's waiver of a jury trial in a criminal case, and the denial of its petition for writ of prohibition seeking to compel a jury trial, the state supreme court had to dismiss the state's appeal of the denial of its writ of prohibition since the state supreme court did not have jurisdiction to reverse the ruling after the writ had been denied and statutory law did not permit the state to appeal that ruling. Howard v. Lane, 276 Ga. 688, 581 S.E.2d 1 (2003).

Discovery orders. — Discovery orders are not directly appealable as an exception to the final judgment rule for appeal of collateral orders. Johnson & Johnson v. Kaufman, 226 Ga. App. 77, 485 S.E.2d 525 (1997), overruling Department of Trans. v. Hardaway, 216 Ga. App. 262, 454 S.E.2d 167 (1995).

When attorneys for a defendant in a capital case served a subpoena regarding the funding of indigent services on the Executive Director of the Georgia Public Defender Standards Council, the Council's appeal from the denial of Council's motion to quash was directly appealable under the collateral order doctrine. It involved matters that were unrelated to the basic issues to be decided in the criminal case; an appeal would conclusively resolve the discovery issue; and the important rights of a number of indigent capital defendants would be compromised if the Council had to await final judgment before seeking review. Britt v. State, 282 Ga. 746, 653 S.E.2d 713 (2007).

Discovery sanction not directly appealable. — In a civil suit, an appellate court properly dismissed an appeal of an order finding the appellants in contempt for violating a discovery order and that dismissed the answer and entered a default judgment as to liability as the order was not directly appealable as a contempt judgment under O.C.G.A. § 5-6-34(a)(2)

since the order did not impose a civil or criminal contempt sanction but rather imposed a discovery sanction under O.C.G.A. § 9-11-37(b)(2)(C). Am. Med. Sec. Group, Inc. v. Parker, 284 Ga. 102, 663 S.E.2d 697 (2008).

Denial of motion to dismiss based on sovereign immunity. — Patient sued the Board of Regents of the University System of Georgia alleging the board failed to notify the patient that transfusions given at a college hospital might have exposed the patient to HIV. Although the trial court's order denying the board's motion to dismiss was not a final judgment and was not directly appealable by statute, as the order was based on a conclusive determination that the board was not immune from suit on the basis of sovereign immunity, the order was appealable under the collateral order doctrine. Bd. of Regents v. Canas, 295 Ga. App. 505, 672 S.E.2d 471 (2009).

In a wrongful death case, an appellate court had jurisdiction to consider an appeal of a denial of the Georgia Department of Transportation's motion to dismiss under O.C.G.A. § 9-11-12(b)(1) based on the collateral order exception to the final judgment rule. Ga. DOT v. Crooms, 316 Ga. App. 536, 729 S.E.2d 660 (2012).

Denial of motion to recuse. — Court of appeals had jurisdiction under the collateral order doctrine to consider the defendant's appeal of an order denying a motion to recuse because the trial court's order concerned a matter wholly unrelated to the basic issues to be decided in the criminal case; whether the trial judge could properly preside over the case would be unresolved if review had to await final judgment, and the order resolved the matter completely and nothing remains in the underlying case to affect it. Braddy v. State, 316 Ga. App. 292, 729 S.E.2d 461 (2012).

Moot Issues

Without supersedeas, complaint that action ordered is erroneous becomes moot. — Without supersedeas, action ordered by trial court must be done as ordered and once the ordered action is taken, complaint about its being erroneously ordered becomes moot. Padgett v. Cowart, 232 Ga. 633, 208 S.E.2d 455 (1974).

To prevent appeal of order requiring action which may affect rights of litigants from becoming moot, it is necessary for appealing party to obtain a supersedeas. If a supersedeas is not obtained, then ordered action takes place as ordered, and the appeal becomes moot. Padgett v. Cowart, 232 Ga. 633, 208 S.E.2d 455 (1974).

If trial court refuses to grant supersedeas, party may request supersedeas from an appellate court. Padgett v. Cowart, 232 Ga. 633, 208 S.E.2d 455 (1974).

Procedural defects cured. — When an attorney did not claim that there were procedural defects in the entry of an appealed order, which contained findings of fact and conclusions of law relating to a previous order compelling the release of a client's file, any procedural defects with regard to the previous order were cured and the attorney's claims relating to the procedural defects in the previous order were rendered moot for purposes of O.C.G.A. § 5-6-34(d). Mary A. Stearns, P.C. v. Williams-Murphy, 263 Ga. App. 239, 587 S.E.2d 247 (2003).

Denial of summary judgment after verdict and judgment is a moot issue. Trade City G.M.C., Inc. v. May, 154 Ga. App. 371, 268 S.E.2d 421 (1980).

After verdict and judgment have been entered, Court of Appeals cannot review judgment denying motion for summary judgment because that issue became moot when court heard evidence at trial. Preferred Risk Mut. Ins. Co. v. Thomas, 153 Ga. App. 154, 264 S.E.2d 662 (1980).

Failure to seek interlocutory appeal. — When plaintiff could have taken an interlocutory appeal of the trial court's denial of the plaintiff's motion to dismiss and plea in abatement but instead of appealing let the suit go to judgment, even assuming the proceedings would properly have been abated, the question of abatement became moot when the proceedings moved to a judgment. MNM 5, Inc. v. Anderson/6438 N.E. Partners, Ltd., 215 Ga. App. 407, 451 S.E.2d 788 (1994).

Appeal deemed moot and dismissed. — Patients' appeal of a judgment

Moot Issues (Cont'd)

entered against the patients in a medical malpractice action on the ground that it was error to grant a motion to transfer filed by a hospital and corporation pursuant to the forum non conveniens statute, O.C.G.A. § 9-10-31.1, was dismissed as moot because the patients admitted in the patients' appellate brief that the patients' case had already been adjudicated, and patients asserted no trial error nor any other error in the Cobb County Superior Court; therefore, any determination by the Court of Appeals regarding whether the Fulton County Superior Court was authorized under the forum non conveniens statute to transfer the patients' case to Cobb County Superior Court for adjudication would be an abstract exercise unrelated to any existing facts or rights. Lamb v. Javed, No. A09A2234, 2010 Ga. App. LEXIS 44 (Jan. 19, 2010).

Mother's appeal from juvenile court's finding of deprivation was rendered moot by subsequent unappealed deprivation and custody judgments in the juvenile court; in the period of time between the issuance of the order appealed from and the docketing of the mother's appeal, the juvenile court conducted a disposition hearing and later issued an order reaffirming the court's finding of the child's deprivation and grant of temporary custody to the Department of Health Services' Division of Children and Family Services, an order which the mother did not appeal. In the Interest of T. H., 319 Ga. App. 216, 735 S.E.2d 287 (2012).

Application

1. In General

Failure to comply with subsection (b). — Denial of a motion to recuse was not a final order and failure to comply with the provisions of subsection (b) of O.C.G.A. § 5-6-34 mandated the dismissal of the appeal of that motion. Warringer v. Warringer, 204 Ga. App. 86, 418 S.E.2d 446 (1992).

Judgment appealed from must be in writing. — Before appeal may be made, judgment appealed from must be in writing. Merrill v. State, 128 Ga. App. 403, 196 S.E.2d 876 (1973).

Party that sought and was granted an interlocutory appeal from the denial of the party's motion for summary judgment, but failed to timely file the party's notice of appeal in compliance with subsection (b) of O.C.G.A. § 5-6-34, committed a procedural default fatal to the party's appeal and was foreclosed from resubmitting the matter for appellate review. International Indem. Co. v. Robinson, 231 Ga. App. 236, 498 S.E.2d 795 (1998).

When the defendant permitted the vacation of a court order in conjunction with transfer of the entire case for jury trial, the judgment appealed from was not final within the meaning of paragraph (a)(1) of O.C.G.A. § 5-6-34 and the defendant's appeal was dismissed for failure to comply with subsection (b) of § 5-6-34. Dobbs v. Atkinson, 238 Ga. App. 151, 517 S.E.2d 597 (1999).

Given that paragraphs 12 and 13 of the superior court's "final judgment and decree of divorce" provided 90 days for action by the parties, the propriety of which action would be open to review by the trial court, and made a spouse's application for discretionary appeal therefrom interlocutory in nature, when the spouse failed to follow the interlocutory appeal procedures set out in O.C.G.A. § 5-6-34(b), the application was dismissed. Miller v. Miller, 282 Ga. 164, 646 S.E.2d 469 (2007).

Since a church's suit against a minister involved multiple claims, and the trial court's decision adjudicated fewer than all of the claims, in order to appeal, the minister had to either: (1) obtain entry of judgment under O.C.G.A. § 9-11-54(b) based on a finding of no just reason for delay; or (2) obtain a certificate allowing immediate appeal under O.C.G.A. § 5-6-34(b). Because neither § 5-6-34(b) nor § 9-11-54(b) was followed, the minister's appeal was premature. Rhymes v. E. Atlanta Church of God, Inc., 284 Ga. 145, 663 S.E.2d 670 (2008).

Plaintiff's motion to dismiss the defendants' appeal was denied because the defendants were not required to file an application for discretionary appeal pursuant to O.C.G.A. § 5-6-34(b); the underlying subject of the appeal was not one

of those listed in O.C.G.A. § 5-6-35 requiring an application, and the trial court's order was final because there was nothing pending in the trial court. Std. Bldg. Co. v. Schofield Interior Contrs., Inc., 315 Ga. App. 516, 726 S.E.2d 760 (2012).

Certification of class action. — Attorneys, who were divided by the trial court into two classes, were not required to seek an interlocutory appeal from that ruling, and the attorneys were permitted by O.C.G.A. § 5-6-34(d) to raise the trial court's rulings on certification on appeal from a final judgment; thus, the City of Atlanta's argument in the tax refund case that it had relied upon the denial of certification as to one of two classes of attorneys with regard to a tax refund failed. Barnes v. City of Atlanta, 281 Ga. 256, 637 S.E.2d 4 (2006).

When an application is transferred from one appellate court to the other, the 30-day time period is to be computed from the date of the filing in the court to which the application has been transferred. Marr v. Georgia Dep't of Educ., 264 Ga. 841, 452 S.E.2d 112 (1995).

Final judgment cannot be amended at subsequent term. Redmond v. Walters, 228 Ga. 417, 186 S.E.2d 93 (1971).

Nunc pro tunc certificate of immediate review is without efficacy to support appeal. Whitlock v. State, 124 Ga. App. 599, 185 S.E.2d 90 (1971).

Nunc pro tunc entry cannot be used to correct failure to comply with mandatory requirements of Appellate Practice Act. Blackstone v. State, 131 Ga. App. 666, 206 S.E.2d 553 (1974).

No revival of right to appeal. — Nunc pro tunc entry of certificate for immediate review cannot revive right of appeal which has expired. Whitlock v. State, 124 Ga. App. 599, 185 S.E.2d 90 (1971).

Filing of notice of appeal acts as supersedeas even in interlocutory appeal. Lawrence v. Whittle, 146 Ga. App. 686, 247 S.E.2d 212 (1978).

After the correct procedure is followed, the notice of appeal acts as a supersedeas in the case. Carter v. Data Gen. Corp., 162 Ga. App. 244, 291 S.E.2d 99 (1982).

Appellee in interlocutory appeal cannot voluntarily dismiss claim involved after notice of appeal is filed. Sacks v. McCrory, 156 Ga. App. 174, 274 S.E.2d 158 (1980).

Untimely filed notice of appeal is not grounds for dismissal when the appellant was entirely without fault in regard to the delay, but rather the delay was caused by the clerk's error. Western Elec. Co. v. Capes, 164 Ga. App. 353, 296 S.E.2d 381 (1982), cert. vacated, 250 Ga. 890, 302 S.E.2d 108 (1983).

Disposition of a motion for an out-of-time appeal hinges on a determination of who bore the ultimate responsibility for the failure to file a timely appeal; Georgia's courts have long recognized the right to effective assistance of counsel on appeal from a criminal conviction, and have permitted out-of-time appeals if the appellant was denied the right of appeal through counsel's negligence or ignorance, or if the appellant was not adequately informed of the appellant's appeal rights. Copeland v. State, 264 Ga. App. 905, 592 S.E.2d 540 (2003).

Notice of appeal prevents plaintiff from dismissing case while any issue is on appeal. — Filing of notice of interlocutory appeal acts as supersedeas so as to prevent the plaintiff from dismissing the case while any issue was on appeal under Ga. L. 1966, p. 609, § 41 (see O.C.G.A. § 9-11-41(a)). To hold otherwise would subject the appellant to additional costs and possible harassment by appellee who dismisses pending suit when faced with reversal on interlocutory appeal; appellee could then refile his lawsuit, and require the appellant to again bring appeal; just as subsection (a) of Ga. L. 1966, p. 609, § 41 prevented such actions when an appeal was taken from the final judgment, so too the statute applied in instances of appeal from interlocutory rulings. Steele v. Steele, 243 Ga. 522, 255 S.E.2d 43 (1979).

Two methods for appealing orders as to less than all claims of parties. — There were two principal methods by which appeal might be brought from orders in multi-claim party cases as to less than all claims or parties involved. One was that complaining party may obtain certificate of immediate review from trial judge under subsection (b) of former Code

Application (Cont'd)
1. In General (Cont'd)

1933, § 6-701 (see O.C.G.A. § 5-6-34). The second method was where the trial judge entered an order upon express determination that there were no just reasons of delay and upon express direction for entry of judgment under provision of Ga. L. 1966, p. 609, § 54 (see O.C.G.A. § 9-11-54(b)). When second method was used, the appellate court must still determine whether the judgment rendered met the requirements of finality contained in former Code 1933, § 6-701. J.C. Penney Co. v. Malouf Co., 125 Ga. App. 832, 189 S.E.2d 453 (1972), rev'd on other grounds, 230 Ga. 140, 196 S.E.2d 145 (1973).

When order appealed from adjudicated less than all claims and did not provide for the entry of a final judgment as provided in Ga. L. 1966, p. 609, § 54 (see O.C.G.A. § 9-11-54(b)), nor was there a certificate as provided by subsection (b) of former Code 1933, § 6-701 (see O.C.G.A. § 5-6-34), there was no appealable judgment. Givens v. Gray, 124 Ga. App. 152, 183 S.E.2d 29 (1971).

Judgment need not be attacked by one of the methods provided in Ga. L. 1967, p. 226, §§ 26, 27, 30 (see O.C.G.A. § 9-11-60), as any final judgment may be timely appealed. Hiscock v. Hiscock, 227 Ga. 329, 180 S.E.2d 730 (1971).

Orders entered subsequent to the filing of a notice of appeal are appealable only pursuant to a subsequently filed notice of appeal. An enumeration of error which addresses the subsequent grant of summary judgment on the issue of damages is not predicated upon a timely filed notice of appeal from that order or from any other appealable order which encompasses that subsequent ruling. Costanzo v. Jones, 200 Ga. App. 806, 409 S.E.2d 686, cert. denied, 200 Ga. App. 895, 409 S.E.2d 686 (1991).

Motion for rehearing pending when notice of appeal is filed. — Motion for rehearing, undisposed of at time notice of appeal is filed does not cause appeal to be premature, inasmuch as pendency of such motion does not toll time for filing appeal. George v. Lee, 118 Ga. App. 302, 163 S.E.2d 262 (1968).

Prior nonappealable order may be used as enumeration of error whenever appeal is brought to Court of Appeals from final judgment. Kilgore v. Kennesaw Fin. Co., 128 Ga. App. 120, 195 S.E.2d 799 (1973).

When judgment can be appealed under certificate of appealability, plaintiffs have right to elect to await entry of final judgment disposing of case entirely before entering appeal, and in so doing they are authorized to enumerate error on prior judgment. Goolsby v. Allstate Ins. Co., 130 Ga. App. 881, 204 S.E.2d 789 (1974).

Pursuant to subsection (d) of O.C.G.A. § 5-6-34, the defendant would be entitled to enumerate as error any other prior or contemporaneous rulings in the case. Defendant would not, however, be entitled to enumerate as error any and all other subsequent rulings in the case. Costanzo v. Jones, 200 Ga. App. 806, 409 S.E.2d 686, cert. denied, 200 Ga. App. 895, 409 S.E.2d 686 (1991).

On appeal from denial of temporary alimony, error may be assigned on temporary custody order included in same order, without reference to appealability of custody order standing alone. Gray v. Gray, 226 Ga. 767, 177 S.E.2d 575 (1970).

Grant of motion to dismiss. — Appeal involving the grant of a motion to dismiss for failure to follow a procedural requirement of the Georgia Business Corporation Code was not convertible to a summary proceeding; as such, the general appellate process was applicable. McGregor v. Stachel, 200 Ga. App. 324, 408 S.E.2d 118 (1991).

Decisions of administrative agencies. — When taxpayer did not file an application for discretionary appeal from a decision of the superior court reviewing a decision of the Department of Revenue, but chose to appeal directly to Supreme Court pursuant to subsection (a) of O.C.G.A. § 5-6-34, such appeal was dismissed for failure to comply with procedure for appeal from decisions of administrative agencies required by O.C.G.A. § 5-6-35. Plantation Pipe Line Co. v. Strickland, 249 Ga. 829, 294 S.E.2d 471 (1982).

Resolution of merits of administrative appeal was not authorized by sub-

section (d) of O.C.G.A. § 5-6-34, when holdings on appeal that the appellant was not entitled to declaratory-judgment and mandamus remedies were predicated upon the availability of the administrative appeal to the superior court and not upon the appellant's entitlement to judicial relief therein. Consequently, appellate review of the merits of the administrative appeal would not have affected the holdings sustaining the superior court's denial of mandamus and declaratory-judgment relief. Rybert & Co. v. City of Atlanta, 258 Ga. 347, 368 S.E.2d 739 (1988), overruled on other grounds, Southern States Landfill, Inc. v. City of Atlanta Bd. of Zoning Adjustments, 261 Ga. 759, 410 S.E.2d 721 (1991).

Appeal from prosecution of city ordinance in city court. — When uniform traffic citation and complaint form was used to charge an offense in a constitutional city court, but the solicitor (now prosecuting attorney) subsequently amended the form to allege a violation of a city ordinance, jurisdiction of an appeal lay in the superior court rather than the Court of Appeals. Parnell v. City of Atlanta, 173 Ga. App. 602, 327 S.E.2d 569 (1985).

Failure to pursue interlocutory review of order which is not final judgment. — When trial court's order does not constitute a final judgment, an appeal therefrom is premature when a party fails to pursue the procedure for interlocutory review. Commercial Bank v. Simmons, 157 Ga. App. 391, 278 S.E.2d 53 (1981).

Other claims pending. — Order granting writ of possession was not subject to direct appeal, because other claims remained pending in the trial court (e.g., issue of commissions owed to defendant and past rent due and owing to plaintiff). Whiddon v. Stargell, 192 Ga. App. 826, 386 S.E.2d 884 (1989).

Order that merely dismissed a complaint but did not dispose of a counterclaim was not a final appealable judgment. Hogan Mgt. Servs. v. Martino, 225 Ga. App. 168, 483 S.E.2d 148 (1997).

Trial court erred in denying the children's petition for a writ of mandamus to compel a judge to allow the children to appeal from the order dismissing their appeals because the award of attorney fees under O.C.G.A. § 13-6-11 was considered part of the underlying case; therefore, if the judgment reserves the issue of attorney fees under § 13-6-11, then one cannot claim that "the case is no longer pending in the court below" as required by O.C.G.A. § 5-6-34(a)(1). Sotter v. Stephens, 291 Ga. 79, 727 S.E.2d 484 (2012).

Case involving a "domestic relations" issue wherein the appellant sought domestication and "correction" of a foreign divorce decree, normally within the jurisdiction of the Court of Appeals, also involved claims based upon an unincorporated settlement agreement which raised no "domestic relations" issue and, therefore, the Supreme Court had jurisdiction over the direct appeal from the grant of summary judgment in favor of the former husband as to the former wife's claims for specific performance of the settlement agreement and jurisdiction over the rulings on all the former wife's claims, including the "domestic relations" claim. Eickhoff v. Eickhoff, 263 Ga. 498, 435 S.E.2d 914 (1993).

Mother's challenge to deprivation order. — Because a mother's challenge to the unappealed February 11, 2004 deprivation order was brought on April 29, 2004, as part of a timely appeal from the April 21, 2004 disposition order entered in the same deprivation proceeding. motions filed by the Department of Children and Family Services requesting that the mother's appeals be dismissed were denied. In the Interest of S.P., 282 Ga. App. 82, 637 S.E.2d 802 (2006).

Denial of motion to modify in child deprivation proceeding. — Phrase "child custody cases" within the meaning of O.C.G.A. § 5-6-34(a)(11) does not include a child deprivation proceeding in which a custody order has been entered; however, the decision to terminate reunification services is a final judgment directly appealable under O.C.G.A. §§ 5-6-34(a)(1) and 15-11-3. In re J. N., 302 Ga. App. 631, 691 S.E.2d 396 (2010).

Order denying legitimation directly appealable with termination order. — Although an order denying a putative father's petition to legitimate his minor child was subject to the discretion-

Application (Cont'd)
1. In General (Cont'd)

ary appeal procedure under O.C.G.A. § 5-6-35(a)(2), it was directly appealable under O.C.G.A. § 5-6-34(d) where the father filed the appeal together with an appeal from the trial court's decision to terminate his parental rights. In the Interest of T.A.M., 280 Ga. App. 494, 634 S.E.2d 456 (2006).

Order granting motion to enforce settlement agreement regarding custody. — Wife was entitled to file a direct appeal under O.C.G.A. § 5-6-34(a)(11) of an order granting a husband's motion to enforce a settlement agreement regarding child custody and visitation because the final custody order predicated the award of child custody and visitation on the settlement agreement, not on the allegations of the divorce complaint addressed in a temporary hearing or trial; therefore, the relevant legal action for jurisdictional purposes was the husband's motion to enforce the settlement agreement, and since that motion was filed in 2008, the wife was authorized to file a direct appeal in the case. Martinez v. Martinez, 301 Ga. App. 330, 687 S.E.2d 610 (2009).

Visitation orders. — Mother could not object on appeal to an order that was entered on her motion to enforce an agreement between her and her children's grandmother regarding the grandmother's visitation with the children because the order was entered by the mother's agreement. The mother's direct appeal was proper under O.C.G.A. § 5-6-34(a)(11). Hargett v. Dickey, 304 Ga. App. 387, 696 S.E.2d 335, cert. dismissed, No. S10C1688, 2010 Ga. LEXIS 911 (Ga. 2010).

Divorce case involving child custody. — Mother's appeal of a judgment vacating an award of physical custody of a child to her and revising the decree to award physical custody of the child to the father was properly before the supreme court because the mother followed the required application procedures, and the timing of her notice of appeal did not deprive her of the appeal; because it was not a child custody case but a divorce case in which child custody was an issue, O.C.G.A. § 5-6-35(a)(2) required an application for discretionary appeal, and a direct appeal was not authorized by O.C.G.A. § 5-6-34(a)(11). Todd v. Todd, 287 Ga. 250, 696 S.E.2d 323 (2010).

Although a divorce decree determines, among other things, child custody, such determination does not transform it into a "child custody case" as that phrase is used in O.C.G.A. § 5-6-34(a)(11) because a divorce action is not a child custody proceeding but is a proceeding brought to determine whether a marriage should be dissolved, O.C.G.A. § 19-5-1 et seq.; all other issues in a divorce action, including child custody, are merely ancillary to that primary issue. Todd v. Todd, 287 Ga. 250, 696 S.E.2d 323 (2010).

Wife's appeal of a judgment granting a husband's motion under O.C.G.A. § 9-11-60(d)(2) to set aside an order awarding the wife sole legal and physical custody of the parties' children, eliminating the husband's right of visitation, and increasing the husband's child support obligations was a "custody case" subject to direct appeal pursuant to O.C.G.A. § 5-6-34(a)(11); the grant of a motion to set aside in a child custody case is directly appealable, and an action seeking to change visitation qualifies for treatment as a "child custody case". Edge v. Edge, 290 Ga. 551, 722 S.E.2d 749 (2012).

Direct appeal in a child custody case. — Custodial parent had a right under O.C.G.A. § 5-6-34(a)(11) to appeal directly from a judgment or order in a child custody case that refused to change custody and that held the parent in contempt of a child custody judgment or order. Avren v. Garten, 289 Ga. 186, 710 S.E.2d 130 (2011).

Lis pendens. — Husband's motion on appeal for cancellation of a lis pendens entered in favor of his wife pursuant to O.C.G.A. § 44-2-136 was not considered because the propriety of the ruling by the trial court denying cancellation of the lis pendens was not enumerated as error on appeal, and the matter was not properly before the appellate court pursuant to O.C.G.A. § 5-6-34(d). Gardner v. Gardner, 276 Ga. 189, 576 S.E.2d 857 (2003).

Announcement of intent to appeal does not terminate juvenile transfer

proceedings. — Announcement by counsel of counsel's intent to appeal a denial of counsel's plea of double jeopardy did not require the trial court to terminate juvenile transfer proceedings. In re T.E.D., 169 Ga. App. 401, 312 S.E.2d 864 (1984).

Appeal from the denial of a post-judgment discovery order could not be used as a vehicle for obtaining appellate review of the final judgment entered in the case when the time for appealing that judgment had otherwise expired. Barton v. Anthony, 194 Ga. App. 500, 391 S.E.2d 25 (1990).

Post-judgment discovery. — General rule that orders regarding discovery during the pendency of litigation must be appealed under the application procedures of subsection (b) of O.C.G.A. § 5-6-34 apply to post-judgment discovery. Sipple v. Atwood, 223 Ga. App. 677, 478 S.E.2d 473 (1996).

Denial of "motion for continuance." — Appeal taken from the denial of a "Motion for Continuance or Motion in Opposition to Entry of Judgment of Bond Forfeiture," was dismissed on the ground that the appeal was taken from an order or judgment which was not directly appealable. Taylor v. State, 194 Ga. App. 245, 390 S.E.2d 601 (1990).

Direct appeal from petition for inspection and copying of records.. — When an action arose as a petition for inspection and copying of corporate records, the matter was correctly before the appellate court by direct appeal under O.C.G.A. 5-6-34(a)(1). Motor Whse., Inc. v. Richard, 235 Ga. App. 835, 510 S.E.2d 600 (1998).

Motion to lift a freeze on bank accounts. — Court's order denying a motion to lift a freeze on a stroke victim's bank accounts was not a final judgment or any other type of judgment that was directly appealable. Parker v. Kennon, 235 Ga. App. 272, 509 S.E.2d 152 (1998).

Motion for transcript treated as mandamus petition. — Defendant's post-conviction motion for a trial transcript at government expense was treated as a mandamus petition. Coles v. State, 223 Ga. App. 491, 477 S.E.2d 897 (1996).

Denial of petition for writ of mandamus. — Injured parties' petition for a writ of mandamus was properly denied as the injured parties could have appealed from an order denying the parties' motion seeking the recusal of a judge in a malpractice action under O.C.G.A. § 5-6-34(a)(1) and (d) when the parties sought the extraordinary relief of a writ of mandamus. Whitley v. Schwall, 279 Ga. 726, 620 S.E.2d 827 (2005).

Denial of motion to recuse a trial court should have been raised in earlier appeal on the merits. — Appellate court reviewing a grant of attorney's fees against a litigant would not consider the denial of the litigant's motion to recuse the trial judge on the second appeal of the case because the denial of the motion to recuse could have been raised by the litigant in the litigant's earlier appeal of the case but was not. Jones v. Unified Gov't of Athens-Clarke County, 312 Ga. App. 214, 718 S.E.2d 74 (2011), cert. denied, No. S12C0387, 2012 Ga. LEXIS 228 (Ga. 2012).

Judgment in mandamus action subject to direct appeal. — Even though appellant doctor sought review of a decision by appellee board of medical examiners by filing a mandamus action, and even though a judgment in a mandamus action was subject to direct appeal under O.C.G.A. § 5-6-34, the doctor was required to file an application to appeal pursuant to O.C.G.A. § 5-6-35 because the underlying subject matter of the doctor's appeal was covered by O.C.G.A. § 5-6-35. Ferguson v. Composite State Bd. of Med. Exam'rs, 275 Ga. 255, 564 S.E.2d 715 (2002).

Judgment entitling landlord to retain a $2,500 earnest money deposit as liquidated damages, and requiring tenants to pay $1200 as increased rent, exceeded $2,500, and, accordingly, was subject to direct appeal. Alexander v. Steining, 197 Ga. App. 328, 398 S.E.2d 390 (1990).

Judgment condemning property was not final because the issue of just and adequate compensation was still pending below. Cook v. Georgia Power Co., 204 Ga. App. 119, 418 S.E.2d 451 (1992).

Judgment on arbitration award not final. — Limited liability company's appeal was dismissed as the order was not a

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final judgment under O.C.G.A. § 5-6-34(a)(1) since the matter had been remanded for an arbitrator's clarification of one invoice, the arbitrator had entered a clarification ruling, and the clarification ruling formed no part of the judgment; a subcontractor's cross-appeal was dismissed for the same reason. Johnson Real Estate Invs., LLC v. Aqua Indus., 275 Ga. App. 532, 621 S.E.2d 530 (2005).

No express final judgment. — Since there was no determination that there was no just reason for delay and express direction of final judgment pursuant to O.C.G.A. § 9-11-54(b), the orders which the plaintiff would appeal were interlocutory and not appealable without compliance with the interlocutory appeal procedure of subsection (b) of this section. Wright v. Millines, 212 Ga. App. 453, 442 S.E.2d 300 (1994).

Orders requiring supersedeas bonds not final. — Since there were matters still pending in the cases, orders requiring supersedeas bonds were not final and, thus, not subject to direct appeal. Pruett v. Commercial Bank, 211 Ga. App. 692, 440 S.E.2d 85 (1994).

Order in partition proceeding appointing commissioners and ordering sale of land. — When application is made to the superior court for partition of land by sale, and judge, after hearing evidence, appoints commissioners, and orders the commissioners to sell the land, such judgment is so far final as to authorize the objecting party to bring the case to the Supreme Court by a proper bill of exceptions (see O.C.G.A. §§ 5-6-49, 5-6-50). Lanier v. Gay, 195 Ga. 859, 25 S.E.2d 642 (1943) (decided under former Code 1933, § 6-701, as it read prior to revision by Ga. L. 1965, p. 18, § 1).

Judgment denying motion to dismiss motion for new trial when no motion for judgment n.o.v. is pending, would be one from which direct appeal could be taken. Fulton v. Chattanooga Publishing Co., 98 Ga. App. 473, 105 S.E.2d 922 (1958) (decided under former Code 1933, § 6-701, as it read prior to revision by Ga. L. 1965, p. 18, § 1).

Order and judgment of trial court disallowing and striking amendment to petition leaves case pending in court below. Such order is not a final disposition of case in trial court. Virginia Well & Supply Co. v. Landers, 99 Ga. App. 397, 108 S.E.2d 756 (1959) (decided under former Code 1933, § 6-701, as it read prior to revision by Ga. L. 1965, p. 18, § 1).

When trial judge vacates his order overruling demurrers (now motion to dismiss) to petition, there has been no final judgment in case and filing of bill of exceptions (see O.C.G.A. §§ 5-6-49, 5-6-50) to Court of Appeals is premature. Rushin v. Winecoff, 94 Ga. App. 413, 94 S.E.2d 755 (1956) (decided under former Code 1933, § 6-701, as it read prior to revision by Ga. L. 1965, p. 18, § 1).

Until petition for interpleader is dismissed, or otherwise disposed of, cause is pending in trial court. Grogan v. Bank of Acworth, 212 Ga. 421, 93 S.E.2d 569 (1956) (decided under former Code 1933, § 6-701, as it read prior to revision by Ga. L. 1965, p. 18, § 1).

Order sustaining demurrer (now motion to dismiss) to motion made pursuant to former Code 1933, § 24-1704 (see O.C.G.A. § 15-19-7) to require counsel to produce, prove, and show authority under which the party appears in cause and to disclose name of party or parties who employed the party and the name of the real party at interest was not a final judgment that may be reviewed by bill of exceptions (see O.C.G.A. §§ 5-6-49, 5-6-50) to Court of Appeals. Carlock v. Emery, 104 Ga. App. 783, 123 S.E.2d 309 (1961) (decided under former Code 1933, § 6-701, as it read prior to revision by Ga. L. 1965, p. 18, § 1).

Denial of motion for change of venue on ground of inability to obtain fair trial. — Exception to refusal of motion for change of venue, based solely on ground that the defendant cannot obtain fair trial in county in which the defendant is under indictment, cannot form basis of direct bill of exceptions (see O.C.G.A. §§ 5-6-49, 5-6-50) to Court of Appeals prior to final judgment in case. Nickles v. State, 86 Ga. App. 284, 71 S.E.2d 574 (1952) (decided under former

Code 1933, § 6-701, as it read prior to revision by Ga. L. 1965, p. 18, § 1).

Striking of plea of former jeopardy, filed by accused in criminal case, is not a final judgment, and a direct bill of exceptions (see O.C.G.A. §§ 5-6-49, 5-6-50) assigning error upon judgment striking plea is prematurely brought and must be dismissed. McNeal v. State, 88 Ga. App. 333, 76 S.E.2d 640 (1953) (decided under former Code 1933, § 6-701, as it read prior to revision by Ga. L. 1965, p. 18, § 1).

Judgment sustaining or striking plea of res judicata is not final or otherwise within meaning of section. Stout v. Pate, 209 Ga. 536, 74 S.E.2d 458 (1953) (decided under former Code 1933, § 6-701, as it read prior to revision by Ga. L. 1965, p. 18, § 1).

Judgment sustaining plea of res judicata to suit, but not ordering dismissal of action, is not "final," within meaning of section. Harris v. Stowers, 192 Ga. 215, 15 S.E.2d 193 (1941) (decided under former Code 1933, § 6-701, as it read prior to revision by Ga. L. 1965, p. 18, § 1).

Determination of merits of traverse is a mere interlocutory proceeding, and exceptions to rulings in reference thereto may be included in main bill of exceptions (see O.C.G.A. §§ 5-6-49, 5-6-50) which excepts also to error alleged to have been committed in trial of case, after determination of issue raised by traverse. Ragsdale v. Middlebrooks, 50 Ga. App. 8, 176 S.E. 825 (1934) (decided under former Code 1933, § 6-701, as it read prior to revision by Ga. L. 1965, p. 18, § 1).

Judgment declaring entry of default void is no more final than judgment opening default. Ryles v. Moore, 191 Ga. 661, 13 S.E.2d 672 (1941) (decided under former Code 1933, § 6-701, as it read prior to revision by Ga. L. 1965, p. 18, § 1).

Judgment affirming order of State Board of Workmen's (now Workers') Compensation dismissing plea in abatement filed before board is not a final judgment and is not subject to appeal. Scarbrough v. Portress, 111 Ga. App. 875, 143 S.E.2d 555 (1965) (decided under former Code 1933, § 6-701, as it read prior to revision by Ga. L. 1965, p. 18, § 1).

Order appointing partitioners is not a final judgment within meaning of section. Wood v. W.P. Brown & Sons Lumber Co., 199 Ga. 167, 33 S.E.2d 435 (1945) (decided under former Code 1933, § 6-701, as it read prior to revision by Ga. L. 1965, p. 18, § 1).

Order in partition proceeding. — In partition proceeding where division of lands among co-owners was sought by having, under former Code 1933, § 85-1504 (see O.C.G.A. § § 44-6-160) the lands divided by metes and bounds, an order of the court adjudicating what we respective interests of parties in and to realty involved, and appointing partitioners to divide the property in accordance therewith, and make return to court, was merely interlocutory. Lanier v. Gay, 195 Ga. 859, 25 S.E.2d 642 (1943) (decided under former Code 1933, § 6-701, as it read prior to revision by Ga. L. 1965, p. 18, § 1).

Interlocutory order or judgment refusing to dissolve receivership cannot be reviewed in Supreme Court on direct bill of exceptions (see O.C.G.A. §§ 5-6-49, 5-6-50). Melton v. Holland, 204 Ga. 539, 50 S.E.2d 211 (1948) (decided under former Code 1933, § 6-701, as it read prior to revision by Ga. L. 1965, p. 18, § 1).

Direction to receivers to collect rents from defendant, or exclude defendant from property, was an administrative order to carry into effect former order appointing receivers (which order was by consent of all parties), and is not such a final judgment as will support a direct bill of exceptions (see O.C.G.A. §§ 5-6-49, 5-6-50). Melton v. Holland, 204 Ga. 539, 50 S.E.2d 211 (1948) (decided under former Code 1933, § 6-701, as it read prior to revision by Ga. L. 1965, p. 18, § 1).

Order approving, disapproving or rejecting auditor's report. — Whether the court approves, disapproves, or rejects report of auditor, the court's ruling in this matter is only an interlocutory order which does not amount to a final judgment. Jordan v. Harber, 182 Ga. 621, 186 S.E. 670 (1936) (decided under former Code 1933, § 6-701, as it read prior to revision by Ga. L. 1965, p. 18, § 1).

Order overruling exceptions of law and

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of fact to auditor's report did not amount to final judgment, nor would judgment sustaining such exceptions, as sought by the plaintiff in error, have been a final disposition of the cause. Moncrief v. Rimer, 181 Ga. 4, 181 S.E. 169 (1935) (decided under former Code 1933, § 6-701, as it read prior to revision by Ga. L. 1965, p. 18, § 1).

Order overruling exceptions to auditor's report. — Order overruling exceptions to the auditor's report is not a final judgment within meaning of section, unless the court made the auditor's report the judgment of the court, thus adjudicating the rights of the parties on merits. Farrar v. Ainsworth, 207 Ga. 185, 60 S.E.2d 366 (1950) (decided under former Code 1933, § 6-701, as it read prior to revision by Ga. L. 1965, p. 18, § 1).

Voluntary dismissal without prejudice was not a "final termination" of the case, and so the 45-day "window of opportunity" for moving for penalties and attorneys fees pursuant to O.C.G.A. § 9-15-14 did not begin to run with the plaintiff's voluntary dismissal of the plaintiff's complaint without prejudice, and the plaintiff's motion for penalties and attorney fees was timely; however, the award of attorneys fees was vacated and the case was remanded when the trial court's judgment contained no findings of conduct that authorized the award. Meister v. Brock, 268 Ga. App. 849, 602 S.E.2d 867 (2004).

Order overruling plea in bar. — Trial court's order overruling a plea in bar was directly appealable. Langlands v. State, 282 Ga. 103, 646 S.E.2d 253 (2007).

Order concerning transfer of tax funds. — Citizens' appeal was dismissed for lack of jurisdiction because the trial court's orders denying the citizens interlocutory injunctive relief and authorizing a city and development authority to transfer disputed tax funds to a school system were not subject to direct appeal; the trial court's order authorizing the city and development authority to transfer disputed tax funds to the school system for the school's general purposes was an amendment of the trial court's order granting an interlocutory injunction and was a finding by the trial court that a final order in the appellants' favor was unlikely, and the order denying the citizens an interlocutory injunction was not a ruling on an issue raised in the parties' cross-motions for partial summary judgment, which remained pending in the trial court. Clark v. Atlanta Indep. Sch. Sys., 311 Ga. App. 255, 715 S.E.2d 668 (2011).

Order on emergency motion directly appealable. — Trial court erred in dismissing an employee's notice of appeal challenging the grant of an employer's emergency motion because the trial court's order on the emergency motion was directly appealable, and, therefore, the order dismissing the notice of appeal from the order on the emergency motion was, itself, directly appealable under O.C.G.A. § 5-6-34(a)(4), and the Court of Appeals had jurisdiction to consider the appeal; the trial court's order on the emergency motion was, in effect, a mandatory permanent injunction because it required the employee to provide the employer details about prior settlements and insurance coverage in the underlying tort suit, and it prohibited the employee from settling any claims or going to trial unless the employee complied with O.C.G.A. § 33-24-56.1. Lamb v. Salvation Army, 301 Ga. App. 325, 687 S.E.2d 615 (2009).

Appellate jurisdiction to review grant of summary judgment in conversion claims. — Court of appeals had appellate jurisdiction to review the grant of summary judgment in favor of a bank on the bank's conversion claim against a real estate firm because the grant of summary judgment was directly appealable under O.C.G.A. § 9-11-56(h), and the firm's cross-appeal of that grant of summary judgment could stand on the firm's own merits; because the court of appeals had jurisdiction to review the grant of summary judgment in favor of the bank on the bank's conversion claim, the court also had jurisdiction pursuant to O.C.G.A. § 5-6-34(d) to review the denial of the firm's motion for summary judgment on that same issue. Trey Inman & Assocs., P.C. v. Bank of Am., N.A., 306 Ga. App. 451, 702 S.E.2d 711 (2010).

Denial of semen testing not appealable. — Inmate could not take advantage

of O.C.G.A. § 5-6-34(d) to appeal the denial of the inmate's motion for forensic testing of a semen sample because, while the order denying the motion also denied a sentence modification, the inmate had not sought review of that portion of the order. Bradberry v. State, 315 Ga. App. 434, 727 S.E.2d 208 (2012).

2. Certificates of Immediate Review

Interlocutory appeals placed on equal footing with appeals from final judgments. — Provision in subsection (b) of former Code 1933, § 6-701 (see O.C.G.A. § 5-6-34) that … procedure following filing of notice of appeal shall be same as in appeal from final judgment, indicated legislative intent that, after filing notice of appeal, status quo was to be maintained just as it would be if appeal were from a final judgment, and mandated that, once supersedeas attached, interlocutory order shall have same procedural status and dignity as a final judgment; therefore, since Ga. L. 1966, p. 609, § 41 (see O.C.G.A. § 9-11-41(a)) would not permit plaintiff-appellee to dismiss plaintiff-appellee's case while final judgment in the plaintiff-appellee's favor was on appeal, thereby robbing the defendant-appellant of an opportunity to seek reversal of judgment; it would neither permit plaintiff-appellee to do so in an interlocutory context. Lawrence v. Whittle, 146 Ga. App. 686, 247 S.E.2d 212 (1978).

Trial judge has broad discretion. — Trial judge in determining whether an otherwise interlocutory order might be reviewed prior to final judgment is given carte blanche authority. Lee v. Smith, 119 Ga. App. 808, 168 S.E.2d 880 (1969).

When trial judge leaves jurisdiction after rendering order. — When the trial judge, after rendering the order, departs from the jurisdiction so as to make it impossible to request of the judge a timely certificate for immediate appellate review, request, if timely, may be presented for grant or denial to another judge of same court having authority to hear emergency matters. Tingle v. Harvill, 125 Ga. App. 312, 187 S.E.2d 536 (1972); Freemon v. Dubroca, 177 Ga. App. 745, 341 S.E.2d 276 (1986).

Certificate of appealability is not itself a judgment in the cause, but is simply an order allowing judgment or order already entered to be appealed and reviewed. G.M.J. v. State, 130 Ga. App. 420, 203 S.E.2d 608 (1973).

Certificate of immediate review to interlocutory order must be followed by petition to appellate court. When this is not done, an appeal is premature and must be dismissed. Home Mart Bldg. Centers, Inc. v. Wallace, 139 Ga. App. 49, 228 S.E.2d 22 (1976).

When a party does not file an application for interlocutory appeal within ten days of the granting of the trial court's certificate for immediate review, the appeal is premature and must be dismissed. Graves v. Dean, 166 Ga. App. 186, 303 S.E.2d 751 (1983).

When the defendant obtained a certificate of immediate review but failed to apply to the court for permission to file an interlocutory appeal in accordance with O.C.G.A. § 5-6-34, the appeal was dismissed for lack of jurisdiction. State v. Crapse, 173 Ga. App. 100, 325 S.E.2d 620 (1984), but see Hubbard v. State, 176 Ga. App. 622, 337 S.E.2d 60 (1985).

Because it is important to have the defendant's double jeopardy claim adjudicated before trial in order to prevent harm to the defendant, the appellate court has jurisdiction to hear an appeal from the denial of the defendant's O.C.G.A. § 17-7-170 motion even though the defendant did not apply for permission to file an interlocutory appeal. Hubbard v. State, 176 Ga. App. 622, 337 S.E.2d 60 (1985).

Untimely, invalid applications for immediate review cannot be revived. — Amendments offered as applications for immediate review and tendered approximately three months after expiration of time for filing such applications under subsection (b) do not serve to revive invalid appeals. Summer Tree Club Apts. Assocs. v. Graves Constr. Co., 140 Ga. App. 214, 230 S.E.2d 503 (1976).

Unless certificate is filed within time required, party seeking review must await final judgment. — Certificate for immediate review must be filed with clerk of trial court within ten-day period in order to secure immediate re-

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view of nonfinal judgment; if this is not done, party seeking review will merely have to await final judgment in case before he can obtain review of interlocutory judgments entered in trial court. Turner v. Harper, 231 Ga. 175, 200 S.E.2d 748 (1973).

Erroneous certification under § 9-11-54(b) may be treated as certification pursuant to this section. — When the trial court erroneously enters certification pursuant to Ga. L. 1976, p. 1047, § 2 (see O.C.G.A. § 9-11-54(b)), the appellate court may treat certification as one entered pursuant to subsection (b) of former Code 1933, § 6-701 (see O.C.G.A. § 5-6-34). However, because in cases in which erroneous certification under Ga. L. 1976, p. 1047, § 2 § 9-11-54(b)) was treated as certification pursuant to former Code 1933, § 6-701, the cause will have been treated by the trial court and parties as an appeal from a final judgment, time limitations imposed by subsection (b) on parties and this court were not applicable. Georgia Farm Bureau Mut. Ins. Co. v. Wall, 242 Ga. 176, 249 S.E.2d 588 (1978).

Certificate stating review "may" be had. — Certificate ordering new trial, signed by trial judge, stating that immediate review "may" be had rather than "should" be had is in substantial compliance with the law and is not ground for dismissal. State Hwy. Dep't v. Lord, 123 Ga. App. 178, 179 S.E.2d 780 (1971).

Order allowing 30 days to appeal before case shall proceed. — Court order denying motion which states that the movant will be allowed 30 days in which to appeal the order and if no appeal is made within that period case shall proceed, is not certification required by subsection (b) in that there has been no certification of importance of immediate review. Alexander v. State, 122 Ga. App. 331, 176 S.E.2d 633 (1970).

Where ten-day period expires on Sunday and Monday is a holiday. — When ten-day limitation for securing certificate certifying denial of summary judgment for review expired on Sunday, October 11 and Monday, October 12, was Columbus Day, a legal holiday, a certificate for review obtained on October 13 was obtained within time. Allstate Ins. Co. v. Cody, 123 Ga. App. 265, 180 S.E.2d 596 (1971).

Denial of superfluous application does not block available avenues of appeal which caused application to be superfluous. Southeast Ceramics, Inc. v. Klem, 246 Ga. 294, 271 S.E.2d 199 (1980).

Appeal from decision of reviewing court regarding administrative decision. — Under O.C.G.A. § 50-13-20) the Court of Appeals has jurisdiction only of a final judgment of a reviewing court regarding an administrative decision. O.C.G.A. § 5-6-34, providing for interlocutory appeal upon certificate of immediate review, does not govern. Hardison v. Booth, 160 Ga. App. 69, 286 S.E.2d 60 (1981).

Certification for review by one judge of another's decision. — When one judge's order dismissing the defendant's motion to suppress evidence was not issued pursuant to notice and opportunity for hearing and when the trial judge (another judge) in effect reasserted such dismissal before certifying it for review, the Court of Appeals has jurisdiction to consider the order on appeal because there is no jurisdictional defect in the manner in which the appeal reached that court. Caudill v. State, 157 Ga. App. 415, 277 S.E.2d 773 (1981).

Certificate required. — When the defendant's motion to dismiss the defendant's indictment for cocaine possession for failure to comply with O.C.G.A. § 42-6-20, Art. III(a), was denied by the trial court, but no certificate was contained in the record, this issue was one for which a certificate of immediate review and petition for interlocutory appeal were required so the appeal must be dismissed under O.C.G.A. § 5-6-34(b); this is not a question involving speedy trial rights under O.C.G.A. § 17-7-170, which would be directly appealable. Miller v. State, 180 Ga. App. 710, 350 S.E.2d 313 (1986).

Denial of misnamed motion followed by certificate. — When the trial court's denial of the appellant's misnamed motion seeking to dismiss a third-party

intervenor was timely followed by a certificate of immediate review, and the appellant timely sought appeal of it "pursuant to O.C.G.A. § 5-6-34(b)," jurisdiction was properly lodged in the Court of Appeals by interlocutory appeal. Brooks v. Carson, 194 Ga. App. 365, 390 S.E.2d 859 (1990), overruled on other grounds, Mayor of City of Savannah v. Norman J. Bass Constr. Co., 264 Ga. 16, 441 S.E.2d 63 (1994).

Substantial compliance with requirements adequate. — Certificate which substantially complied with the language of subsection (b) was sufficient to allow appeal. Clayton v. Edwards, 225 Ga. App. 141, 483 S.E.2d 111 (1997).

OPINIONS OF THE ATTORNEY GENERAL

Appeals from a municipal court conviction of a traffic offense may lie in the Court of Appeals or in the superior court depending on the status of the municipal court and the nature of the offense. 1985 Op. Att'y Gen. No. U85-18.

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Appellate Review, § 1 et seq.

Am. Jur. Pleading and Practice Forms. — 2 Am. Jur. Pleading and Practice Forms, Appeal and Error, § 2.

ALR. — Will questions which might have been, but were not, raised on prior appeal or error, be considered on subsequent appeal or error, 1 ALR 725.

Right to appeal from order releasing one in extradition proceedings, 5 ALR 1156.

Judgment on claim as bar to action to recover amount of payment which was not litigated in previous action, 13 ALR 1151.

Appeal as affecting time allowed by judgment or order appealed from for the performance of a condition affecting a substantive right or obligation, 28 ALR 1029.

Coram nobis on ground of newly discovered evidence, 33 ALR 84.

First decision of intermediate court as law of the case on appeal to court of last resort from subsequent decision, 41 ALR 1078, 118 ALR 1286.

Conduct of party in court room tending improperly to influence jury as ground for reversal or new trial, 57 ALR 62.

Abatement of action which does not survive, by death of party pending appeal or writ of error, 62 ALR 1048.

Judgment or order dismissing action as against one defendant as subject of appeal or error before disposition of case as against codefendant, 80 ALR 1186; 114 ALR 759.

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Criticism in judge's charge to jury of argument of defendant's counsel in criminal case, 86 ALR 899.

Who entitled to appeal from decree admitting will to probate or denying probate, 88 ALR 1158.

Right of bankrupt after adjudication to take or prosecute appeal from or otherwise review a judgment against him, 92 ALR 291.

Change of law after decision of lower court as affecting decision on appeal or error, 111 ALR 1317; 151 ALR 987.

Judgment or order dismissing action as against one defendant as subject of appeal or error before disposition of case as against codefendant, 114 ALR 759.

Reception of incompetent evidence in criminal case tried to court without jury as ground of reversal, 116 ALR 558.

First decision of intermediate court as law of case on appeal to court of last resort from subsequent decision, 118 ALR 1286.

Remedy of one convicted of crime while insane, 121 ALR 267.

Res judicata as regards decisions or awards under workmen's compensation acts, 122 ALR 550.

Ruling against defendant's attack upon indictment or information as subject to review by higher court, before trial, 133 ALR 934.

Application for or acceptance of executive clemency as affecting appellate proceedings or motion for new trial, 138 ALR 1162.

Adequacy of remedy by appeal in criminal cases to preclude prohibition sought

on the ground of lack or loss of jurisdiction, 141 ALR 1262.

Finality, for purposes of appeal, of judgment in federal court which disposes of plaintiff's claim, but not of defendant's counterclaim, or vice versa, 147 ALR 583.

Order upon application for suppression in criminal case of evidence wrongly seized by government as appealable, 156 ALR 1207.

Effect of, and remedies for, exclusion of eligible class of persons from jury list in civil case, 166 ALR 1422.

Order granting or denying revival of action after death of party as final order subject to appeal, 167 ALR 261.

Order granting or refusing motion for temporary alimony or suit money in divorce action as appealable, 167 ALR 360.

Appealability of ruling or demurrer to plea, answer, or reply, 171 ALR 1433.

Appealability of order entered on motion to strike pleading, 1 ALR2d 422.

Finality of judgment or decree for purposes of review as affected by provision for future accounting, 3 ALR2d 342.

Questions or legal theories affecting trust estates as subject to consideration on appeal though not raised below, 11 ALR2d 317.

Appealability of order granting or denying right of intervention, 15 ALR2d 336.

Appealability of order with respect to motion for joinder of additional parties, 16 ALR2d 1023.

Appealability of federal district court order denying motion to remand cause to state court, 21 ALR2d 760.

Decree granting or refusing injunction as res judicata in action for damages in relation to matter concerning which injunction was asked in first suit, 26 ALR2d 446.

Appealability of order overruling or sustaining motion to quash or set aside service of process, 30 ALR2d 287.

What constitutes final judgment within provision or rule limiting application for new trial to specified period thereafter, 34 ALR2d 1181.

Appealability of order pertaining to pretrial examination, discovery, interrogatories, production of books and papers, or the like, 37 ALR2d 586.

Right of appeal from order on application for removal of personal representative, guardian, or trustee, 37 ALR2d 751.

Judicial relief other than by dissolution or receivership in cases of intracorporate deadlock, 47 ALR2d 365.

Appealability of order denying motion for directed verdict or for judgment notwithstanding the verdict where movant has been granted a new trial, 57 ALR2d 1198.

Ruling on motion to quash execution as ground of appeal or writ of error, 59 ALR2d 692.

Contact or communication between juror and outsider during trial of civil case as ground for mistrial, new trial, or reversal, 64 ALR2d 158.

Participation in, acceptance of, or submission to new trial as precluding appellate review of order granting it or of issue determined in first trial, 67 ALR2d 191.

Appealability of order appointing, or refusing to appoint, receiver, 72 ALR2d 1009.

Appealability of order vacating, or refusing to vacate, approval of settlement of infant's tort claim, 77 ALR2d 801.

Appealability of order relating to forfeiture of bail, 78 ALR2d 1180.

Appealability of order relating to transfer, on jurisdictional grounds, of cause from one state court to another, 78 ALR2d 1204.

Reviewability, on appeal from final judgment, of interlocutory order, as affected by fact that order was separately appealable, 79 ALR2d 1352.

Retroactive effect on appeal from judgment previously entered of statute shortening time allowed for appellate review, 81 ALR2d 417.

Inattention of juror from sleepiness or other cause as ground for reversal or new trial, 88 ALR2d 1275; 59 ALR5th 1.

Appealability of order entered in connection with pretrial conference, 95 ALR2d 1361.

Appealability of order arresting judgment in criminal case, 98 ALR2d 737.

Judgment subject to appeal as entitled to full faith and credit, 2 ALR3d 1384.

Appealability of order setting aside, or refusing to set aside, default judgment, 8 ALR3d 1272.

Appealability of order directing payment of money into court, 15 ALR3d 568.

Reviewability of order denying motion for summary judgment, 15 ALR3d 899.

Appealability of orders or rulings, prior to final judgment in criminal case, as to accused's mental competency, 16 ALR3d 714.

Appealability of order staying, or refusing to stay, action because of pendency of another action, 18 ALR3d 400.

Appealability of order granting, extending, or refusing to dissolve temporary restraining order, 19 ALR3d 403.

Appealability of order refusing to grant or dissolving temporary restraining order, 19 ALR3d 459.

Appealability of acquittal from or dismissal of charge of contempt of court, 24 ALR3d 650.

Appealability of contempt adjudication or conviction, 33 ALR3d 448.

Development, since Hickman v. Taylor, of attorney's "work product" doctrine, 35 ALR3d 412; 27 ALR4th 568.

Appealability of order denying right to proceed in form of class action — state cases, 54 ALR3d 595.

Appealability of state court order granting or denying consolidation, severance, or separate trials, 77 ALR3d 1082.

Appealability of order dismissing counterclaim, 86 ALR3d 944.

Defendant's appeal from plea conviction as affected by prosecutor's failure or refusal to dismiss other pending charges, pursuant to plea agreement, until expiration of time for appeal, 86 ALR3d 1262.

Appealability of state court's order granting or denying motion to disqualify attorney, 5 ALR4th 1251.

Right of municipal corporation to review of unfavorable decision in action or prosecution for violation of ordinance — modern status, 11 ALR4th 399.

Relief other than by dissolution in cases of intracorporate deadlock or dissension, 34 ALR4th 13.

Appealability of order suspending imposition or execution of sentence, 51 ALR4th 939.

Appealability of interlocutory or pendente lite order for temporary child custody, 82 ALR5th 389.

5-6-35. Cases requiring application for appeal; requirements for application; exhibits; response; issuance of appellate court order regarding appeal; procedure; supersedeas; jurisdiction of appeal; appeals involving nonmonetary judgments in custody cases.

(a) Appeals in the following cases shall be taken as provided in this Code section:

(1) Appeals from decisions of the superior courts reviewing decisions of the State Board of Workers' Compensation, the State Board of Education, auditors, state and local administrative agencies, and lower courts by certiorari or de novo proceedings; provided, however, that this provision shall not apply to decisions of the Public Service Commission and probate courts and to cases involving ad valorem taxes and condemnations;

(2) Appeals from judgments or orders in divorce, alimony, and other domestic relations cases including, but not limited to, granting or refusing a divorce or temporary or permanent alimony or holding or declining to hold persons in contempt of such alimony judgment or orders;

(3) Appeals from cases involving distress or dispossessory warrants in which the only issue to be resolved is the amount of rent due and such amount is $2,500.00 or less;

(4) Appeals from cases involving garnishment or attachment, except as provided in paragraph (5) of subsection (a) of Code Section 5-6-34;

(5) Appeals from orders revoking probation;

(5.1) Appeals from decisions of superior courts reviewing decisions of the Sexual Offender Registration Review Board;

(5.2) Appeals from decisions of superior courts granting or denying petitions for release pursuant to Code Section 42-1-19;

(6) Appeals in all actions for damages in which the judgment is $10,000.00 or less;

(7) Appeals, when separate from an original appeal, from the denial of an extraordinary motion for new trial;

(8) Appeals from orders under subsection (d) of Code Section 9-11-60 denying a motion to set aside a judgment or under subsection (e) of Code Section 9-11-60 denying relief upon a complaint in equity to set aside a judgment;

(9) Appeals from orders granting or denying temporary restraining orders;

(10) Appeals from awards of attorney's fees or expenses of litigation under Code Section 9-15-14;

(11) Appeals from decisions of the state courts reviewing decisions of the magistrate courts by de novo proceedings so long as the subject matter is not otherwise subject to a right of direct appeal; and

(12) Appeals from orders terminating parental rights.

(b) All appeals taken in cases specified in subsection (a) of this Code section shall be by application in the nature of a petition enumerating the errors to be urged on appeal and stating why the appellate court has jurisdiction. The application shall specify the order or judgment being appealed and, if the order or judgment is interlocutory, the application shall set forth, in addition to the enumeration of errors to be urged, the need for interlocutory appellate review.

(c) The applicant shall include as exhibits to the petition a copy of the order or judgment being appealed and should include a copy of the petition or motion which led directly to the order or judgment being appealed and a copy of any responses to the petition or motion. An applicant may include copies of such other parts of the record or transcript as he deems appropriate. No certification of such copies by the clerk of the trial court shall be necessary in conjunction with the application.

(d) The application shall be filed with the clerk of the Supreme Court or the Court of Appeals within 30 days of the entry of the order, decision, or judgment complained of and a copy of the application, together with a list of those parts of the record included with the application, shall be served upon the opposing party or parties as provided by law, except that the service shall be perfected at or before the filing of the application. When a motion for new trial, a motion in arrest of judgment, or a motion for judgment notwithstanding the verdict has been filed, the application shall be filed within 30 days after the entry of the order granting, overruling, or otherwise finally disposing of the motion.

(e) The opposing party or parties shall have ten days from the date on which the application is filed in which to file a response. The response may be accompanied by copies of the record in the same manner as is allowed with the application. The response may point out that the decision of the trial court was not error, or that the enumeration of error cannot be considered on appeal for lack of a transcript of evidence or for other reasons.

(f) The Supreme Court or the Court of Appeals shall issue an order granting or denying such an appeal within 30 days of the date on which the application was filed.

(g) Within ten days after an order is issued granting the appeal, the applicant, to secure a review of the issues, shall file a notice of appeal as provided by law. The procedure thereafter shall be the same as in other appeals.

(h) The filing of an application for appeal shall act as a supersedeas to the extent that a notice of appeal acts as supersedeas.

(i) This Code section shall not affect Code Section 9-14-52, relating to practice as to appeals in certain habeas corpus cases.

(j) When an appeal in a case enumerated in subsection (a) of Code Section 5-6-34, but not in subsection (a) of this Code section, is initiated by filing an otherwise timely application for permission to appeal pursuant to subsection (b) of this Code section without also filing a timely notice of appeal, the appellate court shall have jurisdiction to decide the case and shall grant the application. Thereafter the appeal shall proceed as provided in subsection (g) of this Code section.

(k) Where an appeal is taken pursuant to this Code section for a judgment or order granting nonmonetary relief in a child custody case, such judgment or order shall stand until reversed or modified by the reviewing court unless the trial court states otherwise in its judgment or order. (Ga. L. 1979, p. 619, §§ 3, 6; Ga. L. 1982, p. 3, § 5; Ga. L. 1984, p. 22, § 5; Ga. L. 1984, p. 599, § 2; Ga. L. 1986, p. 1591, § 2; Ga. L.

1988, p. 1357, § 1; Ga. L. 1991, p. 412, § 1; Ga. L. 1994, p. 347, § 2; Ga. L. 1997, p. 543, § 1; Ga. L. 2007, p. 554, § 3/HB 369; Ga. L. 2010, p. 168, § 1/HB 571; Ga. L. 2011, p. 562, § 2/SB 139.)

The 2011 amendment, effective July 1, 2011, added subsection (k). See editor's note for applicability.

Cross references. — Petitions for alimony or child support when no divorce is pending, §§ 19-6-10, 19-6-11. Filings in clerk's office, Rules of the Supreme Court of the State of Georgia, Rule 1. Application for leave to appeal final judgment, Rules of the Supreme Court of the State of Georgia, Rule 25. Leave to appeal interlocutory order, Rules of the Court of Appeals of the State of Georgia, Rule 29.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1997, "(a) of this Code section" was substituted for "(a) of this Code Section" in the first sentence of subsection (j).

Editor's notes. — Ga. L. 1986, p. 1591, § 3, not codified by the General Assembly, provided that that Act applies to actions filed or presented for filing on or after July 1, 1986, and to any action pending on July 1, 1986, with respect to any claim, defense, or other position which is first raised in the action on or after July 1, 1986.

Ga. L. 2007, p. 554, § 1/HB 369, not codified by the General Assembly, provides that: "The General Assembly of Georgia declares that it is the policy of this state to assure that minor children have frequent and continuing contact with parents who have shown the ability to act in the best interests of their children and to encourage parents to share in the rights and responsibilities of rearing their children after the parents have separated or dissolved their marriage or relationship."

Ga. L. 2007, p. 554, § 8/HB 369, not codified by the General Assembly, provides that the 2007 amendment applies to all child custody proceedings and modifications of child custody filed on or after January 1, 2008.

Ga. L. 2011, p. 562, § 4/SB 132, not codified by the General Assembly, provides that the amendment by that Act shall apply to all notices or applications for appeal filed on or after July 1, 2011.

Law reviews. — For article surveying appellate practice and procedure, see 34 Mercer L. Rev. 3 (1982). For survey article on domestic relations, see 34 Mercer L. Rev. 113 (1982). For annual survey of domestic relations law, see 35 Mercer L. Rev. 127 (1983). For article surveying recent developments in administrative law, see 37 Mercer L. Rev. 503 (1985). For annual survey of administrative law, see 38 Mercer L. Rev. 17 (1986). For annual survey of appellate practice and procedure, see 38 Mercer L. Rev. 47 (1986). For annual survey of criminal law, see 38 Mercer L. Rev. 129 (1986). For annual survey of law of domestic relations, see 38 Mercer L. Rev. 179 (1986). For article, "Battling the Many-Headed Hydra: Abusive Litigation Law in Georgia," see 25 Ga. St. B.J. 65 (1988). For article, "Intangible Tax Appeals After Blank v. Collins; The Uncertainty Continues," see 27 Ga. St. B.J. 78 (1990). For annual survey on law of domestic relations, see 42 Mercer L. Rev. 201 (1990). For article, "Let's Revise Appellate Procedure in Georgia," see 27 Ga. St. B.J. 135 (1991). For article, "Getting Certiorari Granted", 28 Ga. St. B.J. 90 (1991). For annual survey of appellate practice and procedure, see 43 Mercer L. Rev. 73 (1991). For annual survey of domestic relations, see 43 Mercer L. Rev. 243 (1991). For article, "Appeals, Interlocutory and Discretionary Applications, and Post-Judgment Motions in the Georgia Courts: The Current Practice and the Need for Reform Legislation," see 44 Mercer L. Rev. 17 (1992). For annual survey of administrative law, see 56 Mercer L. Rev. 31 (2004). For annual survey of domestic relations law, see 56 Mercer L. Rev. 221 (2004). For annual survey of Administrative Law, see 57 Mercer L. Rev. 1 (2005). For annual survey of appellate practice and procedure, see 57 Mercer L. Rev. 35 (2005). For annual survey of domestic relations cases, see 57 Mercer L. Rev. 173 (2005). For annual survey of criminal law, see 58 Mercer L. Rev. 83 (2006). For survey article on appellate practice and pro-

cedure, see 59 Mercer L. Rev. 21 (2007). For survey article on appellate practice and procedure, see 60 Mercer L. Rev. 21 (2008). For annual survey on domestic relations, see 61 Mercer L. Rev. 117 (2009). For annual survey of law on appellate practice and procedure, see 62 Mercer L. Rev. 25 (2010). For article, "Administrative Law," see 63 Mercer L. Rev. 47 (2011). For article, "Appellate Practice and Procedure," see 63 Mercer L. Rev. 67 (2011). For annual survey on domestic relations law, see 64 Mercer L. Rev. 121 (2012). For annual survey on real property, see 64 Mercer L. Rev. 255 (2012). For annual survey on administrative law, see 64 Mercer L. Rev. 39 (2012).

For note, "Restrictions on the Right to Direct Appeal under Georgia's Appellate Practice Act," see 21 Ga. St. B.J. 43 (1984).

JUDICIAL DECISIONS

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General Consideration

Purpose of section. — Clear purpose of O.C.G.A. § 5-6-35 is to permit the appellate courts to review expeditiously decisions of the superior courts reviewing decisions of administrative agencies without issuing an opinion in every such case. Tri-State Bldg. & Supply, Inc. v. Reid, 251 Ga. 38, 302 S.E.2d 566 (1983).

O.C.G.A. § 5-6-35 was enacted to ameliorate the appellate courts' massive case loads. Scruggs v. Georgia Dep't of Human Resources, 261 Ga. 587, 408 S.E.2d 103 (1991).

Construction with other law. — In an action on a credit card contract brought by a creditor, the debtor's voluntary dismissal of an appeal from an order granting the creditor summary judgment before the case was ever docketed served to dismiss the debtor's direct appeal, even though the trial court did not enter a formal dismissal order; thus, the appellate court lacked jurisdiction to hear the case, and a payment of appeal costs became moot. Ghee v. Target Nat'l Bank, 282 Ga. App. 28, 637 S.E.2d 742 (2006), cert. denied, 2007 Ga. LEXIS 62 (Ga. 2007), 552 U.S. 859, 128 S. Ct. 141, 169 L.Ed.2d 97 (2007).

Applicability. — Section applies to all appeals specified in subsection (a) whether judgment be final, interlocutory, or summary. Citizens & S. Nat'l Bank v. Rayle, 246 Ga. 727, 273 S.E.2d 139 (1980).

Award of attorney fees need not be appealed through the discretionary application process when a direct appeal from the underlying judgment is pending. Cagle v. Davis, 236 Ga. App. 657, 513 S.E.2d 16 (1999).

Discretionary application requirement of Georgia Prison Litigation Reform Act, O.C.G.A. § 42-12-8, was inapplicable to an injured party's renewed personal injury suit because the injured party was not a prisoner when the de novo action was filed. Baskin v. Ga. Dep't of Corr., 272 Ga. App. 355, 612 S.E.2d 565 (2005).

Because a city could have challenged an agency consent order under O.C.G.A. §§ 12-2-2(c) and 50-13-19, but did not, the city's appeal of a judgment to enforce the consent order did not fall under O.C.G.A. § 5-6-35(a)(1), but arose from proceedings

General Consideration (Cont'd)

under O.C.G.A. § 12-5-189; since the city did not appeal the director's decision, the appellate issue was limited to the propriety of the judgment and not the correctness of the decision. City of Rincon v. Couch, 272 Ga. App. 411, 612 S.E.2d 596 (2005).

Property owners were allowed to file a direct appeal of the dismissal of the owners' two latest lawsuits challenging zoning decisions related to a proposed private school near or contiguous to their property; the property owners' appeal was not one from the decision of a court reviewing the decision of an administrative agency within the meaning of O.C.G.A. § 5-6-35(a)(1), and, thus, the owners were not required to file an application for a discretionary appeal. Harrell v. Fulton County, 272 Ga. App. 760, 612 S.E.2d 838 (2005).

Although a former employer failed to properly serve papers, including a summary judgment motion, on the former employee's counsel at the counsel's new address, despite a change of address having been provided, pursuant to Ga. Ct. App. R. 1(a) and Ga. Ct. App. R. 6, the appellate court denied the employee's motion to dismiss the appeal and, instead, the court reviewed the matter on the merits; the improper service was asserted as a ground for an award of attorney fees, pursuant to O.C.G.A. § 9-15-14, and such award would be subject to appellate review under O.C.G.A. § 5-6-35(a)(10). Whimsical Expressions, Inc. v. Brown, 275 Ga. App. 420, 620 S.E.2d 635 (2005).

While the failure to move for a directed verdict barred a party from contending on appeal that the party was entitled to a judgment as a matter of law because of insufficient evidence, such did not bar the party from contending their entitlement to a new trial on that ground, as fairness dictated that a party who has failed to move for a directed verdict at trial should not be able to obtain a judgment as a matter of law on appeal based on the contention the evidence was insufficient to support the verdict. Aldworth Co. v. England, 281 Ga. 197, 637 S.E.2d 198 (2006).

Clear intent of paragraph (a)(1) is to give appellate courts (particularly Court of Appeals which has jurisdiction of workers' compensation cases not involving constitutionality of a law) discretion not to entertain an appeal when the superior court has reviewed a decision of certain specified lower tribunals (i.e., two tribunals had already adjudicated the case). Citizens & S. Nat'l Bank v. Rayle, 246 Ga. 727, 273 S.E.2d 139 (1980).

Clear intent of paragraph (a)(2) is to give appellate courts (Supreme Court in divorce and alimony cases and Court of Appeals in child custody cases) discretion not to entertain appeal where superior or juvenile court has made a decision as to divorce, alimony, child custody, or contempt, the latter three of which are in large part discretionary and yet frequently appealed by the losing spouse. Citizens & S. Nat'l Bank v. Rayle, 246 Ga. 727, 273 S.E.2d 139 (1980).

Legislative intent. — Legislature required the discretionary appeals procedures for appeals from orders or judgments denying relief in cases seeking to set aside judgments. Manley v. Jones, 203 Ga. App. 173, 416 S.E.2d 744, cert. denied, 203 Ga. App. 907, 416 S.E.2d 744 (1992).

Constitutionality of paragraph (a)(8) classification. — Classification created by paragraph (a)(8) of O.C.G.A. § 5-6-35 is reasonable and does not deny equal protection on the ground that while a party desiring to appeal an order denying a complaint in equity must file an application to appeal, a party desiring to appeal from an order granting a complaint in equity is entitled to a direct appeal. Schiesser v. Ross, 256 Ga. 414, 349 S.E.2d 745 (1986).

Construed with O.C.G.A. § 5-6-34(b). — O.C.G.A. § 5-6-35 does not allow a party to ignore the interlocutory-application provision of O.C.G.A. § 5-6-34(b), when attempting to obtain appellate review. Scruggs v. Georgia Dep't of Human Resources, 261 Ga. 587, 408 S.E.2d 103 (1991); Collier v. Evans, 205 Ga. App. 764, 423 S.E.2d 704 (1992).

Party seeking appellate review from an interlocutory order must follow the interlocutory-application i subsection, O.C.G.A. § 5-6-34(b), seek a certificate of immediate review from the trial court,

and comply with the time limitations therein. Scruggs v. Georgia Dep't of Human Resources, 261 Ga. 587, 408 S.E.2d 103 (1991); Collier v. Evans, 205 Ga. App. 764, 423 S.E.2d 704 (1992).

Construed with § 5-6-34(d). — Phrase "following cases" in the introductory language of subsection (a) of O.C.G.A. § 5-6-35 is construed to exclude those cases in which O.C.G.A. § 5-6-34(d) is applicable; thus, since the appellants filed a motion styled as both a motion for a new trial and a motion to set aside the judgment, but it was clearly only a motion for new trial since it raised issues relating to the verdict but none relating to a motion to set aside under O.C.G.A. § 9-11-60(d), the Court of Appeals erred in dismissing the appeal. Martin v. Williams, 263 Ga. 707, 438 S.E.2d 353 (1994).

Underlying subject matter generally controls over the relief sought in determining the proper procedure to follow to appeal; thus, when a trial court issues a judgment listed in the direct appeal statute in a case whose subject matter is covered under the discretionary appeal statute, the discretionary application procedure must be followed when the party is appealing a judgment or order that is procedurally subject to a direct appeal. Rebich v. Miles, 264 Ga. 467, 448 S.E.2d 192 (1994).

In plaintiff's appeal of the denial of the plaintiff's request for a declaratory judgment, the plaintiff could add issues relating to other rulings which might affect the proceedings below without regard to whether the proceedings were appealable standing alone. Smith v. Department of Human Resources, 214 Ga. App. 508, 448 S.E.2d 372 (1984).

While a judgment or an order denying an application for injunctive relief, mandamus or other extraordinary relief is a judgment or order subject to direct appellate review under O.C.G.A. § 5-6-34, it is subject to discretionary application procedure if the underlying subject matter of the appeal is one contained in O.C.G.A. § 5-6-35. Prison Health Servs., Inc. v. Georgia Dep't of Admin. Servs., 265 Ga. 810, 462 S.E.2d 601 (1995).

Effect of 1986 amendment of § 40-13-28. — The 1986 amendment to O.C.G.A. § 40-13-28 that changed the scope of review in the superior court from a de novo investigation to a review of the record was not also intended to change the method of appeal from the superior court in such cases from discretionary appeals under O.C.G.A. § 5-6-35(a)(1) to direct appeals under O.C.G.A. § 5-6-34(a). Brown v. City of Marietta, 214 Ga. App. 840, 449 S.E.2d 540 (1994).

Two-step appellate review process: (1) initial appellate review of a record which will include copies of such parts of the trial court record or transcript as the appellant or appellee deem appropriate; (2) if the initial appellate review reveals that the appellant's enumerations of error are clearly without merit then the application for appeal is dismissed; if however the initial appellate review reveals that the appellant's enumerations of error are not clearly without merit, then the application for appeal is granted and a final appellate review ensues. Harris v. Harris, 245 Ga. 75, 263 S.E.2d 113 (1980).

Required contents of application. — O.C.G.A. § 5-6-35 requires a party to state if the order or judgment is interlocutory, and if it is interlocutory, the party must state "the need for interlocutory appellate review." Scruggs v. Georgia Dep't of Human Resources, 261 Ga. 587, 408 S.E.2d 103 (1991).

Because a grandparent failed to request review of a custody order through the application procedures of O.C.G.A. § 5-6-35 in a timely manner, the grandparent's application was dismissed. In the Interest of J.R.P., 287 Ga. App. 621, 652 S.E.2d 206 (2007), cert. denied, 2008 Ga. LEXIS 207 (Ga. 2008).

Discretionary application is generally required from the denial of a motion to set aside. Beals v. Beals, 203 Ga. App. 81, 416 S.E.2d 301, cert. denied, 203 Ga. App. 905, 416 S.E.2d 301 (1992).

Petition for discretionary appeal must adequately demonstrate reversible error. — Although paragraph (c) of O.C.G.A. § 5-6-35 does not require an applicant for discretionary appeal to include relevant portions of the record or transcript as exhibits to the petition, a prudent applicant should support the assertions of error with relevant parts of the

General Consideration (Cont'd)

record or transcript so as to adequately demonstrate reversible error, unless the alleged errors are otherwise established as, for instance, by the agreement of the parties on appeal or by a quote or paraphrase from the record or transcript. Harper v. Harper, 259 Ga. 246, 378 S.E.2d 673 (1989).

Effect of grant of discretionary appeal. — When the court of appeals granted a discretionary appeal under O.C.G.A. § 5-6-35, the trial court was without authority to find such appeal to be frivolous and the denial of supersedeas bond on that ground was an abuse of discretion as a matter of law and fact. Farmer v. State, 216 Ga. App. 515, 455 S.E.2d 297 (1995).

Amount in controversy. — No application for discretionary review by the Court of Appeals need be made pursuant to paragraph (a)(6) of O.C.G.A. § 5-6-35 when the amount placed in controversy exceeds $2,500 (now $10,000.00). Todd v. City of Brunswick, 175 Ga. App. 562, 334 S.E.2d 1 (1985), aff'd, 255 Ga. 448, 339 S.E.2d 589 (1986).

For establishing jurisdiction pursuant to paragraph (a)(6) of O.C.G.A. § 5-6-35, a judgment is comprised of principal, plus costs, plus interest at the legal rate accrued from the date of the filing of the judgment until the date of the filing of the notice of appeal; appeals involving nonmonetary judgments in child custody cases. Castleberry's Food Co. v. Smith, 205 Ga. App. 859, 424 S.E.2d 33 (1992).

Standing. — Full board of the state board of workers' compensation neither granted the plaintiff's petition for a change of benefits nor authorized action which is adverse to the defendant; therefore, since the defendant was not aggrieved by the full board's award, the defendant had no standing to appeal to the superior court from the full board's award. Southwire Co. v. Hull, 212 Ga. App. 131, 441 S.E.2d 293 (1994).

"Condemnation" construed. — Word "condemnations," as the word appears in the exceptions to the rule of paragraph (a)(1) of O.C.G.A. § 5-6-35, was intended by the legislature to except "inverse" as well as classic condemnation cases therefrom. Brownlow v. City of Calhoun, 198 Ga. App. 710, 402 S.E.2d 788 (1991).

Timely filing of the notice of appeal is an absolute prerequisite in order to confer jurisdiction on the appellate court. White v. White, 188 Ga. App. 556, 373 S.E.2d 824 (1988); Barnes v. Justis, 223 Ga. App. 671, 478 S.E.2d 402 (1996).

When an application for discretionary review was not filed, and a subsequent notice of direct appeal was filed untimely, there was no jurisdiction conferred on the court to hear the appeal. Boney v. State, 236 Ga. App. 179, 510 S.E.2d 892 (1999).

Filing before granting of application is timely. — While a failure to file a notice of appeal within ten days after the grant of an application will subject an appellant to dismissal, the filing of a notice of appeal after the judgment complained of is entered but before the granting of the application to appeal does not constitute a failure to timely file. Wannamaker v. Carr, 257 Ga. 634, 362 S.E.2d 53 (1987).

When the plaintiff had filed the plaintiff's initial application for discretionary review nearly four months before the trial court's order denying the plaintiff's motion for a new trial, the order was void and a nullity, and provided no jurisdictional basis for an appeal. Department of Human Resources v. Holland, 236 Ga. App. 273, 511 S.E.2d 628 (1999), overruled on other grounds, Cooper v. Spotts, 309 Ga. App. 361, 710 S.E.2d 159 (2011).

Date of judgment governs applicability of revised discretionary appeal procedures. — Discretionary appeal procedures were applicable to an action for damages not exceeding $2,500.00 (now $10,000.00) which was instituted prior to enactment of paragraph (a)(6) of O.C.G.A. § 5-6-35 but in which judgment was entered after the effective date of that enactment. Crimminger v. Habif, 174 Ga. App. 440, 330 S.E.2d 164 (1985).

When appellant fails to follow appeal procedures required in O.C.G.A. § 5-6-35, appeal must be dismissed. Walker v. City of Macon, 166 Ga. App. 228, 303 S.E.2d 776 (1983); In re J.E.P., 168 Ga. App. 30, 308 S.E.2d 712 (1983), aff'd, 252 Ga. 520, 315 S.E.2d 416 (1984).

When the appellant fails to follow the proper procedures required by law when appealing from a decision of a superior court to which a writ of certiorari has been taken from a decision of a lower court, the appellant's appeal must be dismissed. Crawford v. Goza, 168 Ga. App. 565, 310 S.E.2d 1 (1983).

In appealing from a decision of the superior court reviewing a decision of a state administrative agency, when the appellant fails to obtain an order of the appellate court permitting the filing of the appeal, the appeal must be dismissed. Risner v. Georgia Dep't of Labor, 168 Ga. App. 242, 308 S.E.2d 582 (1983).

When the appellants fail to obtain an order of court permitting the filing of an appeal in a garnishment proceeding, the appeal must be dismissed. Mason v. Osburn Hdwe. & Supply Co., 174 Ga. App. 865, 331 S.E.2d 888 (1985).

Failure to follow discretionary appeal procedures. — Owners' appeals to the Supreme Court of Georgia were dismissed because the owners actually participated in the administrative process, a superior court ruled on the merits of the owners' challenges to a zoning decision, and the owners failed to follow the discretionary appeal procedures in O.C.G.A. § 5-6-35(a)(1). Hamryka v. City of Dawsonville, 291 Ga. 124, 728 S.E.2d 197 (2012).

When applicable, requirements of this section are jurisdictional and the appellate court had no authority to accept an appeal in the absence of compliance with these statutory provisions. Hogan v. Taylor County Bd. of Educ., 157 Ga. App. 680, 278 S.E.2d 106 (1981); Crews v. State, 175 Ga. App. 300, 333 S.E.2d 176 (1985); Boyle v. State, 190 Ga. App. 734, 380 S.E.2d 57 (1989); Serpentfoot v. Salmon, 225 Ga. App. 478, 483 S.E.2d 927 (1997); Brown v. E.I. du Pont de Nemours & Co., 240 Ga. App. 893, 525 S.E.2d 731 (1999).

Appellant's failure to comply with the discretionary appeals procedure of O.C.G.A. § 5-6-35 deprives the appellate court of jurisdiction, just as if the appellant failed to file a timely notice of appeal. Fabe v. Floyd, 199 Ga. App. 322, 405 S.E.2d 265 (on motion for rehearing), cert. denied, 199 Ga. App. 906, 405 S.E.2d 265 (1991).

Appellate court did not have jurisdiction to consider the county's direct appeal of the trial court's affirmance of the administrative agency's decision against the county, as the county was required to file an application for discretionary review of a trial court's affirmance of an administrative agency's decision, and since the county did not do so, the county's appeal had to be dismissed. Coweta County v. Jackson, 264 Ga. App. 17, 589 S.E.2d 839 (2003).

Absent application pursuant to section, appeal is a nullity. — When appellant appealed directly to the Supreme Court from the trial court's directed verdict without having made application pursuant to O.C.G.A. § 5-6-35, the attempted appeal was a nullity, and could not supersede the judgment appealed from. Reno v. Reno, 247 Ga. 560, 277 S.E.2d 511 (1981).

Effect of filing application. — By filing applications for discretionary appeal, the parties divested the trial court of jurisdiction to enter orders on the parties' motions for reconsideration. Nest Inv., Inc. v. Tzavaras, 221 Ga. App. 282, 471 S.E.2d 223 (1996).

Appeal from an award of attorney's fees in a domestic relations case is subject to the appeal procedures of O.C.G.A. § 5-6-35. Sprague v. Sprague, 253 Ga. 485, 321 S.E.2d 742 (1984).

Temporary protective custody order was subject to appeal by discretionary action under O.C.G.A. § 5-6-35. Williams v. Stepler, 221 Ga. App. 338, 471 S.E.2d 284 (1996).

Superior court dismissal without review on merits. — O.C.G.A. § 5-6-35 is not inapplicable to an appeal from a superior court decision because the superior court dismissed the decision of a local tribunal without reviewing it on the merits. Brewer v. Board of Zoning Adjustment, 170 Ga. App. 351, 317 S.E.2d 327 (1984).

De novo appeal from magistrate court. — Regardless of whether the litigation was subsequently erroneously expanded in state court to include matters beyond the parameters of a de novo investigation, when the litigation reached the state court by means of a de novo appeal

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from magistrate court, in order to obtain appellate review of the state court judgment in the Court of Appeals, an application for appeal must be sought as required by paragraph (a)(11) of O.C.G.A. § 5-6-35. Handler v. Hulsey, 199 Ga. App. 751, 406 S.E.2d 225, cert. denied, 199 Ga. App. 906, 406 S.E.2d 225 (1991); Strachan v. Meritor Mtg. Corp. E., 216 Ga. App. 82, 453 S.E.2d 119 (1995); Southtowne Hyundai-Isuzu-Suzuki v. Hooper, 216 Ga. App. 214, 453 S.E.2d 756 (1995).

Section not limited to judgments for plaintiffs. — O.C.G.A. § 5-6-35 applies to all judgments for $2,500.00 (now $10,000.00) or less that arise from an action for damages, and its application is not limited to judgments for plaintiffs. Gardner v. Villa Monte Homes, Inc., 173 Ga. App. 896, 328 S.E.2d 565 (1985).

Paragraph (a)(6) of O.C.G.A. § 5-6-35 requires that an application for discretionary review be filed when the amount placed in controversy by the claimant (plaintiff, counterclaimant or cross-claimant) is $2,500 (now $10,000.00) or less. Brown v. Associates Fin. Servs. Corp., 175 Ga. App. 553, 333 S.E.2d 888 (1985), aff'd, 255 Ga. 457, 339 S.E.2d 590 (1986).

Actions in which only a few hundred dollars was sued for and nothing at all was recovered may be directly appealed. Malloy v. Sexton, 179 Ga. App. 769, 347 S.E.2d 648 (1986).

Appeals from the denial of a motion to set aside the judgment under O.C.G.A. § 9-11-60(d) are subject to the discretionary appeals procedure even when coupled with motions for a new trial or j.n.o.v. Willard v. Wilburn, 203 Ga. App. 393, 416 S.E.2d 798, cert. denied, 203 Ga. App. 908, 416 S.E.2d 798 (1992).

Although the denial of a motion to set aside a judgment was ordinarily subject to the discretionary appeal procedure, O.C.G.A. § 5-6-35(a)(8), the denial of a stepson's motion to set aside was reviewable in conjunction with the stepson's appeal from the superior court's judgment reviewing the probate court's decision because the superior court's judgment reviewing the probate court's decision was directly appealable under O.C.G.A. § 5-6-34(a)(1). Bocker v. Crisp, 313 Ga. App. 585, 722 S.E.2d 186 (2012).

Plaintiff's motion to dismiss the defendants' appeal was denied because the defendants were not required to file an application for discretionary appeal pursuant to O.C.G.A. § 5-6-34(b); the underlying subject of the appeal was not one of those listed in O.C.G.A. § 5-6-35 requiring an application, and the trial court's order was final because there was nothing pending in the trial court. Std. Bldg. Co. v. Schofield Interior Contrs., Inc., 315 Ga. App. 516, 726 S.E.2d 760 (2012).

Denial of a "discretionary" motion to set aside is never appealable in the motion's own right, nor does the filing of such a motion extend the time for filing an appeal. Stone v. Dawkins, 192 Ga. App. 126, 384 S.E.2d 225 (1989).

Order denying discovery is premature in the absence of a certificate of immediate review; therefore, the interlocutory appeal procedure set forth in O.C.G.A. § 5-6-34(b) is mandated. Rogers v. Department of Human Resources, 195 Ga. App. 118, 392 S.E.2d 713 (1990).

All appeals from decisions of the superior court reviewing decisions of the commissioners of the department of revenue, with the exception of cases involving ad valorem taxes, are by discretionary appeal. Bankers Trust Co. v. Jackson, 236 Ga. App. 490, 512 S.E.2d 378 (1999).

Appeal from review of auditor's report. — When the auditor did not submit a final report containing separate findings of fact and conclusions of law for the superior court's review, the judgment of the court was directly appealable. McCaughey v. Murphy, 267 Ga. 64, 473 S.E.2d 762 (1996).

Discretionary appeal. — Trial court's order upholding the constitutionality of Georgia's Child Support Guidelines was erroneously certified by the trial court since the order did not dispose of any claim. However, since the appellate court had granted a father's application for discretionary appeal, the appellate court proceeded to a consideration of the merits of the constitutional issue. Keck v. Harris, 277 Ga. 667, 594 S.E.2d 367 (2004).

Cited in Jackson v. Stuldivant, 151 Ga. App. 784, 262 S.E.2d 642 (1979); Cale v.

Cale, 244 Ga. 796, 264 S.E.2d 21 (1979); Brown v. Brown, 245 Ga. 44, 263 S.E.2d 438 (1980); Hathcock v. Hathcock, 245 Ga. 141, 263 S.E.2d 440 (1980); Godbold v. Godbold, 245 Ga. 121, 263 S.E.2d 440 (1980); Sullins v. Bishop, 245 Ga. 130, 263 S.E.2d 442 (1980); Wilson v. Crosby, 245 Ga. 140, 263 S.E.2d 442 (1980); Cale v. Cale, 245 Ga. 62, 264 S.E.2d 22 (1980); Ritchie v. Ritchie, 245 Ga. 199, 264 S.E.2d 230 (1980); Martinez v. Martinez, 245 Ga. 211, 264 S.E.2d 231 (1980); Seymour v. Seymour, 245 Ga. 211, 264 S.E.2d 232 (1980); Horne v. Horne, 245 Ga. 300, 265 S.E.2d 3 (1980); McDonald v. McDonald, 245 Ga. 355, 265 S.E.2d 57 (1980); Austin v. Austin, 245 Ga. 487, 265 S.E.2d 788 (1980); Hilsman v. Hilsman, 245 Ga. 555, 266 S.E.2d 173 (1980); Mabry v. Mabry, 245 Ga. 512, 266 S.E.2d 799 (1980); Moore v. Employers Ins., 153 Ga. App. 589, 266 S.E.2d 811 (1980); Reno v. Reno, 245 Ga. 792, 267 S.E.2d 221 (1980); Copeland v. Copeland, 245 Ga. 656, 267 S.E.2d 253 (1980); Cobb v. Cobb, 245 Ga. 646, 267 S.E.2d 623 (1980); Russell v. Hughes, 154 Ga. App. 398, 268 S.E.2d 440 (1980); Hendley v. Auto Owners Ins. Co., 154 Ga. App. 316, 268 S.E.2d 722 (1980); Kiser v. Kiser, 246 Ga. 153, 269 S.E.2d 860 (1980); Tennis v. Hinch, 246 Ga. 188, 269 S.E.2d 861 (1980); Morgan v. Morgan, 154 Ga. App. 595, 270 S.E.2d 94 (1980); Myers v. Netherland, 155 Ga. App. 153, 270 S.E.2d 407 (1980); Brown v. Brown, 246 Ga. 330, 272 S.E.2d 75 (1980); Zusmann v. Zusmann, 246 Ga. 341, 272 S.E.2d 75 (1980); Yawn v. Yawn, 246 Ga. 817, 272 S.E.2d 717 (1980); Biggs v. Biggs, 246 Ga. 520, 273 S.E.2d 403 (1980); Waters v. Waters, 246 Ga. 547, 273 S.E.2d 404 (1980); Bradfield v. Jackson, 156 Ga. App. 81, 274 S.E.2d 164 (1980); Porter v. Marcus, 156 Ga. App. 368, 274 S.E.2d 168 (1980); Walker v. City of Atlanta, 156 Ga. App. 223, 274 S.E.2d 668 (1980); Shepherd v. Shepherd, 247 Ga. 273, 275 S.E.2d 317 (1981); Hanes v. Hanes, 247 Ga. 305, 276 S.E.2d 4 (1981); Chesser v. Chesser, 247 Ga. 168, 276 S.E.2d 45 (1981); Hanes v. Hanes, 247 Ga. 305, 276 S.E.2d 4 (1981); Tison v. Tison, 247 Ga. 246, 276 S.E.2d 247 (1981); Keeter v. State ex rel. Keeter, 247 Ga. 256, 276 S.E.2d 247 (1981); Fields v. Fields, 247 Ga. 437, 276 S.E.2d 614 (1981); Larson v. Gambrell, 157 Ga. App. 193, 276 S.E.2d 686 (1981); Camp v. Camp, 247 Ga. 533, 277 S.E.2d 55 (1981); Dunn v. Dunn, 247 Ga. 327, 277 S.E.2d 241 (1981); Shepherd v. Epps, 247 Ga. 545, 277 S.E.2d 686 (1981); Alday v. Alday, 247 Ga. 663, 277 S.E.2d 914 (1981); Levison v. Levison, 247 Ga. 667, 278 S.E.2d 409 (1981); Neal v. Washington, 158 Ga. App. 39, 279 S.E.2d 294 (1981); Robertson v. Robertson, 247 Ga. 810, 280 S.E.2d 335 (1981); Field Developers, Inc. v. City of Atlanta, 158 Ga. App. 388, 280 S.E.2d 364 (1981); McCrary v. City of Atlanta, 158 Ga. App. 406, 280 S.E.2d 906 (1981); Woodall v. Woodall, 248 Ga. 172, 281 S.E.2d 619 (1981); Foy v. Lewis, 248 Ga. 234, 282 S.E.2d 295 (1981); Robbins v. Robbins, 248 Ga. 273, 282 S.E.2d 340 (1981); Bedingfield v. Bedingfield, 248 Ga. 147, 282 S.E.2d 641 (1981); Hunnicutt v. Hunnicutt, 248 Ga. 516, 283 S.E.2d 891 (1981); Yarbrough v. Yarbrough, 248 Ga. 282, 283 S.E.2d 898 (1981); Walsh Constr. Co. v. Frawley, 248 Ga. 151, 284 S.E.2d 434 (1981); Keller v. Berger, 248 Ga. 552, 285 S.E.2d 188 (1981); Mills v. Pepsi-Cola Bottlers, 160 Ga. App. 349, 287 S.E.2d 41 (1981); Southwire Co. v. Sweet, 160 Ga. App. 625, 287 S.E.2d 635 (1981); Tallman v. Tallman, 161 Ga. App. 447, 287 S.E.2d 703 (1982); Farmer v. Union County Dep't of Family & Children Servs., 162 Ga. App. 66, 290 S.E.2d 163 (1982); Zamora v. Coffee Gen. Hosp., 162 Ga. App. 82, 290 S.E.2d 192 (1982); DeLoach v. DeLoach, 162 Ga. App. 185, 290 S.E.2d 292 (1982); Gordin v. Gordin, 249 Ga. 371, 290 S.E.2d 921 (1982); Prentice v. Prentice, 249 Ga. 27, 291 S.E.2d 553 (1982); Wigley v. Nance, 163 Ga. App. 185, 293 S.E.2d 369 (1982); Moon v. Habersham County Dep't of Family & Children Servs., 162 Ga. App. 694, 293 S.E.2d 402 (1982); Sutton v. Burousas, 164 Ga. App. 553, 293 S.E.2d 566 (1982); Fender v. Fender, 249 Ga. 773, 294 S.E.2d 474 (1982); Chattooga County v. Bruce, 163 Ga. App. 478, 294 S.E.2d 712 (1982); Young v. Hinton, 163 Ga. App. 692, 295 S.E.2d 150 (1982); Webster v. Webster, 250 Ga. 57, 295 S.E.2d 828 (1982); McCannon v. City of Atlanta, 163 Ga. App. 844, 296 S.E.2d 363 (1982); Steele v. Steele, 250 Ga. 101, 296 S.E.2d 570 (1982); Geron v. Calibre Cos., 250 Ga. 213,

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296 S.E.2d 602 (1982); Wiggins v. City of Millen, 165 Ga. App. 18, 299 S.E.2d 191 (1983); Johnson v. Smith, 164 Ga. App. 611, 299 S.E.2d 387 (1982); Johnson v. Smith, 251 Ga. 1, 302 S.E.2d 542 (1983); Buckholts v. Buckholts, 251 Ga. 58, 302 S.E.2d 676 (1983); Wren v. Harrison, 165 Ga. App. 847, 303 S.E.2d 67 (1983); In re M.K.C., 166 Ga. App. 261, 304 S.E.2d 430 (1983); In re M.R., 166 Ga. App. 360, 304 S.E.2d 736 (1983); In re M.G., 167 Ga. App. 38, 306 S.E.2d 40 (1983); Fowler v. City of East Point, 166 Ga. App. 872, 306 S.E.2d 431 (1983); Beckman v. Black, 170 Ga. App. 193, 316 S.E.2d 784 (1984); Stanley v. Stanley, 172 Ga. App. 85, 322 S.E.2d 97 (1984); American Druggists' Ins. Co. v. Harris, 253 Ga. 535, 322 S.E.2d 496 (1984); In re J.M.B., 172 Ga. App. 371, 324 S.E.2d 213 (1984); Holbrook v. State, 173 Ga. App. 251, 326 S.E.2d 240 (1985); Voight v. Orr, 173 Ga. App. 248, 326 S.E.2d 480 (1985); Williamson v. Department of Pub. Safety, 173 Ga. App. 249, 326 S.E.2d 480 (1985); Hall v. Jenkins, 173 Ga. App. 710, 327 S.E.2d 831 (1985); Farlar v. State, 173 Ga. App. 622, 328 S.E.2d 436 (1985); Kingery Block & Concrete Co. v. Luttrell, 174 Ga. App. 481, 330 S.E.2d 181 (1985); Feagin v. Feagin, 174 Ga. App. 474, 330 S.E.2d 410 (1985); McCrary v. State, 174 Ga. App. 492, 330 S.E.2d 429 (1985); Bright v. DeKalb County, 174 Ga. App. 662, 331 S.E.2d 58 (1985); Law Offices of Johnson & Robinson v. Fortson, 175 Ga. App. 706, 334 S.E.2d 33 (1985); Bennett v. Barrett, 175 Ga. App. 695, 334 S.E.2d 44 (1985); Simpkins v. Minks, 175 Ga. App. 729, 334 S.E.2d 340 (1985); In re W.S.G., 175 Ga. App. 883, 334 S.E.2d 739 (1985); Jaraysi v. Southern Bell Tel. & Tel. Co., 176 Ga. App. 105, 335 S.E.2d 463 (1985); Nixon v. A.F.M., Inc., 176 Ga. App. 546, 336 S.E.2d 382 (1985); Baety v. Eisenstein, 176 Ga. App. 612, 336 S.E.2d 849 (1985); Sloan v. Brooks, 176 Ga. App. 872, 338 S.E.2d 299 (1985); Pritchett v. Anding, 177 Ga. App. 34, 338 S.E.2d 503 (1985); Henderson v. Smith, 177 Ga. App. 89, 338 S.E.2d 520 (1985); Milner v. Milner, 177 Ga. App. 164, 338 S.E.2d 757 (1985); Noggle v. Arnold, 177 Ga. App. 119, 338 S.E.2d 763 (1985); Harper v. Evans, 177 Ga. App. 303, 339 S.E.2d 265 (1985); Murdock v. Bank of Am. Nat'l Trust & Sav. Ass'n, 177 Ga. App. 409, 339 S.E.2d 392 (1985); Walker v. Georgia Power Co., 177 Ga. App. 493, 339 S.E.2d 728 (1986); Folks, Inc. v. Agan, 177 Ga. App. 480, 340 S.E.2d 26 (1986); Elmore v. Elmore, 177 Ga. App. 682, 340 S.E.2d 651 (1986); Dogwood Square Nursing Ctr., Inc. v. State Health Planning Agency, 255 Ga. 694, 341 S.E.2d 432 (1986); Parham v. Lanier Collection Agency & Serv., Inc., 178 Ga. App. 84, 341 S.E.2d 889 (1986); Colwell v. Voyager Cas. Ins. Co., 178 Ga. App. 42, 342 S.E.2d 7 (1986); Nazerian v. City of McCaysville, 178 Ga. App. 27, 342 S.E.2d 11 (1986); Klobe v. Montgomery Ward & Co., 178 Ga. App. 164, 342 S.E.2d 496 (1986); Mitchell v. Purser, 178 Ga. App. 267, 342 S.E.2d 753 (1986); Gazaway v. State, 178 Ga. App. 318, 343 S.E.2d 135 (1986); New v. Wilkins, 178 Ga. App. 337, 343 S.E.2d 136 (1986); Sidwell v. Wheeler, 178 Ga. App. 732, 344 S.E.2d 527 (1986); Vikowsky v. Savannah Appliance Serv. Corp., 179 Ga. App. 135, 345 S.E.2d 621 (1986); Jones Roofing & Constr. Co. v. Roberts, 179 Ga. App. 169, 345 S.E.2d 683 (1986); Doby v. State, 179 Ga. App. 285, 346 S.E.2d 89 (1986); Walker v. State, 179 Ga. App. 690, 347 S.E.2d 307 (1986); Howell v. Howell, 179 Ga. App. 612, 347 S.E.2d 361 (1986); In re R.L.Y., 180 Ga. App. 559, 349 S.E.2d 800 (1986); Rich v. McDonald Car & Truck Leasing, Inc., 180 Ga. App. 613, 349 S.E.2d 832 (1986); Carrigan v. City of Atlanta, 180 Ga. App. 741, 350 S.E.2d 482 (1986); Castor v. DeKalb County, 180 Ga. App. 772, 350 S.E.2d 487 (1986); McDonald v. State, 180 Ga. App. 713, 350 S.E.2d 581 (1986); Cullen v. Bragg, 180 Ga. App. 866, 350 S.E.2d 798 (1986); Jones v. Jones, 181 Ga. App. 276, 351 S.E.2d 691 (1986); Preferred Risk Mut. Ins. Co. v. Laube, 181 Ga. App. 579, 353 S.E.2d 203 (1987); AAA Van Servs., Inc. v. Willis, 182 Ga. App. 46, 354 S.E.2d 631 (1987); Hamrick v. Bonner, 182 Ga. App. 76, 354 S.E.2d 687 (1987); Roach v. Roach, 182 Ga. App. 122, 354 S.E.2d 877 (1987); Bonner v. State, 182 Ga. App. 133, 355 S.E.2d 91 (1987); Lewis v. Sun Mgt., Inc., 182 Ga. App. 560, 356 S.E.2d 526 (1987); Williams v. Aetna Cas. & Sur. Co., 182 Ga. App. 684, 356 S.E.2d 690 (1987);

Davis v. State, 182 Ga. App. 736, 356 S.E.2d 762 (1987); Goodwin v. Richmond, 182 Ga. App. 745, 356 S.E.2d 888 (1987); Ganjizadeh v. Brown, 182 Ga. App. 807, 357 S.E.2d 154 (1987); Henderson v. Mrs. Smith's Frozen Foods, 182 Ga. App. 829, 357 S.E.2d 271 (1987); Honester v. Tinsley, 183 Ga. App. 146, 358 S.E.2d 295 (1987); Denney v. Shield Ins. Co., 183 Ga. App. 280, 358 S.E.2d 628 (1987); Williams v. Kaminsky, 183 Ga. App. 283, 358 S.E.2d 667 (1987); Byrd v. Byrd, 183 Ga. App. 302, 359 S.E.2d 2 (1987); Leonard v. Easley, 183 Ga. App. 579, 359 S.E.2d 443 (1987); Georgia Am. Ins. Co. v. Mills, 183 Ga. App. 707, 359 S.E.2d 697 (1987); Vaughn v. Cable E. Point, Inc., 185 Ga. App. 203, 363 S.E.2d 639 (1987); Nova Group, Inc. v. M.B. Davis Elec. Co., 258 Ga. 7, 364 S.E.2d 833 (1988); Crolley v. Johnson, 185 Ga. App. 671, 365 S.E.2d 277 (1988); Tanner v. Davis, 185 Ga. App. 711, 365 S.E.2d 871 (1988); Shelton v. Ervin, 185 Ga. App. 712, 365 S.E.2d 873 (1988); Graves v. Graves, 186 Ga. App. 140, 366 S.E.2d 809 (1988); Jones v. Padgett, 186 Ga. App. 362, 367 S.E.2d 88 (1988); State v. Baldwin, 187 Ga. App. 611, 371 S.E.2d 135 (1988); State Farm Mut. Auto. Ins. Co. v. Yancey, 188 Ga. App. 8, 371 S.E.2d 883 (1988); Self v. City of Atlanta, 188 Ga. App. 81, 372 S.E.2d 283 (1988); Lloyd v. State, 258 Ga. 645, 373 S.E.2d 1 (1988); Bishop v. Typo-Repro Servs., Inc., 188 Ga. App. 581, 373 S.E.2d 762 (1988); Patrick v. Glass, 188 Ga. App. 737, 374 S.E.2d 229 (1988); Fellman v. State, 189 Ga. App. 203, 375 S.E.2d 476 (1988); McCrary v. Department of Human Resources, 191 Ga. App. 299, 381 S.E.2d 438 (1989); Ponder v. State, 191 Ga. App. 503, 382 S.E.2d 204 (1989); Scott v. McLaughlin, 192 Ga. App. 230, 384 S.E.2d 212 (1989); McCracken v. City of College Park, 259 Ga. 490, 384 S.E.2d 648 (1989); McClure v. Gower, 259 Ga. 678, 385 S.E.2d 271 (1989); Mobley v. State, 192 Ga. App. 719, 386 S.E.2d 384 (1989); Parker v. Bellamy-Lunda-Dawson, 192 Ga. App. 764, 386 S.E.2d 527 (1989); Hardwick v. Barnes, 193 Ga. App. 127, 386 S.E.2d 927 (1989); Smathers v. City of Lawrenceville Hous. Auth., 193 Ga. App. 94, 387 S.E.2d 6 (1989); Georgia Water Resources, Inc. v. Commissioner of Labor, 193 Ga. App. 252, 387 S.E.2d 374 (1989); Wiley v. Tanner, 193 Ga. App. 477, 388 S.E.2d 70 (1989); Jarallah v. Pickett Suite Hotel, 193 Ga. App. 325, 388 S.E.2d 333 (1989); Anderson v. State, 193 Ga. App. 540, 388 S.E.2d 351 (1989); North Ga. Home Constr. Co. v. Lackey, 193 Ga. App. 346, 388 S.E.2d 766 (1989); Mack v. Third Bedford-Pines Apt., Ltd., 193 Ga. App. 838, 389 S.E.2d 405 (1989); McSmith v. Marshall, 194 Ga. App. 331, 390 S.E.2d 126 (1990); Saben Appliances v. Waller, 194 Ga. App. 286, 390 S.E.2d 431 (1990); Human v. State, 194 Ga. App. 355, 390 S.E.2d 446 (1990); Oran v. Canada Life Assurance Co., 194 Ga. App. 518, 390 S.E.2d 879 (1990); Barton v. Anthony, 194 Ga. App. 500, 391 S.E.2d 25 (1990); Griffin v. State, 194 Ga. App. 624, 391 S.E.2d 675 (1990); Ko v. Habersham Fed. Sav. Bank, 194 Ga. App. 769, 391 S.E.2d 723 (1990); Alstrom v. Allstate Enters., Inc., 195 Ga. App. 458, 394 S.E.2d 801 (1990); Lee v. Britt, 196 Ga. App. 152, 395 S.E.2d 347 (1990); Ogeechee Steel, Inc. v. City of Atlanta, 196 Ga. App. 84, 396 S.E.2d 609 (1990); Jim Walter Homes, Inc. v. Roberts, 196 Ga. App. 618, 396 S.E.2d 787 (1990); Weaver v. Jones, 260 Ga. 493, 396 S.E.2d 890 (1990); Service Truck Brokers v. Kellco Transp., Inc., 196 Ga. App. 702, 397 S.E.2d 53 (1990); In re N.A.B., 196 Ga. App. 819, 397 S.E.2d 301 (1990); Joyner v. Joyner, 197 Ga. App. 304, 398 S.E.2d 294 (1990); Marshall v. Gatison, 197 Ga. App. 370, 398 S.E.2d 429 (1990); Jones v. McCoy, 197 Ga. App. 430, 398 S.E.2d 786 (1990); Akins v. Life Investors Ins. Co. of Am., 197 Ga. App. 574, 399 S.E.2d 584 (1990); Crymes v. Smith, 260 Ga. 730, 401 S.E.2d 11 (1990); Faircloth v. Greiner, 260 Ga. 682, 401 S.E.2d 11 (1990); Lane v. Taylor, 199 Ga. App. 470, 405 S.E.2d 324 (1991); Farmer v. State, 199 Ga. App. 576, 405 S.E.2d 569 (1991); Miller v. Merck & Co., 199 Ga. App. 722, 405 S.E.2d 761 (1991); Citation Bonding Co. v. State, 199 Ga. App. 868, 406 S.E.2d 289 (1991); Offutt v. Earp, 200 Ga. App. 74, 406 S.E.2d 571 (1991); Scott v. State, 200 Ga. App. 481, 408 S.E.2d 495 (1991); Robenolt v. Chrysler Fin. Servs. Corp., 201 Ga. App. 168, 410 S.E.2d 365 (1991); Sartin v. State, 201 Ga. App. 612, 411 S.E.2d 582 (1991); Wieland v. Wieland, 202 Ga. App.

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222, 414 S.E.2d 247 (1991); Olin Corp. v. Collins, 261 Ga. 849, 413 S.E.2d 193 (1992); Heuer Indus., Inc. v. Crum, 202 Ga. App. 675, 415 S.E.2d 307 (1992); Moultrie Ins. Agency, Inc. v. Goodbar, 203 Ga. App. 677, 417 S.E.2d 658 (1992); Walls v. State, 204 Ga. App. 348, 419 S.E.2d 344 (1992); Snow's Farming Enters., Inc. v. Carver State Bank, 206 Ga. App. 661, 426 S.E.2d 158 (1992); Denton v. Hogge, 208 Ga. App. 734, 431 S.E.2d 728 (1993); C.W. Matthews Contracting Co. v. Collins, 210 Ga. App. 1, 435 S.E.2d 221 (1993); Brownlee v. City of Atlanta, 212 Ga. App. 174, 441 S.E.2d 492 (1994); Kleber v. Cobb County, 212 Ga. App. 441, 442 S.E.2d 296 (1994); Crowder v. Citizens Trust Bank, 213 Ga. App. 477, 444 S.E.2d 853 (1994); Madan v. Damiano, 213 Ga. App. 736, 445 S.E.2d 831 (1994); Castro v. Hidden Village Apts., 216 Ga. App. 248, 453 S.E.2d 815 (1995); Weiland v. Weiland, 216 Ga. App. 417, 454 S.E.2d 613 (1995); Hill v. Rose Elec. Co., 220 Ga. App. 603, 469 S.E.2d 844 (1996); Thibadeau v. Hendon, 221 Ga. App. 258, 471 S.E.2d 52 (1996); Adivari v. Sears, Roebuck & Co., 221 Ga. App. 279, 471 S.E.2d 59 (1996); Smoak v. Department of Human Resources, 221 Ga. App. 257, 471 S.E.2d 60 (1996); In re J.C.H., 224 Ga. App. 708, 482 S.E.2d 707 (1997); Kappelmeier v. Homer, 226 Ga. App. 379, 486 S.E.2d 612 (1997); Clark v. Davis, 242 Ga. App. 425, 530 S.E.2d 49 (2000); NF Invs., Inc. v. Whitfield, 245 Ga. App. 72, 537 S.E.2d 207 (2000); Consolidated Gov't v. Barwick, 274 Ga. 176, 549 S.E.2d 73 (2001); McCormick v. Harris, 253 Ga. App. 417, 559 S.E.2d 158 (2002); Amaechi v. Lib Props., Ltd., 254 Ga. App. 74, 561 S.E.2d 137 (2002); City of Warner Robins v. Baker, 255 Ga. App. 601, 565 S.E.2d 919 (2002); McKenna v. Dupree, 285 Bankr. 759 (Bankr. M.D. Ga. 2002); State v. Huckeba, 258 Ga. App. 627, 574 S.E.2d 856 (2002); Gulledge v. State, 276 Ga. 740, 583 S.E.2d 862 (2003); Giles v. Vastakis, 262 Ga. App. 483, 585 S.E.2d 905 (2003); Rainey v. Lange, 261 Ga. App. 491, 583 S.E.2d 163 (2003); Shelley v. Shannon, 267 Ga. App. 582, 601 S.E.2d 131 (2004); Jones v. Van Horn, 283 Ga. App. 144, 640 S.E.2d 712 (2006); Michna v. Blue Cross & Blue Shield of Ga., Inc., 288 Ga. App. 112, 653 S.E.2d 377 (2007); Atmos Energy Corp. v. Ga. PSC, 290 Ga. App. 243, 659 S.E.2d 385 (2008); Ponder v. CACV of Colo., LLC, 289 Ga. App. 858, 658 S.E.2d 469 (2008); Smith v. State, 283 Ga. 376, 659 S.E.2d 380 (2008); Atmos Energy Corp. v. Ga. PSC, 290 Ga. App. 243, 659 S.E.2d 385 (2008); Stoker v. Severin, 292 Ga. App. 870, 665 S.E.2d 913 (2008); Stone v. Stone, 295 Ga. App. 783, 673 S.E.2d 283 (2009); In the Interest of H.L.H., 297 Ga. App. 347, 677 S.E.2d 396 (2009); Longleaf Energy Assocs., LLC v. Friends of the Chattahoochee, Inc., 298 Ga. App. 753, 681 S.E.2d 203 (2009); In the Interest of C.B., 300 Ga. App. 278, 684 S.E.2d 401 (2009); Bishop v. Patton, 288 Ga. 600, 706 S.E.2d 634 (2011); Blackmore v. Blackmore, 311 Ga. App. 885, 717 S.E.2d 504 (2011); Udoinyion v. Michelin N. Am., Inc., 313 Ga. App. 248, 721 S.E.2d 190 (2011); Cook v. Board of Registrars, 291 Ga. 67, 727 S.E.2d 478 (2012); Sosniak v. State, 292 Ga. 35, 734 S.E.2d 362 (2012).

Application

1. In General

Appeal from the denial of an extraordinary motion for new trial is separate from any original appeal, and must be made by application. Turner v. Binswanger, 203 Ga. App. 319, 417 S.E.2d 221 (1992).

Appeals from the denial of extraordinary motions for new trial, when separate from an original direct appeal, are subject to the discretionary appeal procedure of O.C.G.A. § 5-6-35. Hooks v. State, 210 Ga. App. 171, 435 S.E.2d 617 (1993).

Procedure for discretionary appeals applied to an appeal from the denial of an extraordinary motion for a new trial. Balkcom v. State, 227 Ga. App. 327, 489 S.E.2d 129 (1997), overruling Walls v. State, 204 Ga. App. 348, 419 S.E.2d 344 (1992).

Appeal from post-judgment award. — Party aggrieved by a post-judgment O.C.G.A. § 9-15-14 award is required to comply with the discretionary appeal procedure of paragraph (a)(10) of O.C.G.A.

§ 5-6-35 only in those instances where no direct appeal has been otherwise taken from the underlying judgment. However, in those instances where a direct appeal has been taken from the underlying judgment, a party may also appeal directly from the § 9-15-14 post-judgment award without regard to the discretionary appeal procedures of paragraph (a)(10) of O.C.G.A. § 5-6-35. Rolleston v. Huie, 198 Ga. App. 49, 400 S.E.2d 349 (1990), cert. denied, 198 Ga. App. 898, 400 S.E.2d 349 (1991).

Construction with O.C.G.A. § 5-6-34. — While O.C.G.A. § 5-6-35(h) provides that the filing of an application for appeal shall act as a supersedeas to the extent that a notice of appeal acts as a supersedeas, that section applies only to discretionary appeals. O.C.G.A. § 5-6-34(b), which applies to interlocutory appeals, does not so provide, but states that if the appellate court issues an order granting an appeal, the applicant may then timely file a notice of appeal and the notice of appeal shall act as a supersedeas, as provided in O.C.G.A. § 5-6-46. Nelson v. Haugabrook, 282 Ga. App. 399, 638 S.E.2d 840 (2006).

Construction with Declaratory Judgment Act. — Because the plaintiffs' claim under the Declaratory Judgment Act was independent of their claim under the Administrative Procedure Act (APA) and was directly appealable, plaintiffs could include their APA claim in the plaintiffs' appeal under O.C.G.A. § 5-6-34(d) and were not required to file an application for appeal under O.C.G.A. § 5-6-35(a)(1). Zitrin v. Ga. Composite State Bd. of Med. Examiners, 288 Ga. App. 295, 653 S.E.2d 758 (2007), cert. denied, 2008 Ga. LEXIS 285 (Ga. 2008).

Request for Deoxyribonucleic Acid (DNA) testing. — O.C.G.A. § 5-5-41(c)(13) emphasizes the Georgia General Assembly's intent that the denial of a motion seeking DNA testing that is made as part of an extraordinary motion for a new trial be recognized as an appealable issue, but the filing of an application for discretionary appeal is the proper form of appeal in such a case. Concluding otherwise would yield the absurd result that the denial of an extraordinary motion for a new trial would be appealable only as a discretionary appeal while the denial of a motion seeking DNA testing filed as part of that extraordinary motion for new trial would be appealable directly. Crawford v. State, 278 Ga. 95, 597 S.E.2d 403, cert. denied, stay denied, 542 U.S. 954, 125 S. Ct. 5, 159 L. Ed. 2d 837 (2004).

Actions filed by prisoners. — Non-prisoner defendant is required to follow the discretionary application procedures when appealing an action filed by a prisoner. Ray v. Barber, 273 Ga. 856, 548 S.E.2d 283 (2001).

Failure to comply with procedures. — Court of Appeals was deprived of jurisdiction over appeal from a prisoner's civil action concerning medical treatment the prisoner received when the prisoner failed to comply with the discretionary procedures as required by O.C.G.A. § 42-12-8. Botts v. Givens, 223 Ga. App. 139, 476 S.E.2d 816 (1996).

Appeal seeking review of a trial court's declaratory judgment which extended the term of a charter school from the charter issued by a county board of education was required to follow the discretionary appeal requirements of O.C.G.A. § 5-6-35; because the appeal was not made by application as required, the appeal was subject to dismissal. Cox v. Academy of Lithonia, Inc., 280 Ga. App. 626, 634 S.E.2d 778 (2006).

Prisoner's failure to comply with discretionary appeal procedures in appealing from the trial court's denial of the prisoner's pro se petition for mandamus required dismissal of the action. Jones v. Townsend, 267 Ga. 489, 480 S.E.2d 24 (1997).

Agency decision denying request to expunge criminal records. — Appeal of a superior court decision reviewing a decision of an agency denying a request to expunge criminal records requires the discretionary appeal procedures of O.C.G.A. § 5-6-35. Strohecker v. Gwinnett County Police Dep't, 182 Ga. App. 853, 357 S.E.2d 305 (1987).

Appeals from decisions of superior courts reviewing decision of state and local administrative agencies must be by application pursuant to O.C.G.A. § 5-6-35; the words "by certiorari

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1. In General (Cont'd)

or de novo proceedings" in paragraph (a)(1) relate only to the category "lower courts" and not to the category "state and local administrative agencies"; since no application for appeal was made from the superior court's order affirming the decision of the administrative law judge of the Department of Natural Resources, the appellate court was without jurisdiction to entertain the application. St. Simons Island Save the Beach Ass'n. v. Glynn County Bd. of Comm'rs., 205 Ga. App. 428, 422 S.E.2d 258 (1992).

When the underlying subject matter was the decision of a trial court reviewing the decision of a state administrative agency, appellate review was required to be secured by the grant of an application for discretionary appeal. Prison Health Servs., Inc. v. Georgia Dep't of Admin. Servs., 265 Ga. 810, 462 S.E.2d 601 (1995).

Decision of the local school board in this case to appeal the State Board's decision to the superior court constituted a decision of a local administrative agency within the meaning of O.C.G.A. § 5-6-35. As such, a direct appeal to the appellate court from the superior court's final disposition was not authorized. Gurley v. Gordon County Bd. of Educ., 231 Ga. App. 481, 498 S.E.2d 64 (1998).

Georgia Supreme Court could only review the decision of a superior court involving the review of a local zoning board decision by granting an application to appeal to the party seeking to have such superior court decision reviewed; it did not have jurisdiction to review a direct appeal. Powell v. City of Snellville, 275 Ga. 207, 563 S.E.2d 860 (2002).

Appeal from a decision of the superior court reviewing a decision of a magistrate court by a de novo proceeding was subject to the discretionary appeal procedures of O.C.G.A. § 5-6-35. Dean's Catering v. Sturm & Assocs., 231 Ga. App. 202, 498 S.E.2d 786 (1998).

Revenue department assessment is a decision of a state administrative agency within the meaning of paragraph (a)(1), and an application must be filed. Miles v. Collins, 259 Ga. 536, 384 S.E.2d 630 (1989).

Appeal from a ruling on a declaratory judgment action that was essentially an appeal from an administrative decision to suspend a driver's license was dismissed since the driver was required to proceed by application for discretionary appeal. Miller v. Georgia Dep't of Pub. Safety, 265 Ga. 62, 453 S.E.2d 725 (1995); Greenburg v. Griffith, 226 Ga. App. 818, 487 S.E.2d 411 (1997).

Appeals from temporary restraining orders. — Although paragraph (a)(9) of O.C.G.A. § 5-6-35 makes appeals from temporary restraining orders subject to the procedural requirements of § 5-6-35, such an order may be directly appealable if the order is entered following a lengthy adversary hearing and effectively grants plaintiff all of the relief he or she seeks. Dolinger v. Driver, 269 Ga. 141, 498 S.E.2d 252 (1998).

In an interlocutory appeal pursuant to O.C.G.A. § 5-6-35(j), a trial court's issuance of a temporary restraining order was upheld that directed a shopping center owner to keep the north entrance open because the language of a 2004 easement was clear in that the easement provided for ingress and egress through that entrance. Nat'l Hills Exch., LLC v. Thompson, No. A12A2259, 2013 Ga. App. LEXIS 4 (Jan. 9, 2013).

Appeal from probate court to superior court. — Under the plain language of O.C.G.A. § 5-6-35, no application for appeal is required for decisions of superior courts reviewing judgments of the probate courts. The statute mandates that a direct appeal is available from the superior court affirmance of a probate court case. Phillips v. State, 261 Ga. 190, 402 S.E.2d 737 (1991).

Appeal from board of commissioners. — An appeal in a case involving the board of county commissioners' removal from office of a person appointed to that office by the board required compliance with discretionary appeal procedure; overruling Parsons v. Chatham County Bd. of Comm'rs, 204 Ga. App. 139(1), 418 S.E.2d 459 (1992) and Geron v. Calibre Cos., 250 Ga. 213(1), 296 S.E.2d 602 (1982). Swafford v. Dade County Bd. of Comm'rs,

266 Ga. 646, 469 S.E.2d 666 (1996).

Paragraph (a)(7) applicable to criminal cases. — The 1984 amendment requiring applications to appeal orders denying extraordinary motions for new trial applies to criminal cases as well as civil cases. Pitts v. State, 254 Ga. 298, 328 S.E.2d 732 (1985).

Appeal dismissed as moot. — County board of education member's appeal of a judgment denying a request to reverse the governor's order removing the member from office under O.C.G.A. § 45-10-4 for violating O.C.G.A. § 45-10-3 was dismissed because the term to which the member had originally been elected expired. Roberts v. Deal, 290 Ga. 705, 723 S.E.2d 901 (2012).

Appeal dismissed when no application. — Appeal from judgment for costs entered in an action for damages in the amount of $1,951.00 must be dismissed when the discretion of the Court of Appeals is not invoked by application. Gardner v. Villa Monte Homes, Inc., 173 Ga. App. 896, 328 S.E.2d 565 (1985).

Failure to file an application for a discretionary appeal pursuant to paragraph (a)(7) of O.C.G.A. § 5-6-35 leaves the appellate court without jurisdiction over a direct appeal. Ibietatorremendia v. State, 174 Ga. App. 786, 332 S.E.2d 20 (1985).

When a father's petition for legitimation was denied, the appellate court did not have jurisdiction to review the order because the father had failed to follow the discretionary procedures to appeal pursuant to O.C.G.A. § 5-6-35(a)(2), nor did he file his application for such review within the time period allowed by § 5-6-35(d); his appeal from an order terminating his parental rights and allowing adoption of the minor by the stepfather, pursuant to O.C.G.A. § 19-8-1 et seq., was also denied when the issues that the father raised related to the lack of a hearing on his legitimation proceeding, which was already determined to be not reviewable. In the Interest of C.M.L., 260 Ga. App. 502, 580 S.E.2d 276 (2003).

Defendant's direct appeal from a trial court's grant of partial summary judgment in favor of the plaintiff was dismissed for lack of jurisdiction because an application to appeal under O.C.G.A. § 5-6-35(a) was required but not submitted. Bullock v. Sand, 260 Ga. App. 874, 581 S.E.2d 333 (2003).

Application is required to appeal a domestic relations case in which a "judgment" or an "order" has been entered. Any party who seeks to appeal a "judgment" or an "order" entered in a domestic relations case must follow the procedure set out in paragraph (a)(2) of O.C.G.A. § 5-6-35. Horton v. Kitchens, 259 Ga. 446, 383 S.E.2d 871 (1989).

Appeal from order revoking juvenile probation. — Provisions of O.C.G.A. § 5-6-35(a)(5) and (d) do not apply to appeals from orders revoking juveniles' probation because orders of disposition under O.C.G.A. § 15-11-65(a) are final judgments, directly appealable under O.C.G.A. § 5-6-34(a)(1); therefore, an order of disposition entered upon the revocation of a juvenile's probation was directly appealable and the Court of Appeals of Georgia had jurisdiction over such an appeal. In the Interest of N.M., 316 Ga. App. 649, 730 S.E.2d 127 (2012).

Failure to file application to appeal results in dismissal of appeal in domestic relations cases. Bedford v. Bedford, 246 Ga. 780, 273 S.E.2d 167 (1980).

Child support. — In an action for repayment of child support expended by the Department of Human Resources, the failure to file an application for appeal required under paragraph (a)(2) of O.C.G.A. § 5-6-35 did not result in dismissal of the appeal. An action for repayment under O.C.G.A. § 19-11-5 is one for collection of a debt and requires discretionary appeal procedures only when the judgment is $2,500 (now $10,000.00) or less, pursuant to paragraph (a)(6) of O.C.G.A. § 5-6-35. Department of Human Resources v. Johnson, 175 Ga. App. 610, 333 S.E.2d 845 (1985).

Appeals from orders awarding support for minor children are domestic relations cases which require compliance with the discretionary appeal procedure of paragraph (a)(2) of O.C.G.A. § 5-6-35. Jackson v. Roach, 199 Ga. App. 653, 405 S.E.2d 712, cert. denied, 199 Ga. App. 906, 405 S.E.2d 712 (1991); Davis v. Welch, 205 Ga. App. 462, 422 S.E.2d 323 (1992).

Father's appeal from superior court's

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order under O.C.G.A. § 19-11-12, modifying the amount of his child support obligation, should have been brought as a discretionary appeal. Fitzgerald v. Department of Human Resources, 231 Ga. App. 129, 497 S.E.2d 659 (1998).

Sufficient filing under subsection (d). — Although a notice of appeal must be filed in the court "wherein the case was determined" putting that court on notice that its jurisdiction is affected according to O.C.G.A. § 5-6-37, there is no such requirement regarding an application, since subsection (d) of O.C.G.A. § 5-6-35 only requires the application to be filed with the clerk of the appellate court. In re A.R.B., 209 Ga. App. 324, 433 S.E.2d 411 (1993).

When an application is transferred from one appellate court to the other, the 30-day time period is to be computed from the date of the filing in the court to which that application has been transferred. Marr v. Georgia Dep't of Educ., 264 Ga. 841, 452 S.E.2d 112 (1995).

Effect of failure to file timely application. — In a case governed by the appeal procedures of O.C.G.A. § 5-6-35, the trial court has the authority to dismiss the appeal when the appellant fails to file timely an application to appeal. Tobitt v. Tobitt, 249 Ga. 245, 290 S.E.2d 49 (1982).

When no application for review was filed with the Court of Appeals within 30 days of the lower court's judgment denying the claim for unemployment compensation, an attempted direct appeal was a nullity requiring dismissal. Depass v. Board of Review, 172 Ga. App. 561, 324 S.E.2d 505 (1984).

Denial of extraordinary motion for new trial. — Subsection (a)(7) of O.C.G.A. § 5-6-35 does not purport to confer direct appellate jurisdiction to consider the merits of issues that could and should have been raised in a timely motion for new trial, an extraordinary motion for new trial is properly denied and will be affirmed on appeal if the motion raises only issues that could and should have been raised in a timely motion for new trial. Bohannon v. State, 203 Ga. App. 783, 417 S.E.2d 679 (1992).

Appeal of denial of motion to set aside arising out of divorce case will be dismissed for failure to comply with O.C.G.A. § 5-6-35. Steele v. Niggelie, 163 Ga. App. 98, 293 S.E.2d 368 (1982).

O.C.G.A. § 5-6-35 cannot be construed to expand the jurisdiction of the Court of Appeals over direct orders of lower courts granting or denying motions whose substance and function are to obtain the set-aside of a judgment, including one based upon equitable grounds. Cain v. Moore, 207 Ga. App. 726, 429 S.E.2d 135 (1993).

O.C.G.A. § 5-6-35(a)(8) requires that review of an order denying a motion to set aside be preceded by an application for discretionary review. When both O.C.G.A. §§ 5-6-34(a) and 5-6-35(a) are involved, an application for appeal is required when the underlying subject matter of the appeal is listed in § 5-6-35(a), even though the party may be appealing a judgment or order that is procedurally subject to a direct appeal under § 5-6-34(a). Avren v. Garten, 289 Ga. 186, 710 S.E.2d 130 (2011).

Appeal from summary judgment grant improperly denied. — Brown v. Rutledge, 263 Ga. 474, 435 S.E.2d 187 (1993).

Appeal from legitimation proceeding is required to be made by application to the appropriate appellate court, rather than by direct appeal. Brown v. Williams, 174 Ga. App. 604, 332 S.E.2d 48 (1985).

Legitimation proceeding is a type of domestic relations case, and an application for permission to appeal must be made in accordance with paragraph (a)(2) of O.C.G.A. § 5-6-35. Hill v. Adams, 182 Ga. App. 848, 357 S.E.2d 300 (1987).

Direct appeal of an order terminating putative father's parental rights was proper, even when the relief he sought was expressed in terms of overturning the denial of his petition to legitimate. In re D.S.P., 233 Ga. App. 346, 504 S.E.2d 211 (1998).

Although an order denying a putative father's petition to legitimate his minor child was subject to the discretionary appeal procedure under O.C.G.A. § 5-6-35(a)(2), it was directly appealable

under O.C.G.A. § 5-6-34(d) when the father filed the appeal together with an appeal from the trial court's decision to terminate his parental rights. In the Interest of T.A.M., 280 Ga. App. 494, 634 S.E.2d 456 (2006).

Action for equitable partition to enforce separation agreement. — Although it had its roots in the parties' divorce action, an action for an equitable partition to enforce the separation agreement which was part of the divorce decree is a new action and not merely a continuation of the divorce action. For this reason, O.C.G.A. § 5-6-35 does not apply to this situation, and the husband's direct appeal from the partition order is proper. Larimer v. Larimer, 249 Ga. 500, 292 S.E.2d 71 (1982).

Failure to file notice of appeal within time required by subsection (g). — Subsection (g) of Ga. L. 1979, p. 619, §§ 3, 6 (see O.C.G.A. § 5-6-35(g)), read in conjunction with Ga. L. 1978, p. 1986, § 1 (see O.C.G.A. § 5-6-48(b)(1)), requires that notice of appeal from judgment in contempt of alimony judgment shall be dismissed if the appellant fails to file the notice within ten days after order is issued granting application for such appeal. Harris v. Harris, 245 Ga. 75, 263 S.E.2d 113 (1980).

Notice of appeal is subject to dismissal if the appellant fails to file the notice within ten days after an order is issued granting an application for such appeal. Caldwell v. Elbert County School Dist., 247 Ga. 359, 276 S.E.2d 43 (1981).

Transcript production appeal was untimely. — Defendant's appeal of the denial of the defendant's post-conviction motion requesting production of a trial transcript at government expense was dismissed as untimely. Coles v. State, 223 Ga. App. 491, 477 S.E.2d 897 (1996).

Transcript of termination hearing not required. — Although a parent argued that the trial court erred in denying the parent a copy of the termination hearing transcript to submit with the parent's application for discretionary review, there was no requirement under O.C.G.A. § 5-6-35(c) or Ga. Ct. App. R. 31 that the transcript be filed with the application. In re D. R., 298 Ga. App. 774, 681 S.E.2d 218 (2009), overruled on other grounds, In re A.C., 285 Ga. 829, 686 S.E.2d 635 (2009).

Applicability of section to judgment on auditor's report in equity case. — When an auditor is appointed in an equity case and renders a report which contains findings of fact and conclusions of law which are approved by the trial court, judgment entered on such report or summary judgment entered in case where there are no genuine issues as to material facts set forth in the report is subject to the application requirement of this section. Citizens & S. Nat'l Bank v. Rayle, 246 Ga. 727, 273 S.E.2d 139 (1980).

When an auditor is appointed in an equity case and renders a report which contains findings of fact and conclusions of law which are approved by the trial court, a judgment rendered on such report is subject to the application requirement of O.C.G.A. § 5-6-35. Ravan v. Stephens, 248 Ga. 289, 282 S.E.2d 312 (1981).

Notice of appeal from judgment of contempt must meet time requirement of subsection (g). — Notice of appeal from judgment of contempt regarding a domestic relations decree is subject to dismissal if the appellant fails to file the notice within ten days after an order is issued granting an application for such appeal. Walters v. Walters, 245 Ga. 695, 266 S.E.2d 507 (1980).

Action seeking to vacate judgment for contempt. — When the court entered an order adjudicating a former spouse in contempt, and after time for appealing the contempt order had expired, former spouse brought action seeking to vacate and set aside the judgment for contempt on ground that judgment in the divorce case was void, for legal purposes this was the same as an appeal from the order holding the appellant in contempt. Failure to file an application to appeal made dismissal proper. Chandler v. Cochran, 247 Ga. 171, 275 S.E.2d 657 (1981).

Action did not require application for discretionary appeal. — Tenants' action was not one that required an application for discretionary appeal when the action was not filed as a renewal of claims made in a de novo appeal to a superior court from a dispossessory action brought in a magistrate court and when the supe-

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rior court had denied the tenants' motion to add counterclaims before dismissing the appeal in the dispossessory action. Slone v. Myers, 288 Ga. App. 8, 653 S.E.2d 323 (2007), cert. denied, 555 U.S. 881, 129 S. Ct. 196, 172 L.Ed.2d 140 (2008).

Denial of application to appeal nonfinal order is not res judicata. — Denial of application to appeal nonfinal order is perhaps persuasive but is not res judicata in appellate court when later reviewing final order in same case. Citizens & S. Nat'l Bank v. Rayle, 246 Ga. 727, 273 S.E.2d 139 (1980).

Appeal from decision to terminate city employee. — Court of Appeals is without jurisdiction to entertain a direct appeal from a decision of a city manager approving the termination of a city employee. Salter v. City of Thomaston, 200 Ga. App. 536, 409 S.E.2d 88 (1991).

Dismissal for appealing review of administrative decision under general appeals statute. — Whern the taxpayer did not file an application for discretionary appeal from a decision of the superior court reviewing a decision of the Department of Revenue, but chose to appeal directly to the O.C.G.A. Supreme Court pursuant to § 5-6-34(a), such appeal was dismissed for failure to comply with procedure for appeal from decisions of administrative agencies required by O.C.G.A. § 5-6-35. Plantation Pipe Line Co. v. Strickland, 249 Ga. 829, 294 S.E.2d 471 (1982).

Appeal from small claims court not brought under paragraph (a)(1). — When plaintiff commenced a dispossessory proceeding against the defendant in the Small Claims Court of Putnam County and received a dispossessory warrant against the defendant, who appealed to the Superior Court of Putnam County where a jury found for defendant, and plaintiff appealed to the Court of Appeals and the defendant cross-appealed, when the appeal was not brought under paragraph (a)(1) of O.C.G.A. § 5-6-35, the appeal and cross-appeal will be dismissed. Manley v. Williams, 166 Ga. App. 298, 304 S.E.2d 468 (1983).

When appeal deals with dismissal of garnishment proceeding for delinquent payments under divorce decree directing payment on installment notes and the divorce is only incidental thereto, a motion to dismiss the appeal for failure to file an application for appeal will be denied. Kile v. Kile, 165 Ga. App. 321, 301 S.E.2d 289 (1983).

Appeal arising out of superior court's dismissal of appeal from judgment by recorder's court should be brought under the provision pertaining to discretionary appeals and the failure to do so subjects the appeal to dismissal. Wimbish v. State, 166 Ga. App. 223, 303 S.E.2d 766 (1983).

Appeal from superior court's review of use and enforcement of investigative powers of the board of medical examiners required discretionary appeal procedures. Rankin v. Composite State Bd. of Medical Exmrs., 220 Ga. App. 421, 469 S.E.2d 500 (1996).

No direct appeal from recorder's court to Supreme Court. — Direct appeal from the recorder's court to the Supreme Court was not available in a case challenging the constitutionality of an ordinance. Instead, the proper method of review was by certiorari to the superior court. Russell v. City of E. Point, 261 Ga. 213, 403 S.E.2d 50 (1991), cert. denied, 502 U.S. 971, 112 S. Ct. 448, 116 L. Ed. 2d 466 (1991).

Dismissal of appeal of final judgment is res judicata. — Dismissal by Supreme Court of direct appeal for lack of application as required by O.C.G.A. § 5-6-35 invokes doctrine of res judicata when judgment appealed was final and on merits. Byrd v. Byrd, 248 Ga. 163, 281 S.E.2d 617 (1981).

Denial of discretionary appeal under O.C.G.A. § 5-6-35 by Supreme Court invokes doctrine of res judicata when judgment appealed was final and on the merits. Steele v. Niggelie, 163 Ga. App. 98, 293 S.E.2d 368 (1982).

Appeal from decision as to State Board of Education's administrative decision. — When the affirmance of the local board of education by the State Board of Education is a decision of a state administrative agency acting in a

quasi-judicial capacity and the order of the superior court is itself an appellate decision, reviewing the decision of the state board, the appeal is from a decision of a superior court reviewing a decision of a state administrative agency, within the meaning of O.C.G.A. § 5-6-35. Accordingly, failure to obtain an order of the Court of Appeals permitting the filing of such an appeal must result in the appeal's dismissal. Hogan v. Taylor County Bd. of Educ., 157 Ga. App. 680, 278 S.E.2d 106 (1981).

Appeal of lower court's review of agency decision. — Requirements of O.C.G.A. § 5-6-35 must be followed as a necessary prerequisite to secure discretionary appellate review of decisions of superior courts reviewing decisions of state administrative agencies. Heiny v. Department of Pub. Safety, 169 Ga. App. 37, 311 S.E.2d 848 (1983).

Appeals from decisions of superior courts reviewing decisions of state and local administrative agencies shall be by application in nature of a petition, enumerating errors to be urged on appeal and stating why the appellate court has jurisdiction. Wheeler v. Strickland, 248 Ga. 85, 281 S.E.2d 556 (1981); City of Atlanta Bd. of Zoning Adjustment v. Midtown N., Ltd., 257 Ga. 496, 360 S.E.2d 569 (1987).

Superior courts have authority and responsibility in workers' compensation cases. — Under O.C.G.A. § 5-6-35, the superior courts have all of the authority and all of the responsibilities which the appellate courts formerly had in workers' compensation cases. Southeastern Aluminum Recycling, Inc. v. Rayburn, 251 Ga. 365, 306 S.E.2d 240 (1983).

Cross-appeal to appealable order. — An appeal which, standing alone, would be subject to discretionary appeal procedures, is appealable as a matter of right if it is classifiable as a cross-appeal to an appealable order. Buschel v. Kysor/Warren, 213 Ga. App. 91, 444 S.E.2d 105 (1994).

Cross appeal in workers' compensation case. — In a workers' compensation case, even though no application was made by the employer as required by O.C.G.A. § 5-6-35, since the claimant had taken direct appeal, the employer's cross appeal could be filed also. Linder v. Alterman Foods, Inc., 162 Ga. App. 786, 292 S.E.2d 900 (1982).

Administrative agency decision. — To conclude that, following review by the superior court, a decision of the administrator of the Office of Consumer Affairs to issue an investigative demand is appealable as a matter of right, but the administrator's decision on the merits is appealable only by application would be contrary to the clear purpose of O.C.G.A. § 5-6-35. The agency's decision to issue an investigative demand is a "decision" of an administrative agency within the meaning of subsection (a) of § 5-6-35 and an appeal from a grant of summary judgment by the superior court to the administrator should be dismissed for failure to comply with the requirements of § 5-6-35. Tri-State Bldg. & Supply, Inc. v. Reid, 251 Ga. 38, 302 S.E.2d 566 (1983).

Atlanta Bureau of Zoning Adjustment is "local administrative agency" within meaning of paragraph (a)(1) of O.C.G.A. § 5-6-35, thereby requiring discretionary-appeal applications from decisions of the superior court reviewing decisions of the Bureau of Zoning Adjustment. Rybert & Co. v. City of Atlanta, 258 Ga. 347, 368 S.E.2d 739 (1988), overruled on other grounds, Southern States Landfill, Inc. v. City of Atlanta Bd. of Zoning Adjustments, 261 Ga. 759, 410 S.E.2d 721 (1991).

Appeal of court order affirming denial of unemployment compensation claim. — When the appellant files a direct appeal from a superior court order affirming the Department of Labor's denial of the appellant's claim for unemployment compensation without first obtaining an order from the appellate court granting permission for such an appeal pursuant to paragraph (a)(1) of O.C.G.A. § 5-6-35, the appeal will be dismissed. Cook v. Caldwell, 166 Ga. App. 452, 305 S.E.2d 187 (1983).

Appeal from State Personnel Board as to termination of state employee. — Direct appeal from an order affirming a decision of the State Personnel Board which reversed the termination of the appellee's employment as a correctional

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officer which was not brought under the discretionary appeal provisions of O.C.G.A. § 5-6-35 must be dismissed for lack of jurisdiction. Department of Offender Rehabilitation v. Meeks, 165 Ga. App. 269, 299 S.E.2d 757 (1983).

Appeal from an order of a superior court affirming a decision of the State Personnel Board which denies an appeal from the sustaining of a dismissal from employment as a correctional officer by a hearing officer must be brought under the discretionary provisions of O.C.G.A. § 5-6-35. When that procedure is not followed, the Court of Appeals has no jurisdiction over the appeal and, accordingly, it must be dismissed. Summerset v. Department of Offender Rehabilitation, 167 Ga. App. 730, 307 S.E.2d 678 (1983).

Appeals of an action, labeled "tort-negligence," which a state prisoner, brought against officials of a correctional institute, were not dismissed under subdivision (a)(1) of O.C.G.A. § 5-6-35 because the defendant filed separate tort actions seeking damages for official actions which could have been the subject of administrative grievances. McBride v. Zant, 204 Ga. App. 183, 418 S.E.2d 781 (1992).

Appeal from order awarding sanction. — Order imposing a monetary sanction for wilfully failing to attend a scheduled post-judgment deposition was in the nature of an award for frivolous litigation and required an application for discretionary appeal. Bonnell v. Amtex, Inc., 217 Ga. App. 378, 457 S.E.2d 590 (1995).

Order imposing a sanction for unnecessarily expanding a proceeding was in the nature of an award for frivolous litigation within the purview of O.C.G.A. § 9-15-14(b) and, as such, was not directly appealable, but required an application for discretionary appeal. Hill v. Doe, 239 Ga. App. 869, 522 S.E.2d 471 (1999).

Appeal of finding of contempt. — Finding of wilful contempt of a court order entering judgment on a jury verdict not dealing with alimony or child custody is directly appealable notwithstanding the denial of a simultaneously filed application for discretionary appeal. Stephens v. Stephens, 184 Ga. App. 538, 362 S.E.2d 118 (1987).

Supreme court had no jurisdiction to consider a trial court's order holding a common law husband in contempt because the enumeration that addressed the contempt order was not predicated upon a proper and timely appeal from that order or from any other appealable order that encompassed that subsequent ruling since the contempt order was not prior to or contemporaneous with that final judgment such that it can be enumerated in the case pursuant to O.C.G.A. § 5-6-34(d) but was a subsequent ruling that the husband was not entitled to enumerate; a separate appeal was not proper in the absence of compliance with the discretionary appeal procedures set forth in O.C.G.A. § 5-6-35(a)(2), no application seeking discretionary review of the contempt order had ever been filed, and the record did not contain any transcript of the contempt hearing. Norman v. Ault, 287 Ga. 324, 695 S.E.2d 633 (2010).

Denial of motions to stay or discharge contempt confinement. — Since a contempt order itself cannot be appealed directly, neither the denial of a motion to stay incarceration for contempt nor the denial of a motion for discharge from confinement can be appealed directly. The procedure for taking such appeals, if allowable at all, is governed by O.C.G.A. § 5-6-35. Strickland v. Strickland, 252 Ga. 218, 312 S.E.2d 606 (1984).

Review of order regarding termination of liquor-wholesaling relationship. — Matter before the state revenue commissioner (the proposed termination by a liquor producer of four of its designated wholesalers) was a "contested case" within the meaning of the Administrative Procedure Act, not involving the suspension or cancellation of licenses, and the trial court was thus correct in treating the review of the commissioner's order denying the proposal as a petition for judicial review pursuant to the APA; there having been no application to appeal the decision of the superior court affirming the commissioner's order, as required by O.C.G.A. § 5-6-35, the motion to dismiss the appeal

was granted. Schieffelin & Co. v. Strickland, 253 Ga. 385, 320 S.E.2d 358 (1984).

Appeal on issue of liquor license. — Supreme Court of Georgia holds that when the underlying subject matter of an appeal prevails over the relief sought when both the direct and discretionary appeal statutes are implicated, such appeals must be brought under the discretionary appeals statute, O.C.G.A. § 5-6-35; accordingly, the trial court's grant of a liquor license applicant's writ of mandamus petition against a county commission that had denied the applicant's request for a license should have been by such procedure. Augusta-Richmond County v. Lee, 277 Ga. 483, 592 S.E.2d 71 (2004).

Appeal from denial of liquor license. — Although the nightclub had a right pursuant to O.C.G.A. § 5-6-35 to seek a discretionary review of the trial court's judgment affirming an administrative agency's decision to deny the nightclub's application for renewal of the nightclub's liquor license, the nightclub did not have a right to directly appeal that judgment after the Supreme Court reviewed and rejected the nightclub's discretionary appeal, as the denial of the discretionary appeal was a ruling on the merits; thus, the nightclub was not entitled to have the Supreme Court review those same claims again. Northwest Soc. & Civic Club, Inc. v. Franklin, 276 Ga. 859, 583 S.E.2d 858 (2003).

Appeals of awards of attorney's fees or expenses of litigation. — Effective July 1, 1986, applications to appeal awards of attorney's fees or expenses of litigation under O.C.G.A. § 9-15-14 are required, and a direct appeal will be dismissed for failure to comply with O.C.G.A. § 5-6-35. Martin v. Outz, 257 Ga. 211, 357 S.E.2d 91 (1987).

When the appellee city sought to dismiss the appellant's appeal from the award of attorney fees because the appellant did not file an application as required by subsection (a)(10) of O.C.G.A. § 5-6-35 for an appeal from an award of attorney fees pursuant to O.C.G.A. § 9-15-14, an application was not necessary to appeal the award of attorney fees, since this was appealed along with other matters directly appealable. Stancil v. Gwinnett County, 259 Ga. 507, 384 S.E.2d 666 (1989).

Appeal that is created by O.C.G.A. § 40-13-28 (traffic offenses) is "de novo proceeding," whereby the superior court reviews the certified record below and makes a new determination as to guilt or innocence. An appeal to the Court of Appeals must comply with the discretionary appeal provisions of O.C.G.A. § 5-6-35. Anderson v. City of Alpharetta, 187 Ga. App. 148, 369 S.E.2d 521 (1988).

Appeal from an order denying a motion to recuse requires an application for interlocutory review. In re Booker, 186 Ga. App. 614, 367 S.E.2d 850 (1988).

Motion to amend motion for new trial. — When the original motion for a new trial, as amended, had been denied and was no longer before the trial court, the motion to amend the motion for a new trial was in reality an extraordinary motion for new trial and appeal from the denial of such a motion must be by application when separate from the original appeal. Martin v. State, 185 Ga. App. 145, 363 S.E.2d 765 (1987).

Traffic appeals. — Construing O.C.G.A. §§ 5-6-35(a)(1) and 40-13-28 according to their real intent and meaning and not so strictly as to defeat the legislative purpose, the General Assembly did not intend to remove traffic appeals under § 40-13-28 from the discretionary appeals procedures. Brown v. City of Marietta, 214 Ga. App. 840, 449 S.E.2d 540 (1994).

All appeals from judgments of superior courts in traffic cases under O.C.G.A. § 40-13-28 must follow the procedures in subsection (a) of O.C.G.A. § 5-6-35. Accordingly, 30 days after the date this decision is published in the official advance sheets any direct appeals in these cases filed under O.C.G.A. § 5-6-34(a) will be dismissed. Brown v. City of Marietta, 214 Ga. App. 840, 449 S.E.2d 540 (1994).

Any appeal from a superior court review under O.C.G.A. § 40-13-28 of any lower court, except the probate court, shall be under subsection (a) of O.C.G.A. § 5-6-35; however, an appeal from the superior court review under § 40-13-28 of a traffic case from the probate court shall be by

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direct appeal under O.C.G.A. § 5-6-34(a)(1). Power v. State, 231 Ga. App. 335, 499 S.E.2d 357 (1998).

Mandamus. — Even though appellant doctor sought review of a decision by the appellee board of medical examiners by filing a mandamus action, and even though a judgment in a mandamus action was subject to direct appeal under O.C.G.A. § 5-6-34, the doctor was required to file an application to appeal pursuant to O.C.G.A. § 5-6-35 because the underlying subject matter of the doctor's appeal was covered by O.C.G.A. § 5-6-35. Ferguson v. Composite State Bd. of Med. Exam'rs, 275 Ga. 255, 564 S.E.2d 715 (2002).

If a request for mandamus relief attacks or defends the validity of an administrative ruling and seeks to prevent or promote the enforcement thereof, the trial court must necessarily "review" the administrative decision within the meaning of O.C.G.A. § 5-6-35(a)(1) before ruling on the request for mandamus relief. Ferguson v. Composite State Bd. of Med. Exam'rs, 275 Ga. 255, 564 S.E.2d 715 (2002).

Intermediate court properly transferred an application for discretionary review filed by a limited liability limited partnership (LLLP), seeking review of the denial of the LLLP's request for a writ of mandamus, to the Georgia Supreme Court, as cases involving the grant or denial of mandamus are within the exclusive jurisdiction of the Georgia Supreme Court without regard to the underlying subject matter or the legal issues raised. As the case involved permitting requirements for landfills, it concerned a statutory scheme requiring a permit from the state for a land use that was regulated by the state, and the LLLP was entitled to a direct appeal from the denial of the LLLP's mandamus action. Mid-Georgia Envtl. Mgmt. Group, L.L.L.P. v. Meriwether County, 277 Ga. 670, 594 S.E.2d 344 (2004).

Laches. — Appeal by county board of education members of a judgment denying the members' request to reverse the governor's order removing the members from office under O.C.G.A. § 45-10-4 for violating O.C.G.A. § 45-10-3 was not dismissed due to the doctrine of laches; the members were required by § 45-10-4 to proceed under the Georgia Administrative Procedure Act, O.C.G.A. § 50-13-1 et seq., and no delay warranted the imposition of the doctrine of laches; the governor's order was signed on August 6, 2010, and the members filed the members' petition for judicial review on August 12, 2010. Roberts v. Deal, 290 Ga. 705, 723 S.E.2d 901 (2012).

2. Judgments Concerning Child Custody

Orders dealing with child custody are subject to discretionary appeal procedures. In re L.W., 216 Ga. App. 222, 453 S.E.2d 808 (1995).

Child custody no longer governed by this statute. — As a parent's petition to modify a visitation schedule was a "child custody case" for purposes of O.C.G.A. § 5-6-34(a)(11), and as the legislature intended to remove child custody cases from the operation of O.C.G.A. § 5-6-35(a)(2) when the legislature excised references to such cases from that statute, the parent was entitled to file a direct appeal from the trial court's final judgment on the petition. Moore v. Moore-McKinney, 297 Ga. App. 703, 678 S.E.2d 152 (2009).

Constitutional challenge to application procedure terminating parental rights raised for first time on appeal. — Appellate court could consider a constitutional challenge to O.C.G.A. § 5-6-35(a)(12), which required an application for appeal from an order terminating parental rights, for the first time on appeal because the statutory procedure at issue did not come into play until after an adverse decision in the trial court and a decision to take an appeal. In re A.C., 285 Ga. 829, 686 S.E.2d 635 (2009).

No due process violation by requiring application for appeal in parental rights termination. — Discretionary appeal process of O.C.G.A. § 5-6-35(a)(12) did not violate a mother's due process rights following the termination of her parental rights to her child. In re A.B., 311 Ga. App. 629, 716 S.E.2d 755 (2011).

Child custody orders include those entered as part of divorce case or pursuant to O.C.G.A. Art. 3, Ch. 9, T. 19 (Uniform Child Custody Jurisdiction Act) or O.C.G.A. Art. 2, Ch. 9, T. 19 (Georgia Child Custody Intrastate Jurisdiction Act). Bryant v. Wigley, 246 Ga. 155, 269 S.E.2d 418 (1980), overruled on other grounds, 247 Ga. 487, 277 S.E.2d 247 (1981).

Cases involving termination of parental rights must be made by direct appeal as those cases are not within the purview of paragraph (a)(2) of O.C.G.A. § 5-6-35 requiring certain appeals to be made by discretionary application. In re S.N.S., 182 Ga. App. 803, 357 S.E.2d 127 (1987).

Appeal from an adoption proceeding was not an appeal from a child custody proceeding, which would require the discretionary appeal procedure. Moore v. Butler, 192 Ga. App. 882, 386 S.E.2d 678 (1989).

Orders terminating parental rights are directly appealable. In re L.W., 216 Ga. App. 222, 453 S.E.2d 808 (1995).

Temporary order changing custody directly appealable. — Mother was permitted to appeal a temporary order changing custody of the parties' children to the father without complying with O.C.G.A. §§ 5-6-34(b) and 5-6-35 because § 5-6-34 provided that all modifications of child custody orders filed on or after January 1, 2008, were directly appealable and were no longer subject to the interlocutory appeal procedures. Taylor v. Curl, 298 Ga. App. 45, 679 S.E.2d 80 (2009).

Failure to file pursuant to section. — Appeals from orders dealing with child custody which are not filed pursuant to O.C.G.A. § 5-6-35 must be dismissed for lack of jurisdiction. Hamilton v. Deutscher, 201 Ga. App. 883, 412 S.E.2d 875 (1991); In re A.M.D., 212 Ga. App. 291, 444 S.E.2d 166 (1994).

Requirement of an application for appeal in parental rights termination cases did not violate equal protection. — O.C.G.A. § 5-6-35(a)(12), which required an application for appeal from an order terminating parental rights, did not violate a parent's equal protection rights by treating that parent differently from other parents whose custody was interrupted, because termination cases and custody interruption cases were not similar, and the classification created by § 5-6-35(a)(12) was reasonable and supported by the state's legitimate interest in not permitting a deprived child to languish in temporary care. In re A.C., 285 Ga. 829, 686 S.E.2d 635 (2009).

Habeas corpus order returning child to lawful custodian is not an order "awarding child custody" within meaning of section. Bryant v. Wigley, 246 Ga. 155, 269 S.E.2d 418 (1980), overruled on other grounds, 247 Ga. 487, 277 S.E.2d 247 (1981).

Notice of appeal from judgment granting child custody must meet time requirement of subsection (g). — Subsection (g) of Ga. L. 1979, p. 619, §§ 3, 6 (see O.C.G.A. § 5-6-35) read in conjunction with Ga. L. 1978, p. 1986, § 1 (see O.C.G.A. § 5-6-48(b)(1)), provides that notice of appeal from judgment granting child custody is subject to dismissal if the appellant fails to file the notice within ten days after order is issued granting application for such appeal. Evans v. Davey, 154 Ga. App. 269, 267 S.E.2d 875 (1980).

Supreme Court jurisdiction over appeals involving child custody requires underlying judgment for divorce. — Supreme Court does not have jurisdictional basis for entertaining appeals involving child custody questions unless appeal also involved judgment for divorce; all other child custody cases are, accordingly, within jurisdiction of Court of Appeals. Evans v. Davey, 154 Ga. App. 269, 267 S.E.2d 875 (1980).

Direct appeal on refusal to change custody. — One parent filed an application for discretionary review of a trial court's order, which the Supreme Court of Georgia granted under O.C.G.A. § 5-6-35(j) inasmuch as the parent had a right under O.C.G.A. § 5-6-34(a)(11) to appeal directly from a judgment or order in a child custody case that refused to change custody and that held the parent in contempt of a child custody judgment or order. Furthermore, that parent, acting pursuant to § 5-6-35(a)(8), filed a timely application seeking review of the denial of a motion to set aside an order requiring

Application (Cont'd)
2. Judgments Concerning Child Custody (Cont'd)

that parent to pay the other parent's attorney fees and reasonable expenses, which application the court granted. Avren v. Garten, 289 Ga. 186, 710 S.E.2d 130 (2011).

Inapplicable to child custody habeas corpus actions. — General Assembly did not intend to include child custody habeas corpus actions brought by the custodial parent within the classes of cases enumerated in O.C.G.A. § 5-6-35. Wright v. Hanson, 248 Ga. 523, 283 S.E.2d 882 (1981), (decided prior to 1984 amendment).

Application for appeal in accordance with the procedures set forth in O.C.G.A. § 5-6-35 is not necessary in child custody habeas corpus proceedings brought by the custodial parent, whether the custodial parent prevails or loses in the trial court. Wright v. Hanson, 248 Ga. 523, 283 S.E.2d 882 (1981), (decided prior to 1984 amendment).

Applicable to child custody habeas corpus actions. — Addition (by Ga. L. 1984, p. 599, § 2) of the term "child custody, and other domestic relations cases including, but not limited to" in paragraph (a)(2) of O.C.G.A. § 5-6-35 was intended to add child custody habeas corpus actions to the purview of § 5-6-35. Leonard v. Benjamin, 253 Ga. 718, 324 S.E.2d 185 (1985).

Failure to file notice of appeal pursuant to § 5-6-38. — When the custodial parent in a child custody habeas corpus proceeding unnecessarily files an application for appeal in accordance with O.C.G.A. § 5-6-35, and the Supreme Court grants the application, and a notice of appeal then is timely filed, the Supreme Court has jurisdiction of the appeal even though no notice of appeal was filed in accordance with O.C.G.A. § 5-6-38 within 30 days from entry of judgment in the trial court. Wright v. Hanson, 248 Ga. 523, 283 S.E.2d 882 (1981).

Appeal involving change of custody falls within provisions of paragraph (a)(2) and subsection (d) of O.C.G.A. § 5-6-35, which require an application to be filed directly with the Court of Appeals within 30 days of the filing of the order changing visitation rights. On failing to follow these requirements, § 5-6-35 precludes vesting of jurisdictional powers either in the trial court based on an appeal to a final judgment or in the Court of Appeals as a discretionary appeal. Jones v. Warrenfells, 166 Ga. App. 519, 305 S.E.2d 147 (1983); Dudai v. Spisak, 170 Ga. App. 744, 318 S.E.2d 501 (1984); Brandenburg v. Brandenburg, 175 Ga. App. 18, 332 S.E.2d 665 (1985).

Order modifying custody, issued following a "temporary" hearing under USCR 24.5, was final. In a post-decree custody modification action authorized by a prior version of O.C.G.A. § 19-9-3(b), the trial court was without authority to enter a "temporary" custody award. Hightower v. Martin, 198 Ga. App. 855, 403 S.E.2d 862 (1991), but see Massey v. Massey, 227 Ga. App. 906, 490 S.E.2d 205 (1997).

There is nothing in O.C.G.A. § 5-6-35 which excludes custody cases involving the state. In re J.E.P., 252 Ga. 520, 315 S.E.2d 416 (1984).

Motion for modification of a juvenile court order terminating parental rights is similar to a motion to set aside under O.C.G.A. § 9-11-60(d), which is appealable but does not sustain an appeal from the underlying judgment. In re H.A.M., 201 Ga. App. 49, 410 S.E.2d 319 (1991).

Denial of stepfather's petition to adopt his ten-year old stepdaughter was directly appealable, as all petitions for adoption, whether granted or denied, whether terminating parental rights, or not, do not come within paragraph (a)(2) of subsection (a). In re J.S.J., 180 Ga. App. 873, 350 S.E.2d 843 (1986).

Contempt of visitation order. — Judgment holding mother in contempt of an order which granted visitation rights to father was not directly appealable since the order constituted a child custody order for purposes of paragraph (a)(2) of O.C.G.A. § 5-6-35. Burnett v. Coleman, 170 Ga. App. 394, 317 S.E.2d 546 (1984).

Denial of a petition to hold the mother in contempt of the final judgment and decree of divorce which granted the father visitation rights to the parties' child can be reviewed only by application for discre-

tionary appeal, because visitation privileges are a part of custody. Hosch v. Hosch, 184 Ga. App. 370, 361 S.E.2d 686 (1987), cert. denied, 484 U.S. 1067, 108 S. Ct. 1030, 98 L. Ed. 2d 994 (1988).

Child support delinquency proceedings. — Appeal from a judgment on the pleadings in an action to set aside a judgment awarding delinquent child support payments is not an appeal concerning those issues as enumerated in paragraph (a)(2) of O.C.G.A. § 5-6-35. Karsman v. Portman, 170 Ga. App. 194, 316 S.E.2d 819 (1984).

Appeal of denial of foster child custody change petition. — When the appellants failed to file an application for appellate review following the denial of the appellant's petition by the juvenile court which sought to have legal custody of a foster child changed from the county department of family and children services to themselves, the appeal was dismissed. In re C.P.H., 169 Ga. App. 122, 311 S.E.2d 850 (1983).

Grandparents seeking appellate review of an unfavorable ruling regarding visitation privileges are, like parents, required to follow the procedure necessary to secure a discretionary appeal. Tuttle v. Stauffer, 177 Ga. App. 112, 338 S.E.2d 544 (1985).

Inapplicable to deprivation cases. — Because deprivation cases are neither child custody nor domestic relations cases within the purview of O.C.G.A. § 5-6-35, a right of direct appeal lies from such orders. Balkcom v. State, 227 Ga. App. 327, 489 S.E.2d 129 (1997); In re J.P., 267 Ga. 492, 480 S.E.2d 8 (1997), overruling In re D.S., 212 Ga. App. 203, 441 S.E.2d 412 (1994); In re M.D.S., 211 Ga. App. 706, 440 S.E.2d 95 (1994); In re N.A.B., 196 Ga. App. 819, 397 S.E.2d 301 (1990); In re M.A.V., 206 Ga. App. 299, 425 S.E.2d 377 (1992).

Appeal from juvenile court decision in deprivation proceeding. — Court of Appeals had jurisdiction to consider a father's appeal from the juvenile court's judgment in a deprivation proceeding. In re A.L.L., 211 Ga. App. 767, 440 S.E.2d 517 (1994).

Appeals from a deprivation proceeding do not involve child custody and therefore do not require an application to appeal. In re J.P., 220 Ga. App. 895, 470 S.E.2d 706 (1996), aff'd, 267 Ga. 492, 480 S.E.2d 8 (1997).

Adoption cases. — Appeal from a declaratory judgment action brought by an adoption agency to determine the validity of the surrender of parental rights and the adoption procedure was not subject to the discretionary appeal procedures of O.C.G.A. § 5-6-35. Families First v. Gooden, 211 Ga. App. 272, 439 S.E.2d 34 (1993).

Denial of custodial parent's motion to set aside attorney fees. — Trial court did not err when the court denied a custodial parent's motion to set aside an award of attorney fees because the court's underlying judgment was final and the trial court's award of attorney fees did not supplement, amend, alter, or modify an order and judgment which were the subjects of the pending discretionary application and notice of appeal. Thus, the supercedeas of the application and notice of appeal did not deprive the trial court of jurisdiction to enter the award of attorney fees. Avren v. Garten, 289 Ga. 186, 710 S.E.2d 130 (2011).

3. Divorce

When the "underlying subject matter" of the case is divorce, the General Assembly intends the case to be brought to the Supreme Court by application pursuant to O.C.G.A. § 5-6-35 rather than by direct appeal. Rolleston v. Rolleston, 249 Ga. 208, 289 S.E.2d 518 (1982).

Where the issue sought to be appealed clearly arises from divorce proceedings, the appeal procedures of O.C.G.A. § 5-6-35 control. Tobitt v. Tobitt, 249 Ga. 245, 290 S.E.2d 49 (1982).

Appeal from denial of superior court petition seeking separate maintenance and equitable division of property and to enjoin matters pending in juvenile court was dismissed for failure to comply with paragraph (a)(2) of O.C.G.A. § 5-6-35. Floyd v. Floyd, 250 Ga. 208, 296 S.E.2d 607 (1982).

When the underlying subject matter was divorce, the appellant was required to file an application for appeal as provided in O.C.G.A. § 5-6-35; the appellant could

Application (Cont'd)
3. Divorce (Cont'd)

not avoid the discretionary review procedure by challenging the trial court's rulings via writ of prohibition. Self v. Bayneum, 265 Ga. 14, 453 S.E.2d 27 (1995).

Right to a direct appeal in child custody cases in O.C.G.A. § 5-6-34(a)(11) did not apply to a divorce decree in which child custody was an issue, even though the only relief sought on appeal pertained to the custody decision; the underlying subject matter was still the divorce action. Therefore, a parent was required to follow the discretionary appeal procedure of O.C.G.A. § 5-6-35, and the parent's direct appeal was dismissed. Todd v. Todd, 287 Ga. 250, 696 S.E.2d 323 (2010).

Mother's appeal of a judgment vacating an award of physical custody of a child to her and revising the decree to award physical custody of the child to the father was properly before the supreme court because the mother followed the required application procedures, and the timing of her notice of appeal did not deprive her of the appeal; because it was not a child custody case but a divorce case in which child custody was an issue; O.C.G.A. § 5-6-35(a)(2) required an application for discretionary appeal, and a direct appeal was not authorized by O.C.G.A. § 5-6-34(a)(11). Todd v. Todd, 287 Ga. 250, 696 S.E.2d 323 (2010).

Case involving a "domestic relations" issue wherein the appellant sought domestication and "correction" of a foreign divorce decree, normally within the jurisdiction of the Court of Appeals, also involved claims based upon an unincorporated settlement agreement which raised no "domestic relations" issue and, therefore, the Supreme Court had jurisdiction over the direct appeal from the grant of summary judgment in favor of the former husband as to the former wife's claims for specific performance of the settlement agreement and jurisdiction over the rulings on all the former wife's claims, including the "domestic relations" claim. Eickhoff v. Eickhoff, 263 Ga. 498, 435 S.E.2d 914 (1993).

Appeal of petition for reformation of separation agreement. — When an agreement purporting to resolve all matters arising out of marriage is incorporated into a final decree of divorce, the rights of the parties are based on the final decree and not the underlying agreement and appeal is within O.C.G.A. § 5-6-35. Paul v. Paul, 250 Ga. 54, 296 S.E.2d 48 (1982).

Appeal from temporary alimony order. — Party seeking appellate review of an order awarding temporary alimony must comply with the interlocutory appeal procedure of O.C.G.A. § 5-6-34. Bailey v. Bailey, 266 Ga. 832, 471 S.E.2d 213 (1996).

Appeals arising out of paternity petitions are domestic relations cases which require compliance with the discretionary appeal procedure of O.C.G.A. § 5-6-35. Brown v. Department of Human Resources, 204 Ga. App. 27, 418 S.E.2d 404 (1992).

Res judicata barred review when previous application was dismissed as untimely. — As a former spouse previously filed an application for discretionary review under O.C.G.A. § 5-6-35(a)(2), based on the spouses' claim that the spouse should have been credited as to the spouse's education expense obligation for the son's college tuition and expenses with the amount withdrawn by the son from a Uniform Transfer to Minor Account, and the application was dismissed as untimely filed, the former spouse was barred under res judicata from appealing that issue. Norris v. Norris, 281 Ga. 566, 642 S.E.2d 34 (2007).

Direct appeal in action for breach of contract contemporaneous with divorce settlement. — In a direct appeal by appellant, the former wife of the appellee, upon an action for breach of a contract entered into by the parties contemporaneous with the divorce settlement and judgment, when the appellee argued that the suit (enforcement of divorce or domestic relations settlement or agreement) was subject only to discretionary appeal under paragraph (a)(2) of O.C.G.A. § 5-6-35, and that the direct appeal should be dismissed, the court found that a former husband and wife may enter into contractual agreements separate from any decreed by the court upon a divorce and that

the action was for a breach of contract, and directly appealable. Scott v. Mohr, 191 Ga. App. 825, 383 S.E.2d 190 (1989).

Appeal of contempt order. — When the jury specifically designates a property transfer as alimony in a divorce case, the Court of Appeals does not have jurisdiction of an appeal of a contempt order entered therein, which by law is subject to application for discretionary appeal to the Supreme Court. Cale v. Byrdwell, 166 Ga. App. 901, 305 S.E.2d 468 (1983).

Notice of appeal from a judgment of contempt regarding a domestic relations decree (finding violations by harassment, abuse, threats, assaults, annoyances, and willful refusal to make house payments as ordered), which judgment imposed a 20-day unconditional imprisonment, was dismissed for failure to file an application for appeal pursuant to paragraph (a)(2) of O.C.G.A. § 5-6-35. Russo v. Manning, 252 Ga. 155, 312 S.E.2d 319 (1984).

Trial court erred by dismissing an ex-spouse's motion for contempt for failure to pay child support, which was filed along with a motion to modify the parties' divorce decree because when one court has rendered a divorce decree and a second court later acquires jurisdiction to modify the decree, the second court also has jurisdiction to entertain a motion for contempt of the original decree as a counterclaim to the petition to modify. Ford v. Hanna, 292 Ga. 500, 739 S.E.2d 309 (2013).

Seeking federal relief when fraudulent obtaining of divorce alleged. — Federal district court could not enjoin enforcement of a state court judgment in a divorce proceeding that had been allegedly obtained by fraud and which, therefore, allegedly deprived the plaintiff of property without due process of law, in that the plaintiff failed to state a claim under the federal civil rights statute, because the existence of adequate review procedures under Georgia law accorded the plaintiff sufficient due process. Collins v. Collins, 597 F. Supp. 33 (N.D. Ga. 1984).

Enforcement of divorce judgment. — An action by a former wife against the state retirement system, seeking an order compelling the system to pay, directly to her, her share of her former husband's retirement benefits under a divorce judgment, was not a divorce case and an application to appeal was not required. Bryant v. Employees Retirement Sys., 264 Ga. 125, 441 S.E.2d 757 (1994).

Because an ex-wife and the children sought damages for a decedent's alleged failure to comply with an insurance provision in a divorce decree, and not a recovery of alimony or child support, the Supreme Court lacked jurisdiction to hear a discretionary appeal under Ga. Const. 1983, Art. VI, Sec. VI, Para. III(6) and the orders appealed from were subject to the discretionary appeal requirements of O.C.G.A. § 5-6-35(a)(2); therefore, the Court of Appeals correctly dismissed their direct appeal. Walker v. Estate of Mays, 279 Ga. 652, 619 S.E.2d 679 (2005).

Suit brought against former spouse seeking to domesticate out-of-state judgment in divorce proceeding and to have spouse attached for contempt and ordered to pay arrearages was a suit on a foreign judgment, not a divorce or alimony case within the meaning of Georgia's Constitution, and jurisdiction of appeal was in the Court of Appeals. Lewis v. Robinson, 254 Ga. 378, 329 S.E.2d 498 (1985).

Suit to domesticate Ohio divorce judgment and have husband held in contempt was a "contempt" or "other domestic relations case" under paragraph (a)(2) of O.C.G.A. § 5-6-35 for direct versus discretionary appeal purposes. Lewis v. Robinson, 176 Ga. App. 374, 336 S.E.2d 280 (1985).

Application for appeal timely filed. — In a divorce action, because a husband sought a discretionary appeal within 30 days of the date the trial court made the parties' settlement agreement the judgment of the court, thereby terminating the litigation, the husband's application for a discretionary appeal was timely filed. Underwood v. Underwood, 282 Ga. 643, 651 S.E.2d 736 (2007).

Temporary alimony continues in effect until entry of remittitur. — Trial court erred in ruling that a husband was not obligated for temporary alimony amounts that had come due before the entry of remittitur in the trial court, but the court correctly ruled that as to child support, the temporary award remained

Application (Cont'd)
3. Divorce (Cont'd)

in effect until the date the remittitur was entered because a temporary award continued in effect until the entry of the remittitur in the trial court, and it was from that date forward that any permanent award in a final judgment and decree of divorce had effect. Nicol v. Nicol, 240 Ga. 673, (1978), and cases following its reasoning on this issue are overruled. Robinson v. Robinson, 287 Ga. 842, 700 S.E.2d 548 (2010).

4. Garnishment

None due to time limitation expiration. — When an owner of a brokerage service account that was garnished failed to timely appeal the garnishment judgment within 30 days, pursuant to the time limitations contained in O.C.G.A. § 5-6-35(a)(4), the assignee of the owner's rights had no right to appeal that judgment after such time had expired; the assignee had the same rights as the owner, and the owner's time had ran on such an appeal. Lamb v. First Union Brokerage Servs., 263 Ga. App. 733, 589 S.E.2d 300 (2003).

Failure to obtain order permitting filing of appeal. — When the appellant files a direct appeal from an order granting defendant-garnishee's motion to open a default judgment but the appellant has failed to obtain an order of the appellate court permitting the filing of an appeal pursuant to paragraph (a)(4) of O.C.G.A. § 5-6-35, the appeal must be dismissed. Wallace v. Saks Fifth Ave., Atlanta, Inc., 180 Ga. App. 679, 350 S.E.2d 308 (1986); Easley, McCaleb & Stallings, Ltd. v. Gateway Mgt., 191 Ga. App. 588, 382 S.E.2d 373 (1989); Maloy v. Ewing, 226 Ga. App. 490, 486 S.E.2d 708 (1997).

5. Revocation of Probation

Pursuant to O.C.G.A. § 5-6-35 (a)(5) and (d), appeals from orders revoking probation are discretionary and require that an application be filed with the clerk of the appropriate court within 30 days of the date of the revocation order. Todd v. State, 236 Ga. App. 757, 513 S.E.2d 287 (1999).

Appeal from order revoking probation included. — Appeal from an order revoking probation is one of the type of cases which must follow the procedure set forth in O.C.G.A. § 5 -6-35. Yellock v. State, 179 Ga. App. 250, 345 S.E.2d 897 (1986).

Appeals from orders revoking probation must be made by application filed directly with the appropriate court within 30 days of the date of the revocation order. Scriven v. State, 179 Ga. App. 513, 346 S.E.2d 906 (1986).

Adjudication of guilt which revokes probationary status. — Proper method of appeal from an order of adjudication of guilt and sentence which serves to revoke the probationary status granted under the First Offender Act is by discretionary appeal, as provided in paragraph (a)(5) of O.C.G.A. § 5-6-35, rather than direct appeal. Dean v. State, 177 Ga. App. 123, 338 S.E.2d 711 (1985); Anderson v. State, 177 Ga. App. 130, 338 S.E.2d 716 (1985); Merciers v. State, 212 Ga. App. 424, 444 S.E.2d 416 (1994); Zamora v. State, 226 Ga. App. 105, 485 S.E.2d 214 (1997); Freeman v. State, 245 Ga. App. 333, 537 S.E.2d 763 (2000).

Availability of motion to set aside or for new trial. — Although the discretionary appeal procedures apply to an order revoking probation and all appeals from such orders must be by application, a discretionary appeal is not the exclusive method of seeking reconsideration or review of orders and judgments enumerated in subsection (a) of O.C.G.A. § 5-6-35, thus barring any motion to set aside or for new trial. Wells v. State, 236 Ga. App. 607, 512 S.E.2d 711 (1999).

Appeal dismissed for lack of jurisdiction. — When following the revocation of the appellant's probation, the appellant filed a "Petition for Appeal" with the trial court, which the trial court dismissed, following which the appellant filed an "Out-of-Date Appeal" to the court of appeals, as no application was filed directly in time, the appeal must be dismissed for lack of jurisdiction. Scriven v. State, 179 Ga. App. 513, 346 S.E.2d 906 (1986).

Appeal by the state from the grant of probationer's motion to suppress was dismissed since a revocation of probation

hearing is not a criminal proceeding for purposes of a direct appeal; jurisdiction would lie upon application only. State v. Wilbanks, 215 Ga. App. 223, 450 S.E.2d 293 (1994).

Defendant's filing of an application for discretionary appeal from a revocation of probation acted as a supersedeas to the same extent as a notice of appeal and deprived the trial court of jurisdiction to enter an amended revocation order. Bryson v. State, 228 Ga. App. 84, 491 S.E.2d 184 (1997).

Statute applied when the appellant challenged the sentence imposed upon the revocation of the appellant's probation, but did not challenge the revocation itself, since the underlying subject matter of the appeal was still the revocation of probation and, therefore, the appellant was required to apply for a discretionary appeal. White v. State, 233 Ga. App. 873, 505 S.E.2d 228 (1998).

Out-of-time appeal not authorized. — Because the defendant raised factors outside the plea hearing that allegedly affected the voluntariness of the defendant's pleas, an out-of-time appeal under O.C.G.A. § 5-6-35(j) was not authorized because such issues could not be resolved by reference to facts contained in the record; rather, the issues could only be developed in the context of a post-plea hearing. Clayton v. State, 285 Ga. 404, 677 S.E.2d 126 (2009).

Appeals after unsuccessful participation in drug court program are discretionary. — When the defendant was sentenced after unsuccessful participation in an O.C.G.A. § 16-13-2(a) drug court program, the defendant's appeal was heard despite failing to comply with the discretionary appeal procedure of O.C.G.A. § 5-6-35(a)(5); in such cases, hearing appeals was discretionary, but that had not been clear prior to the instant case, so the appellate court heard the defendant's case. Andrews v. State, 276 Ga. App. 428, 623 S.E.2d 247 (2005).

Because the drug court program under O.C.G.A. § 16-13-2(a) is similar to the first offender statute of O.C.G.A. § 42-8-60 and because § 42-8-60 appeals are discretionary under O.C.G.A. § 5-6-35(a)(5), the discretionary appeal procedures of § 5-6-35(a)(5) must be followed when appealing after violation of the conditions of the drug court program. Andrews v. State, 276 Ga. App. 428, 623 S.E.2d 247 (2005).

6. Damages Where Judgment Is $10,000.00 or Less

Editor's notes. — Many of the cases cited below were decided prior to the 1991 amendment, which increased the amount from $2,500.00 to $10,000.00.

Applicable to summary judgments. — Discretionary appeal provisions of paragraph (a)(6) of O.C.G.A. § 5-6-35 apply to judgments in the amount of $2,500.00 or less (now $10,000.00 or less) obtained by verdict following a bench or jury trial as well as by summary judgment, so that the court of appeals would be unable to exercise jurisdiction to review the merits on a direct appeal of a summary judgment in a suit on an account for the principal sum of $546.19 plus $43.70 interest and court costs in the amount of $28.00. Perryman v. Georgia Power Co., 180 Ga. App. 259, 348 S.E.2d 762 (1986), overruled on other grounds, MMT Enters., Inc. v. Cullars, 218 Ga. App. 559, 462 S.E.2d 771 (1995).

Paragraph (a)(6) of O.C.G.A. § 5-6-35 is applicable to judgments in the amount of $2,500 or less (now $10,000.00 or less) obtained by a verdict following a bench or jury trial, as well as by summary judgment. Covrig v. Campbell, 187 Ga. App. 39, 369 S.E.2d 293, cert. denied, 187 Ga. App. 907, 369 S.E.2d 762 (1988).

Defendant's direct appeal from summary judgment entered against the defendant in the amount of $1,451.13 principal, plus $87.07 interest was dismissed since the judgment was for $2,500 or less, and the discretionary appeal procedures of O.C.G.A. § 5-6-35 were required. Batchelor v. ISFA Corp., 191 Ga. App. 238, 382 S.E.2d 434 (1989).

Paragraph (a)(6) of O.C.G.A. § 5-6-35 does not apply to appeal from judgment in favor of a defendant. Motor Fin. Co. v. Davis, 188 Ga. App. 291, 372 S.E.2d 674 (1988).

Failure to comply with mandatory provision for discretionary appeal. — When damages of less than $10,000 were

Application (Cont'd)
6. Damages Where Judgment Is $10,000.00 or Less (Cont'd)

entered on a counterclaim against a limited liability company, the company's appeal of the counterclaim judgment had to be dismissed for failure to comply with the mandatory provision for discretionary appeal in O.C.G.A. § 5-6-35(a)(6). Harpagon Co., LLC v. Davis, 283 Ga. 410, 658 S.E.2d 633 (2008).

Inapplicable when no recovery obtained. — Paragraph (a)(6) of O.C.G.A. § 5-6-35 is applicable only when the appellant is seeking to appeal a money judgment for an amount ranging from 1¢ through $2,500.00 (now $10,000.00), and not when the appellant has sought a money judgment but has obtained no recovery whatever. Whatley v. Bank S., 185 Ga. App. 896, 366 S.E.2d 182, cert. denied, 185 Ga. App. 911, 366 S.E.2d 182 (1988); Department of Human Resources v. Prince, 198 Ga. App. 329, 401 S.E.2d 342 (1991).

Paragraph (a)(6) of O.C.G.A. § 5-6-35 does not apply when action and judgment are for writ of possession. Brown v. Associates Fin. Servs. Corp., 255 Ga. 457, 339 S.E.2d 590 (1986).

"Judgment" relates to the final result of an action for damages. City of Brunswick v. Todd, 255 Ga. 448, 339 S.E.2d 589 (1986).

Amount of judgment is determinative. — Under paragraph (a)(6) of O.C.G.A. § 5-6-35 subsection (a), it is the amount of the underlying final judgment from which an appeal is taken, not the enumerations of error, which determines the direct or discretionary appealability of any given case. Ostrom v. Kapetanakos, 185 Ga. App. 728, 365 S.E.2d 849 (1988).

Direct appeal should have been filed by application from the state court's judgment awarding plaintiff $5,000 following the defendant's appeal to the state court from the magistrate court's judgment entered in plaintiff's favor. Salaam v. Nasheed, 220 Ga. App. 43, 469 S.E.2d 245 (1996).

Direct appeal was not authorized from an order denying the plaintiff's motion for new trial, motion to set aside the judgment, and motion to reopen default when the underlying judgment awarded to the defendant on the defendant's counterclaim was less than $10,000. Khan v. Sanders, 223 Ga. App. 576, 478 S.E.2d 615 (1996).

When the plaintiff failed to follow the procedure for discretionary appeal in a case where the plaintiff was awarded $1,500 in damages, the plaintiff's direct appeal was dismissed. Jennings v. Moss, 235 Ga. App. 357, 509 S.E.2d 655 (1998).

Appellate court properly dismissed an attorney's direct appeal in a case wherein the attorney sued a client for attorney fees because the judgment the attorney recovered was one for damages in an amount under $10,000, and as such, the judgment was subject to appeal as a matter of discretion under O.C.G.A. § 5-6-35(a)(6), rather than of right. The failure of the attorney to recover on the claims of prejudgment interest or attorney fees did not transform the judgment into a finding on liability adverse to the attorney so as to render appeal of the matter outside the ambit of § 5-6-35(a)(6). Cooney v. Burnham, 283 Ga. 134, 657 S.E.2d 239 (2008).

Direct appeal on zero award. — Plaintiff was authorized to file direct, rather than discretionary, appeal as to "zero" award on main claim, and portion of judgment pertaining to counterclaim on which less than $10,000 was awarded would also be reviewable on direct appeal. Robinwood, Inc. v. Baker, 206 Ga. App. 202, 425 S.E.2d 353 (1992).

Amount of damage judgment applicable, whether issues decided by court or jury. — Application to appeal is required when a party seeking a money judgment prevails, that is, a judgment for some sum is obtained but the award is $2,500.00 or some lesser sum. The use of the amount of the judgment would apply whether the issues are decided by the court or by a jury. Brown v. Associates Fin. Servs. Corp., 255 Ga. 457, 339 S.E.2d 590 (1986).

Paragraph (a)(6) of O.C.G.A. § 5-6-35 applies to judgments in the amount of $2,500.00 or less (now $10,000.00 or less) obtained by verdict following a bench or jury trial as well as by summary judg-

ment. Jarrett v. Ford Motor Credit Co., 178 Ga. App. 600, 344 S.E.2d 440 (1986).

Awards for bad faith are within the category of "damages" as contemplated by paragraph (a)(6) of O.C.G.A. § 5-6-35, requiring an application to appeal in all actions in which the judgment is $2,500.00 or less. MTW Inv. Co. v. Vanguard Properties Fin. Corp., 179 Ga. App. 403, 346 S.E.2d 575, aff'd, 256 Ga. 318, 349 S.E.2d 749 (1986); Landor Condominium Consultants, Inc. v. Colony Place Condominium Ass'n, 195 Ga. App. 840, 395 S.E.2d 25 (1990).

When the judgment was a determination of nonliability on the part of the defendant, as such it is a matter of direct appeal and not controlled by the requirements for discretionary appeal in paragraph (a)(6) of O.C.G.A. § 5-6-35. Consequently, appellee's motion to dismiss for failure to comply with paragraph (a)(6) must be denied. Turner v. Taylor, 179 Ga. App. 574, 346 S.E.2d 920 (1986).

When trial court entered judgment for $800.00, after jury returned verdict of $5,800.00, but the parties had stipulated that any jury verdict would be reduced by $5,000.00, as that amount had already been received by the plaintiff under the plaintiff's insurance coverage, plaintiff was required to follow the discretionary appeal procedure of paragraph (a)(6) of O.C.G.A. § 5-6-35. Barikos v. Vanderslice, 177 Ga. App. 884, 341 S.E.2d 513 (1986), overruled on other grounds, Bales v. Shelton, 260 Ga. 335, 391 S.E.2d 394 (1990).

Total damages basis for jurisdiction. — In a case on an insurance contract, the total damages at stake in the case, not the damages remaining after set-offs, determined jurisdiction under this section; when total damages before set-offs were over $10,000, O.C.G.A. § 5-6-35 did not apply and direct appeal was proper. Eberhardt v. Georgia Farm Bureau Mut. Ins. Co., 223 Ga. App. 478, 477 S.E.2d 907 (1996).

Amount of judgment reduced by payments from collateral source. — In a tort action, set-offs to the judgment that arise from some collateral source — such as prior payments, or pre-existing debts — should not be considered when deciding whether an application for appeal is necessary under paragraph (a)(6) of O.C.G.A. § 5-6-35. Bales v. Shelton, 260 Ga. 335, 391 S.E.2d 394 (1990).

Prospective application of Bales v. Shelton, 260 Ga. 335, 391 S.E.2d 394 (1990) applies only to those pending appeals in which the appellant had relied on the prior holdings in City of Brunswick v. Todd, 255 Ga. 448, 339 S.E.2d 589 (1986) and Barikos v. Vanderslice, 177 Ga. App. 884, 341 S.E.2d 513 (1986). It was not intended in Bales to require the dismissal of an appeal of a judgment that exceeds $2,500 (now $10,000), prior to set-offs from a collateral source, on the ground that, at the time the notice of appeal was filed, an appeal application was required under Barikos. Lee v. Britt, 260 Ga. 757, 400 S.E.2d 5 (1991).

Judgment entitling landlord to retain a $2,500 earnest money deposit as liquidated damages, and requiring tenants to pay $1,200 as increased rent, exceeded $2,500, and, accordingly, was subject to direct appeal. Alexander v. Steining, 197 Ga. App. 328, 398 S.E.2d 390 (1990).

Rent due less than $2,500. — Application for discretionary appeal pursuant to O.C.G.A. § 5-6-35(a)(3) was not required because applications for discretionary appeal were required in appeals from cases involving distress or dispossessory warrants in which the only issue to be resolved was the amount of rent due and such amount was $2,500.00 or less; the tenant's notice of appeal showed that the tenant sought to raise issues other than the amount of rent due. Smith v. R. James Props., Inc., 292 Ga. App. 317, 665 S.E.2d 19 (2008).

Dispossessory actions. — O.C.G.A. § 5-6-35 is applicable only to dispossessory actions in which the only issue to be resolved is rent due of $2,500 or less. Housing Auth. v. Bigsby, 200 Ga. App. 878, 410 S.E.2d 44 (1991).

Effect of coplaintiff's judgment. — Although the judgment for one plaintiff was less than $10,000, the judgment was appealable without application, since no application was required for appeal of a zero award judgment to a coplaintiff. Smith v. Curtis, 226 Ga. App. 470, 486 S.E.2d 699 (1997).

Application (Cont'd)

7. Appeals Under O.C.G.A. § 9-11-60

Denial of application for discretionary review. — Denial of the application for discretionary review could have been based merely on a determination that the application was rendered redundant and unnecessary by the pendency of a present appeal and did not constitute a prior adjudication of the merits of the present appeal. Berger & Washburne Ins. Agency, Inc. v. Commercial Ins. Brokers, Inc., 204 Ga. App. 146, 418 S.E.2d 640 (1992).

As a hotel owner's application for discretionary appeal of the trial court's denial of the court's motion to set aside a default judgment and to open the default had been denied, the owner was estopped from seeking further judicial review of those orders. PHF II Buckhead LLC v. Dinku, 315 Ga. App. 76, 726 S.E.2d 569 (2012), cert. denied, No. S12C1257, 2012 Ga. LEXIS 1041 (Ga. 2012).

Denial of motion to set aside judgment. — While the denial of a motion to set aside may be considered appealable in its own right when the motion is filed pursuant to O.C.G.A. § 9-11-60(d), the right of appeal is conditioned, under such circumstances, upon compliance with the application procedures set forth in O.C.G.A. § 5-6-35. North Carolina Constr. Co. v. Action Mobilplatform, Inc., 187 Ga. App. 507, 370 S.E.2d 800 (1988).

Appeals from the denial of a motion to set aside the judgment under O.C.G.A. § 9-11-60(d) are subject to the discretionary appeals procedure even when coupled with motions for a new trial or judgment n.o.v. Fabe v. Floyd, 199 Ga. App. 322, 405 S.E.2d 265, cert. denied, 199 Ga. App. 906, 405 S.E.2d 265 (1991).

Unless tied to a directly appealable order, an appeal from the denial of a motion to set aside a judgment requires a timely application to the appellate court for permission to pursue a discretionary appeal. Thierman v. Thierman, 234 Ga. App. 716, 507 S.E.2d 489 (1998).

Appeal from an order denying a motion to set aside filed pursuant to O.C.G.A. § 9-11-60(d) is subject to the application procedures set forth in subsection (b) of O.C.G.A. § 5-6-35. Agency Mgt. Servs. v. Escape Travel/Tour Servs., 199 Ga. App. 882, 406 S.E.2d 285 (1991).

Since, regardless of how appellant's motion was denominated, the basis of the motion was that the consent judgment was entered in violation of the settlement agreement, the proper vehicle through which to take exception to the judgment was a motion to set aside and not a motion for new trial. Accordingly, appellant failed to follow the discretionary appeal procedures of O.C.G.A. § 5-6-35(b). Magnum Communications, Ltd. v. IBM, 206 Ga. App. 131, 424 S.E.2d 379 (1992).

Order which simultaneously denies both a motion for new trial and a motion to vacate or set aside a judgment is not directly appealable. Gooding v. Boatright, 211 Ga. App. 221, 438 S.E.2d 685 (1993).

Denial of the defendant's motion to set aside the judgment required an application for discretionary appeal. Bonnell v. Amtex, Inc., 217 Ga. App. 378, 457 S.E.2d 590 (1995).

Plaintiffs' notice of direct appeal did not confer appellate jurisdiction on the court to consider the trial court's denial of plaintiffs' motion to set aside a judgment which incorporated an arbitration award in the absence of a proper and timely order granting permission to pursue a discretionary appeal. Anderson v. GGS Hotel Holdings, Ga., Inc., 234 Ga. App. 284, 505 S.E.2d 572 (1998).

Court lacked jurisdiction to hear the caveator's appeal of the probate court's order denying the caveator's motion to set aside the court's previous orders granting letters of dismission to the executrix when the caveator's direct appeal was untimely and the caveator's application to the appellate court for a discretionary appeal also was untimely. Thierman v. Thierman, 234 Ga. App. 716, 507 S.E.2d 489 (1998).

In an action in which an appellant sought review of the denial of a motion to vacate and set aside a consent order, the appellate court lacked jurisdiction over the appeal; the appellant did not file a timely application for a discretionary appeal under O.C.G.A. § 5-6-35, as was required under § 5-6-35(a)(8) for orders under O.C.G.A. § 9-11-60(d) denying a motion to set aside a judgment. Rogers v.

Estate of Harris, 276 Ga. App. 898, 625 S.E.2d 65 (2005).

Denial of motion to set aside default judgment. — Court of Appeals lacks jurisdiction to consider a direct appeal from a trial court's order denying a motion to set aside a default judgment when the court previously held that a discretionary appeal was the only appellate remedy available and the application for a discretionary appeal was denied. Lewis v. Sun Mgt., Inc., 187 Ga. App. 591, 370 S.E.2d 840 (1988).

Although the Court of Appeals had jurisdiction to consider the grant of appellee's O.C.G.A. § 9-11-60(g) motion to correct a clerical mistake in a default judgment, the court had no jurisdiction to address the denial of appellants' § 9-11-60(d) motion to set aside the default judgment, because an application must be filed to appeal from an order denying a motion to set aside a judgment. Brooks v. Federal Land Bank, 193 Ga. App. 591, 388 S.E.2d 704 (1989); TMS Ins. Agency, Inc. v. Galloway, 205 Ga. App. 896, 424 S.E.2d 71 (1992).

Appeal from denial of motion for relief from foreign judgment based on the foreign state's lack of personal jurisdiction was subject to O.C.G.A. § 5-6-35. Okekpke v. Commerce Funding Corp., 218 Ga. App. 705, 463 S.E.2d 23 (1995).

Appeal of an order denying the appellants' motion to vacate a foreign judgment was dismissed because the appellants never filed a motion to set aside the judgment under O.C.G.A. § 9-11-60(d), which was the proper method for attacking a foreign judgment filed under the Uniform Enforcement of Foreign Judgments Law, O.C.G.A. § 9-12-130 et seq.; the underlying subject matter of the appellants' motions was an attempt to set aside a judgment, and the denial of the appellants' motions was subject to discretionary appeal because the underlying subject matter generally controlled over the relief sought in determining the proper procedure to follow to appeal. Noaha, LLC v. Vista Antiques & Persian Rugs, Inc., 306 Ga. App. 323, 702 S.E.2d 660 (2010).

Correction of clerical mistakes. — Although, basically, the import and result of motions to set aside and to correct judgments are in most instances identical, and logically the legislature probably did not contemplate allowing direct appeals from orders under O.C.G.A. § 9-11-60(g) (correcting clerical mistakes) while mandating a discretionary approach for those under § 9-11-60(d) (motion to set aside judgment), the clear language of the statute prevents an interpretation which would render both motions subject to subsection (b) of this section, and, therefore, § 9-11-60(g) motions do not require applications to appeal. Crawford v. Kroger Co., 183 Ga. App. 836, 360 S.E.2d 274, cert. denied, 183 Ga. App. 905, 360 S.E.2d 274 (1987).

Motion for limited remand. — When consideration of an issue raised in a motion for limited remand is not necessary to the disposition of an appeal, it is appropriate that the normal procedure for motions under O.C.G.A. § 9-11-60(d)(2) be followed, including procedures for appellate review if necessary. Fabe v. Floyd, 199 Ga. App. 322, 405 S.E.2d 265, cert. denied, 199 Ga. App. 906, 405 S.E.2d 265 (1991).

Failure to appeal divorce decree. — Husband's application to vacate an arbitration award under O.C.G.A. § 9-9-13 should have been dismissed rather than denied since the trial court's divorce decree in which the court approved the arbitration award was final on the date that the court issued the decree even though the arbitration award had, in fact, not been issued on that date; thus, the husband should have filed an application for a discretionary appeal from the trial court's final judgment within 30 days of the entry of the judgment and decree under O.C.G.A. § 5-6-35(d) or filed a motion to set aside the judgment and decree under O.C.G.A. § 9-11-60. Since, pursuant to O.C.G.A. § 9-9-15 the order confirming the arbitration award became the judgment of the trial court on the date that the trial court issued the court's divorce decree, all matters in litigation in the action were final on that date, including those submitted for arbitration, and the later purported arbitration award was of no effect. Ciraldo v. Ciraldo, 280 Ga. 602, 631 S.E.2d 640 (2006).

Application (Cont'd)

8. Attorney's Fees or Expenses

When application not required. — Judgment awarding attorney's fees and costs of litigation pursuant to O.C.G.A. § 9-15-14 may be reviewed on direct appeal, when it is appealed as part of a judgment that is directly appealable. The application required by O.C.G.A. § 5-6-35 need not be filed on the separate costs and fees issue. Haggard v. Board of Regents, 257 Ga. 524, 360 S.E.2d 566 (1987); Mitcham v. Blalock, 268 Ga. 644, 491 S.E.2d 782 (1997). But see Felix v. State, 271 Ga. 534, 523 S.E.2d 1 (1999).

Appeal from an award of expenses of litigation under O.C.G.A. § 9-15-14 is discretionary when not appealed as part of a judgment that is directly appealable. Cheeley-Towns v. Rapid Group, Inc., 212 Ga. App. 183, 441 S.E.2d 452 (1994).

Direct appeal from an award of attorney fees under O.C.G.A. § 9-15-14 was not properly before the Court of Appeals after the directly appealable judgment was dismissed. Roberts v. Pearce, 232 Ga. App. 417, 501 S.E.2d 555 (1998). See Burns v. Howard, 239 Ga. App. 315, 520 S.E.2d 491 (1999).

When an attorney and law firm appealed an award to a hospital of attorney fees and expenses incurred in resisting a subpoena issued in a medical malpractice case, to which the hospital was not a party, by the attorney, the attorney's and law firm's petition for discretionary review was timely under O.C.G.A. § 5-6-35(d) because: (1) the petition was filed within 30 days of the trial court's amended award of attorney fees and expenses; and (2) the appellate court's dismissal of the attorney's and law firm's attempt to appeal the original award by notice of appeal, which found the original award was interlocutory, was the law of the case. Reeves v. Upson Reg'l Med. Ctr., 315 Ga. App. 582, 726 S.E.2d 544 (2012).

Because the main case was before the Court of Appeals of Georgia, Third Division on direct appeal, under O.C.G.A. § 5-6-35(j) the court granted an attorney's application for discretionary appeal of the denial by the trial court of the attorney's motion for attorney fees pursuant to O.C.G.A. § 9-15-14(a) and (b). After considering the record under the appropriate standards as to each subsection of § 9-15-14, the court held that the trial court did not abuse the court's discretion and that the evidence supported the court's denial of the motion. Kilgore v. Sheetz, 268 Ga. App. 761, 603 S.E.2d 24 (2004).

Failure to follow requisite discretionary appeals procedures. — Employer's failure to follow the requisite discretionary appeals procedures of O.C.G.A. § 5-6-35 deprived the appellate court of jurisdiction to consider the claim that the trial court erred in granting the employee attorney fees on the employee's claim against the employer for past wages. Capricorn Sys. v. Godavarthy, 253 Ga. App. 840, 560 S.E.2d 730 (2002).

Lacking application, appeal dismissed. — Appeals from awards of attorney fees or expenses of litigation under O.C.G.A. § 9-15-14 require application for appellate review. Lacking such an application, the appellate court is without jurisdiction to entertain the appeal and the appeal must be dismissed. Loveless v. Pickering, 187 Ga. App. 49, 369 S.E.2d 281, cert. denied, 187 Ga. App. 908, 369 S.E.2d 281 (1988); Morris v. Morris, 226 Ga. App. 799, 487 S.E.2d 528 (1997).

Challenge to award of attorney's fees denied. — Defendant's challenge of award of attorney's fees to the plaintiff based on the frivolous nature of the defendant's adverse possession defense to an ejectment action was not properly before the Court of Appeals since the defendant's appeal was from the dismissal of the defendant's prior appeal rather than from the underlying claim. Boveland v. YWCA, 227 Ga. App. 241, 489 S.E.2d 35 (1997).

Construed with O.C.G.A. § 5-6-34(a). — Even though the amount of attorney fees awarded by a trial court was less than $10,000, a petition for inspection and copying of records was not an action for damages necessitating a discretionary appeal under O.C.G.A. § 5-6-35(a)(6). Motor Whse., Inc. v. Richard, 235 Ga. App. 835, 510 S.E.2d 600 (1998).

9. Zoning Cases

Paragraph (a)(1) applicable to appeals in zoning cases. — All zoning cases appealed either to the Court of Appeals or the Supreme Court of Georgia must come by application, since in neither case is the appeal direct because it is an appeal from the decision of a court reviewing a decision of an administrative agency within the meaning of O.C.G.A. § 5-6-35. Trend Dev. Corp. v. Douglas County, 259 Ga. 425, 383 S.E.2d 123 (1989).

Application to Court of Appeals required. — Appeals from decisions in zoning cases require an application to the Court of Appeals for permission to pursue a discretionary appeal, pursuant to paragraph (a)(1) of O.C.G.A. § 5-6-35. City of Byron v. Betancourt, 242 Ga. App. 71, 528 S.E.2d 841 (2000).

Dismissal of appeal reviewing zoning tribunal decision. — Paragraph (a)(1) of O.C.G.A. § 5-6-35 is applicable to appeals from a decision of a superior court reviewing a decision of a local zoning tribunal when the superior court dismissed the appeal based on the appellants' failure to serve the appellee with a copy of the petition in a timely manner. Ross v. Mullis Tree Serv., Inc., 183 Ga. App. 627, 360 S.E.2d 288 (1987).

Court was without jurisdiction to hear the appeal of a zoning case since appellants failed to file an application as required by Trend Dev. Corp. v. Douglas County, 259 Ga. 425, 383 S.E.2d 123 (1989). Pruitt v. Fulton County, 210 Ga. App. 873, 437 S.E.2d 861 (1993); OS Adv. Co. v. Rubin, 267 Ga. 723, 482 S.E.2d 295 (1997).

Denial of injunctive relief. — Appeal from denial of injunction filed to enforce a zoning ordinance was not a superior court review of an administrative decision; it was therefore directly appealable under O.C.G.A. § 5-6-34(a)(4), and did not fall under the purview of paragraph (a)(1) of O.C.G.A. § 5-6-35 so as to require the grant of an application for discretionary appeal. Harrell v. Little Pup Dev. & Constr., Inc., 269 Ga. 143, 498 S.E.2d 251 (1998).

Direct appeal was proper when zoning case did not involve superior court review of an administrative decision. White v. Board of Comm'rs, 252 Ga. App. 120, 555 S.E.2d 45 (2001).

Construction with O.C.G.A. § 5-6-34. — Underlying subject matter of a resident's suit seeking a writ of mandamus and other relief arising from the issuance of a building permit for the construction of a school building in the neighborhood concerned the review of an administrative zoning decision and, therefore, the appellate court had jurisdiction to address the merits only in the context of a discretionary appeal; while the trial court's order ruling against the resident was appealable under O.C.G.A § 5-6-34(a), the resident was required to obtain permission to file the appeal, and could not circumvent the discretionary application requirements of O.C.G.A. § 5-6-35. Ladzinske v. Allen, 280 Ga. 264, 626 S.E.2d 83 (2006).

10. Criminal Cases

Habeas petition improperly granted. — Writ of habeas corpus granted to a prisoner was reversed because the prisoner presented the same issues raised in the habeas petition to the trial court and relief had been denied, and the prisoner's appeal of that decision was rejected by the appellate courts; thus, the prisoner's claim was procedurally barred. Thompson v. Stinson, 279 Ga. 196, 611 S.E.2d 29 (2005).

Trial court may not grant extension for discretionary appeal. — Although extensions of time could be granted for applications for discretionary appeal, pursuant to O.C.G.A. § 5-6-39(a)(5), a trial court did not have the authority to grant an out-of-time discretionary appeal in a criminal case as a remedy for counsel's failure to timely file the application under O.C.G.A. § 5-6-35(d) absent a violation of the appellant's constitutional rights. Gable v. State, 290 Ga. 81, 720 S.E.2d 170 (2011).

Discretionary appeal required. — Even if an inmate's motion for non-DNA forensic testing of a semen sample could be construed as an extraordinary motion for new trial based upon a claim that the results would constitute newly discovered evidence, the denial of the motion could not have served as a basis for the direct

Application (Cont'd)
10. Criminal Cases (Cont'd)

appeal the inmate filed because the appeal would be separate from the inmate's original appeal of the inmate's conviction; in that case, an application for discretionary appeal was required. Bradberry v. State, 315 Ga. App. 434, 727 S.E.2d 208 (2012).

Compliance not excused for failure to inform pro se habeas petitioner of the statute's requirements. — Compliance with O.C.G.A. § 5-6-35 cannot be excused for failure to abide by a judicially imposed rule that the habeas petitioner be informed of that statute's requirements. Crosson v. Conway, 291 Ga. 220, 728 S.E.2d 617 (2012).

RESEARCH REFERENCES

Am. Jur. 2d. — 5 Am. Jur. 2d, Appellate Review, § 252 et seq.

C.J.S. — 4 C.J.S., Appeal and Error, § 40, 401 et seq., 477 et seq.

ALR. — Coram nobis on ground of newly discovered evidence, 33 ALR 84.

Appealability of order entered on motion to strike pleading, 1 ALR2d 422.

Retrospective increase in allowance for alimony, separate maintenance, or support, 52 ALR3d 156.

5-6-36. Filing of motion for new trial and motion for judgment notwithstanding verdict where appeal taken from judgment, ruling, or order.

(a) A motion for new trial need not be filed as a condition precedent to appeal or consideration of any judgment, ruling, or order in any case; but, in all cases where a motion for new trial is an available remedy, the party entitled thereto may elect to file the motion first or to appeal directly. However, where matters complained of arise or are discovered subsequent to verdict or judgment which otherwise would not appear in the record, such as newly discovered evidence, and in other like instances, a motion for new trial or other available procedure shall be filed and together with all proceedings thereon shall become a part of the record on appeal. Otherwise, the motion for new trial need not be transmitted as a part of the record on appeal; nor shall it be necessary that the overruling thereof be enumerated as error (subject to the exception last stated), as the appellate court may consider all questions included in the enumeration of errors provided for in Code Section 5-6-40. The entry of judgment on a verdict by the trial court constitutes an adjudication by the trial court as to the sufficiency of the evidence to sustain the verdict, affording a basis for review on appeal without further ruling by the trial court.

(b) A motion for judgment notwithstanding the verdict need not be filed as a condition precedent to review upon appeal of an order or ruling of the trial court overruling a motion for directed verdict; but, in all cases where the motion is an available remedy, the party may file the motion or appeal directly from the final judgment and enumerate as error the overruling of the motion for directed verdict. (Ga. L. 1965, p. 18, § 2; Ga. L. 1966, p. 493, § 1.)

Cross references. — Motions for judgment notwithstanding the verdict and motions for new trial after entry of judgment or, if verdict not returned, after discharge of jury, § 9-11-50. Filings in clerk's office, Rules of the Supreme Court of the State of Georgia, Rule 1. Filing of papers, Rules of the Court of Appeals of the State of Georgia, Rule 5. Preparation and filing of motions, Rules of the Court of Appeals of the State of Georgia, Rule 32.

Law reviews. — For survey article on appellate practice and procedure, see 59 Mercer L. Rev. 21 (2007).

For note discussing the reluctance of Georgia courts to grant appeals when overruled motion for new trial not enumerated as error in light of Hill v. Willis, 224 Ga. 263, 161 S.E.2d 281 (1968), see 5 Ga. St. B.J. 269 (1968).

JUDICIAL DECISIONS

Appellants may elect to attack judgment in court below or to appeal directly. Dempsey v. Ellington, 125 Ga. App. 707, 188 S.E.2d 908 (1972).

Construction with O.C.G.A. § 9-11-50. — While the failure to move for a directed verdict barred a party from contending on appeal that the party was entitled to a judgment as a matter of law because of insufficient evidence, such did not bar that party from claiming their entitlement to a new trial on that ground, as fairness dictated that a party who has failed to move for a directed verdict at trial should not be able to obtain a judgment as a matter of law on appeal based on the contention the evidence was insufficient to support the verdict. Aldworth Co. v. England, 281 Ga. 197, 637 S.E.2d 198 (2006).

Subsection (a) gives litigant option to appeal directly, or first move for new trial. — Subsection (a) clearly gives a litigant the right to appeal directly from an adverse verdict and judgment, or to defer appeal until a ruling is obtained on a motion for new trial. Brissette v. Munday, 115 Ga. App. 131, 153 S.E.2d 606 (1967).

Effect of filing of motion for new trial is to toll time for filing appeal from judgment on the verdict until the motion for new trial is overruled (unless the appellant should elect to abandon or dismiss the motion). Allen v. Rome Kraft Co., 114 Ga. App. 717, 152 S.E.2d 618 (1966); A & D Barrel & Drum Co. v. Fuqua, 132 Ga. App. 827, 209 S.E.2d 272 (1974).

Appeal from ruling on motion for new trial or from original judgment rendered. — Since filing of motion for new trial is not condition precedent to appeal, an appeal may be made directly from any other appealable judgment, ruling, or order, but this does not negate appealability of ruling on motion for new trial when that procedure is utilized and it is desired to appeal from such ruling. The result is practically identical moreover, since the same grounds of appeal may be urged whichever judgment is appealed from and the appellants are not limited to grounds of motion for new trial in any appeal. Munday v. Brissette, 113 Ga. App. 147, 148 S.E.2d 55, rev'd on other grounds, 222 Ga. 162, 149 S.E.2d 110 (1966).

Appellant not limited on appeal to issues presented in motion for new trial. Hulsey v. Sears, Roebuck & Co., 138 Ga. App. 523, 226 S.E.2d 791 (1976).

Appellant may argue all properly raised enumerations of error as well as matters contained in new trial motion. Hulsey v. Sears, Roebuck & Co., 138 Ga. App. 523, 226 S.E.2d 791 (1976).

Overruling of the defendant's motion for directed verdict may be enumerated as error by the defendant in a criminal case. Merino v. State, 230 Ga. 604, 198 S.E.2d 311 (1973).

Appellant need not enumerate as error the judgment overruling motion for new trial in order to confer jurisdiction of appeal upon the appellate court. State Hwy. Dep't v. Hilliard, 114 Ga. App. 328, 151 S.E.2d 491 (1966).

Adverse ruling on motion for judgment n.o.v. must be enumerated as error on appeal. — Losing party may file motion for judgment n.o.v., or the party may appeal directly from judgment and enumerate as error the denial of a di-

rected verdict. If the losing party files a motion for judgment n.o.v. and obtains a ruling on it judgment, the losing party has used that device as a means of reviewing the motion for directed verdict at trial level. If ruling is adverse the losing party must enumerate it as error on appeal or become bound by the ruling and judgment unexcepted to, which becomes the law of the case. Wood v. Mobley, 114 Ga. App. 170, 150 S.E.2d 358 (1966).

To set aside judgment predicated upon jury verdict requires direct appeal or new trial. — When judgment is predicated upon jury verdict, the court has no plenary right to vacate, revise, or otherwise treat. To set aside that kind of judgment the verdict must also be set aside, except for defects appearing on the face of the record; remedy is by motion for new trial, or by direct appeal. Thompson v. Maslia, 127 Ga. App. 758, 195 S.E.2d 238 (1972).

Procedure for excepting to judgment awarding child custody. — When losing party in child custody case desires to except to judgment awarding custody of child, proper procedure is by direct exceptions to decree, and not by motion for new trial. Alf v. Alf, 226 Ga. 880, 178 S.E.2d 187 (1970).

Appellate court may review sufficiency of evidence although not considered in motion for new trial. Gilman Paper Co. v. James, 235 Ga. 348, 219 S.E.2d 447 (1975).

Failure to renew motion for directed verdict. — Challenges to the sufficiency of the evidence may be considered on appeal pursuant to O.C.G.A. § 5-6-36(a); even though an owner and a driver failed to renew their motions for a directed verdict on the issues of agency and lost earnings at the close of all evidence, the appellate court considered the merits of the evidentiary challenges. Pep Boys-Manny, Moe & Jack, Inc. v. Yahyapour, 279 Ga. App. 674, 632 S.E.2d 385 (2006).

Excessiveness of verdict. — Appellate court declined to set aside the amount of the verdict for pain and suffering and wrongful death when a juvenile in a child care institution was accidentally electrocuted because $1,000,000 for pain and suffering and $2,000,000 for wrongful death were not excessive as a matter of law. Ga. Dep't of Human Res. v. Johnson, 264 Ga. App. 730, 592 S.E.2d 124 (2003).

Sufficiency of evidence, not its weight, is reviewed. — Weight of the evidence and the credibility of witnesses are questions for the triers of fact. The Court of Appeals passes on the sufficiency of the evidence, not the weight of the evidence, which is considered by the jury. Mosley v. State, 157 Ga. App. 578, 278 S.E.2d 154 (1981).

Role of an appellate court is not to pass on the weight of the evidence but the sufficiency. If there is any evidence to support the verdict of the trial court the appellate court cannot disturb the verdict. Gay v. City of Rome, 157 Ga. App. 368, 277 S.E.2d 741 (1981).

While the trier of fact can and must weigh and analyze the evidence, an appellate court, in reviewing on the general grounds, is restricted to determining if there is sufficient evidence to support the judgment of conviction. After conviction, the evidence in the record is reviewed on appeal in the light most favorable to the state. Gibbs v. State, 157 Ga. App. 530, 278 S.E.2d 111 (1981).

Cited in Undercofler v. White, 113 Ga. App. 853, 149 S.E.2d 845 (1966); St. Paul Fire & Marine Ins. Co. v. Postell, 113 Ga. App. 862, 149 S.E.2d 864 (1966); Crider v. State, 114 Ga. App. 523, 151 S.E.2d 792 (1966); Daniel v. Daniel, 222 Ga. 861, 152 S.E.2d 873 (1967); Sutton v. State, 223 Ga. 313, 154 S.E.2d 578 (1967); Kirkman v. Miller, 116 Ga. App. 78, 156 S.E.2d 558 (1967); Foskey v. State, 116 Ga. App. 334, 157 S.E.2d 314 (1967); Jackson v. Mayor of Carrollton, 116 Ga. App. 323, 157 S.E.2d 500 (1967); Hill v. General Rediscount Corp., 116 Ga. App. 459, 157 S.E.2d 888 (1967); Gardner v. State, 117 Ga. App. 262, 160 S.E.2d 271 (1968); Hill v. Willis, 224 Ga. 263, 161 S.E.2d 281 (1968); Crowley v. State, 118 Ga. App. 7, 162 S.E.2d 299 (1968); Tiller v. State, 224 Ga. 645, 164 S.E.2d 137 (1968); Yale & Towne, Inc. v. Sharpe, 118 Ga. App. 480, 164 S.E.2d 318 (1968); Lansford v. Gatliff, 119 Ga. App. 145, 166 S.E.2d 639 (1969); Taylor v. Buckhead Glass Co., 120 Ga. App. 663, 171 S.E.2d 779 (1969); Walker v. Camp,

121 Ga. App. 765, 175 S.E.2d 53 (1970); Hichman v. Frazier, 128 Ga. App. 552, 197 S.E.2d 441 (1973); Buffington v. McClelland, 130 Ga. App. 460, 203 S.E.2d 575 (1973); Shaddrix v. Womack, 231 Ga. 628, 203 S.E.2d 225 (1974); Guardian of Ga., Inc. v. Granite Equip. Leasing Corp., 130 Ga. App. 514, 203 S.E.2d 733 (1974); Glover v. Southern Bell Tel. & Tel. Co., 132 Ga. App. 74, 207 S.E.2d 584 (1974); Wooten v. State, 135 Ga. App. 97, 217 S.E.2d 350 (1975); Schwartz v. C & S Mtg. Co., 142 Ga. App. 682, 236 S.E.2d 856 (1977); Adderholt v. Adderholt, 240 Ga. 626, 242 S.E.2d 11 (1978); Grizzle v. Federal Land Bank, 145 Ga. App. 385, 244 S.E.2d 362 (1978); Jackson v. State, 154 Ga. App. 367, 268 S.E.2d 418 (1980); Bennett v. Caton, 154 Ga. App. 515, 268 S.E.2d 786 (1980); DOT v. Claussen Paving Co., 246 Ga. 807, 273 S.E.2d 161 (1980); Battle v. Yancey Bros. Co., 157 Ga. App. 277, 277 S.E.2d 280 (1981); Fuller v. State, 159 Ga. App. 512, 284 S.E.2d 29 (1981); City of Atlanta v. West, 160 Ga. App. 609, 287 S.E.2d 558 (1981); Johnson v. Hensel Phelps Constr. Co., 250 Ga. 83, 295 S.E.2d 841 (1982); Hensel Phelps Constr. Co. v. Johnson, 161 Ga. App. 631, 295 S.E.2d 843 (1982); Hensel Phelps Constr. Co. v. Johnson, 164 Ga. App. 404, 298 S.E.2d 261 (1982); Stewart v. State, 165 Ga. App. 428, 300 S.E.2d 331 (1983); California Fed. Sav. & Loan Ass'n v. Hudson, 185 Ga. App. 384, 364 S.E.2d 582 (1987); Balkcom v. State, 227 Ga. App. 327, 489 S.E.2d 129 (1997); GLW Int'l Corp. v. Yao, 243 Ga. App. 38, 532 S.E.2d 151 (2000); ALEA London Ltd. v. Woodcock, 286 Ga. App. 572, 649 S.E.2d 740 (2007); Griffith v. State, 286 Ga. App. 859, 650 S.E.2d 413 (2007); Bldg. Materials Wholesale, Inc. v. Triad Drywall, LLC, 287 Ga. App. 772, 653 S.E.2d 115 (2007); Gill Plumbing Co. v. Jimenez, 310 Ga. App. 863, 714 S.E.2d 342 (2011); Gospel Tabernacle Deliverance Church, Inc. v. From the Heart Church Ministries, Inc., 312 Ga. App. 355, 718 S.E.2d 575 (2011).

RESEARCH REFERENCES

Am. Jur. 2d. — 5 Am. Jur. 2d, Appellate Review, § 489 et seq. 58 Am. Jur. 2d, New Trial, § 340 et seq.

C.J.S. — 4 C.J.S., Appeal and Error, §§ 191, 195. 5 C.J.S., Appeal and Error, § 865.

ALR. — Will questions which might have been, but were not, raised on prior appeal or error, be considered on subsequent appeal or error, 1 ALR 725.

Abandonment of appeal or right of appeal by commencement, or prosecution to judgment, of another action, 115 ALR 121.

Appealability of order overruling motion for directed verdict, or for judgment, or the like, where the jury has disagreed, 40 ALR2d 1284.

Delay as affecting right to coram nobis attacking criminal conviction, 62 ALR2d 432.

Inattention of juror from sleepiness or other cause as ground for reversal or new trial, 88 ALR2d 1275; 59 ALR5th 1.

Appeal by state of order granting new trial in criminal case, 95 ALR3d 596.

5-6-37. Filing and contents of notice of appeal; service of notice upon parties to appeal.

Unless otherwise provided by law, an appeal may be taken to the Supreme Court or the Court of Appeals by filing with the clerk of the court wherein the case was determined a notice of appeal. The notice shall set forth the title and docket number of the case; the name of the appellant and the name and address of his attorney; a concise statement of the judgment, ruling, or order entitling the appellant to take an appeal; the court appealed to; a designation of those portions of the record to be omitted from the record on appeal; a concise statement as to why the appellate court appealed to has jurisdiction rather than the

other appellate court; and, if the appeal is from a judgment of conviction in a criminal case, a brief statement of the offense and the punishment prescribed. The appeal shall not be dismissed nor denied consideration because of failure to include the jurisdictional statement or because of a designation of the wrong appellate court. In addition, the notice shall state whether or not any transcript of evidence and proceedings is to be transmitted as a part of the record on appeal. Approval by the court is not required as a condition to filing the notice. All parties to the proceedings in the lower court shall be parties on appeal and shall be served with a copy of the notice of appeal in the manner prescribed by Code Section 5-6-32. (Ga. L. 1965, p. 18, § 4; Ga. L. 1966, p. 493, § 2; Ga. L. 1973, p. 303, § 1.)

Cross references. — Filings in clerk's office, Rules of the Supreme Court of the State of Georgia, Rule 1. Filing notice of appeal and cross appeal, Rules of the Supreme Court of the State of Georgia, Rule 38. Filing with clerk's office, Rules of the Court of Appeals of the State of Georgia, Rule 1. Filing of papers, Rules of the Court of Appeals of the State of Georgia, Rule 5. Notices of appeal and cross appeal, Rules of the Court of Appeals of the State of Georgia, Rule 33.

Law reviews. — For annual survey of appellate practice and procedure, see 43 Mercer L. Rev. 73 (1991). For annual survey of appellate practice and procedure, see 56 Mercer L. Rev. 61 (2004). For survey article on appellate practice and procedure, see 59 Mercer L. Rev. 21 (2007). For annual survey of law on appellate practice and procedure, see 62 Mercer L. Rev. 25 (2010).

JUDICIAL DECISIONS

Analysis

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General Consideration

"Proceedings in lower court" as used in section should be liberally construed. — To define "proceedings in lower court," as used in this section to mean only those proceedings which directly relate to the appellant's enumerations of error is unduly restrictive because liberal construction comports with policies of this article, enhances efficient administration of justice, and avoids multiplicity of appeals. Executive Jet Sales, Inc. v. Jet America, Inc., 242 Ga. 307, 248 S.E.2d 676 (1978).

Verdict is not an appealable decision or judgment within purview of section. Williams v. Keebler, 222 Ga. 437, 150 S.E.2d 674, answer conformed to 114 Ga. App. 332, 151 S.E.2d 483 (1966).

Judgment of forfeiture. — Because an appealed judgment was a forfeiture, the court of appeals addressed the merits of the appeal. Arreola-Soto v. State of Ga., 314 Ga. App. 165, 723 S.E.2d 482 (2012), cert. denied, No. S12C1048, 2012 Ga. LEXIS 593 (Ga. 2012).

Appellant responsible for contents of record. — It is appellant's burden to designate what shall be included in the record on appeal; failing which the Court of Appeals is not authorized to go outside the record and accept assertions of fact in briefs which are not supported by the record, nor accept as fact what is asserted by way of argument in a transcript. Doe v. State, 205 Ga. App. 322, 422 S.E.2d 558 (1992).

Burden is on the appellant to direct transmittal of the trial transcript and, lacking a transcript of the evidence, the court of appeals must assume that the proceedings, the jury's verdict, and the judgment entered upon that verdict, were correct. Durham v. Winn-Dixie Stores, 215 Ga. App. 209, 450 S.E.2d 257 (1994).

Court of Appeals lacks jurisdiction to review jury verdicts. — When there is only an appeal from a jury verdict, and no description of an appealable judgment or order, there is nothing to review, and the Court of Appeals has no jurisdiction since the appellate court is a court for corrections of errors of law alone. Interstate Fire Ins. Co. v. Chattam, 222 Ga. 436, 150 S.E.2d 618, answer conformed to 114 Ga. App. 332, 151 S.E.2d 486 (1966).

Trial court is not deprived of jurisdiction because appellant fails to serve notice of appeal on appellee as required. Bull v. Bull, 243 Ga. 72, 252 S.E.2d 494 (1979).

When third-party defendant not harmed by failure of service. — Appeal shall not be dismissed when counsel for a third-party defendant appeared in court and argued the merits of the third party's claim both orally and by brief, it appears that the third-party defendant was not harmed by failure of service, and there is no ground to dismiss the appeal. Petroleum Carrier Corp. v. Jones, 127 Ga. App. 676, 194 S.E.2d 670 (1972).

Transmittal of portion of record. — Appellant may choose to have only a portion of a record transmitted to the Court of Appeals, but this does not relieve the appellant from the obligation to demonstrate error by the record. Jordan v. Johnson, 223 Ga. App. 875, 479 S.E.2d 175 (1996).

Delay in filing of transcript is not necessarily cause for dismissal. — Delay in filing of transcript, if it does not delay docketing and hearing of case in appellate court, is not cause for dismissal. AMOCO v. McCluskey, 116 Ga. App. 706, 158 S.E.2d 431 (1967), rev'd on other grounds, 224 Ga. 253, 161 S.E.2d 271 (1968).

Because there was no evidence that an 11-day delay in the filing of a transcript for transmission as part of the appellate record discernibly delayed the docketing of the record in the appellate court, the trial court abused the court's discretion by concluding that the delay was unreasonable, and erred by dismissing an appeal. Fulton County Bd. of Tax Assessors v. Love, 289 Ga. App. 252, 656 S.E.2d 576 (2008).

Delay caused by clerk of court. — The Constitution forbids dismissal of any case when delay is attributable to clerk of court rather than to counsel. AMOCO v. McCluskey, 116 Ga. App. 706, 158 S.E.2d 431 (1967), rev'd on other grounds, 224 Ga. 253, 161 S.E.2d 271 (1968).

Erroneous filing with Supreme Court. — Application for discretionary appeal erroneously filed with the Supreme Court was not required to be dismissed as untimely, but could be transferred to the Court of Appeals. Smith v. Department of Human Resources, 226 Ga. App. 491, 487 S.E.2d 94 (1997).

Supersedeas not enforceable. — Issue of whether judgment debtor received adequate notice of the sheriff's sale was not preserved for the appellate court's review, as the judgment debtor did not seek to set aside the supersedeas bond order or the sheriff's sale. Wilson v. 72 Riverside Invs., LLC, 277 Ga. App. 312, 626 S.E.2d 521 (2006).

Cited in Mobley v. State, 221 Ga. 716, 146 S.E.2d 735 (1966); Taylor v. Haygood, 113 Ga. App. 30, 147 S.E.2d 48 (1966); Chambliss v. Hall, 113 Ga. App. 96, 147 S.E.2d 334 (1966); Birdwell v. Pippen, 113 Ga. App. 202, 147 S.E.2d 673 (1966); Peak v. Cody, 113 Ga. App. 674, 149 S.E.2d 519 (1966); Ekbery v. Bollenbach, 114 Ga. App. 562, 152 S.E.2d 8 (1966); Daniel v. Daniel, 222 Ga. 861, 152 S.E.2d 873 (1967); Scarborough v. Martha White Mills of Ga., Inc., 115 Ga. App. 737, 155 S.E.2d 818 (1967); Ward v. Ward, 115 Ga. App. 778, 156 S.E.2d 210 (1967); Byrd v. Moore Ford Co., 116 Ga. App. 292, 157 S.E.2d 41 (1967); Wilbanks v. State, 116 Ga. App. 698, 158 S.E.2d 274 (1967); Aetna Life Ins. Co. v. Greene, 116 Ga. App. 783, 159 S.E.2d 87 (1967); Steadham v. State, 224 Ga. 78, 159 S.E.2d 397 (1968); Hoover v. State Hwy. Dep't, 117 Ga. App. 619, 161 S.E.2d 371 (1968); McKinney v. Schaefer, 117 Ga. App. 595, 161 S.E.2d 446 (1968);

General Consideration (Cont'd)

Bradford v. Lindsey Chevrolet Co., 117 Ga. App. 781, 161 S.E.2d 904 (1968); Insurance Co. of N. Am. v. Jewel, 118 Ga. App. 599, 164 S.E.2d 846 (1968); Dowling v. State, 120 Ga. App. 810, 172 S.E.2d 190 (1969); Hicks v. State, 121 Ga. App. 52, 172 S.E.2d 453 (1970); Stewart v. Church, 121 Ga. App. 783, 175 S.E.2d 46 (1970); G.E.C. Corp. v. Southern Fabricators, Inc., 122 Ga. App. 452, 177 S.E.2d 497 (1970); Ellison v. Labor Pool of Am., Inc., 228 Ga. 147, 184 S.E.2d 572 (1971); Housing Auth. v. Marbut Co., 229 Ga. 403, 191 S.E.2d 785 (1972); Petroleum Carrier Corp. v. Jones, 127 Ga. App. 676, 194 S.E.2d 670 (1972); Smith v. Rothstein, 131 Ga. App. 632, 206 S.E.2d 592 (1974); Burger v. Burgess, 234 Ga. 388, 216 S.E.2d 294 (1975); Hughes Motor Co. v. First Nat'l Bank, 136 Ga. App. 295, 220 S.E.2d 782 (1975); Dargan, Whitington & Conner, Inc. v. Kitchen, 138 Ga. App. 414, 226 S.E.2d 482 (1976); Maheia v. Weeks, 144 Ga. App. 199, 240 S.E.2d 752 (1977); Associate Architects, Inc. v. Holland, 145 Ga. App. 210, 243 S.E.2d 573 (1978); Justice v. Dunbar, 241 Ga. 327, 245 S.E.2d 286 (1978); Garrett v. Heisler, 149 Ga. App. 240, 253 S.E.2d 863 (1979); Hardy v. Georgia Power Co., 151 Ga. App. 803, 261 S.E.2d 749 (1979); Hughes v. Newell, 152 Ga. App. 618, 263 S.E.2d 505 (1979); City of Atlanta v. Barton, 153 Ga. App. 426, 265 S.E.2d 345 (1980); In re Norris, 154 Ga. App. 173, 267 S.E.2d 788 (1980); Subsequent Injury Trust Fund v. Alterman Foods, Inc., 162 Ga. App. 428, 291 S.E.2d 758 (1982); Underwood v. State ex rel. Price, 164 Ga. App. 109, 296 S.E.2d 365 (1982); In re T.E.D., 169 Ga. App. 401, 312 S.E.2d 864 (1984); Smiway, Inc. v. DOT, 178 Ga. App. 414, 343 S.E.2d 497 (1986); Yates Paving & Grading Co. v. Waters, 181 Ga. App. 537, 352 S.E.2d 791 (1987); Jim Walter Homes, Inc. v. Strickland, 185 Ga. App. 306, 363 S.E.2d 834 (1987); Westmoreland v. State, 192 Ga. App. 173, 384 S.E.2d 249 (1989); McClure v. Gower, 259 Ga. 678, 385 S.E.2d 271 (1989); Ray v. Maxwell, 198 Ga. App. 849, 403 S.E.2d 442 (1991); Stephens v. State, 201 Ga. App. 737, 412 S.E.2d 568 (1991); McFarren v. State, 210 Ga. App. 889, 437 S.E.2d 869 (1993); Barton v. Barton, 216 Ga. App. 292, 454 S.E.2d 155 (1995); Adams v. State, 234 Ga. App. 696, 507 S.E.2d 538 (1998); Crown Diamond Co. v. N.Y. Diamond Corp., 242 Ga. App. 674, 530 S.E.2d 800 (2000); Holy Fellowship Church of God in Christ v. First Community Bank, 242 Ga. App. 400, 530 S.E.2d 24 (2000); NF Invs., Inc. v. Whitfield, 245 Ga. App. 72, 537 S.E.2d 207 (2000); Cain v. State, 275 Ga. 784, 573 S.E.2d 46 (2002); In re Estate of Dasher, 259 Ga. App. 201, 575 S.E.2d 921 (2002); Moore v. Moore-McKinney, 297 Ga. App. 703, 678 S.E.2d 152 (2009); Burnett v. State, 309 Ga. App. 422, 710 S.E.2d 624 (2011).

Filing of Notice of Appeal

Proper, timely filing of notice of appeal is an absolute requirement to confer jurisdiction upon appellate court. Hardnett v. United States Fid. & Guar. Co., 116 Ga. App. 732, 158 S.E.2d 303 (1967); Jordan v. Caldwell, 229 Ga. 343, 191 S.E.2d 530 (1972).

Burden is upon party desiring to take appeal to file timely notice of appeal. — Burden is on party desiring to take appeal to determine when judgment is filed in trial court, and to file notice of appeal within the 30-day period or within duly authorized extension of the 30-day period. Jordan v. Caldwell, 229 Ga. 343, 191 S.E.2d 530 (1972).

Because a litigant's appeal was untimely filed, despite evidence of mistaken delivery beyond the litigant's control, the superior court properly held that the court lacked discretion to find otherwise as the burden to timely file an appeal could not be relieved by providential cause and excusable neglect; thus, the court did not err in dismissing the appeal. Register v. Elliott, 285 Ga. App. 741, 647 S.E.2d 406 (2007).

Filing of notice of appeal constitutes entering an appeal. Gibson v. Hodges, 221 Ga. 779, 147 S.E.2d 329 (1966), overruled on other grounds, Gillen v. Bostick, 234 Ga. 308, 215 S.E.2d 676 (1975).

Although notice of appeal is dated prior to entry of judgment intended to be appealed from, it is the filing of notice of appeal which constitutes entering an ap-

peal. Anthony v. Anthony, 120 Ga. App. 261, 170 S.E.2d 273 (1969).

Motion for out-of-time appeal properly denied. — Trial court properly denied the defendant's motion for an out-of-time appeal, as such failed to show any meritorious ground, and the defendant's failure to timely file an appeal did not result from the ineffective assistance of trial counsel, as it was apparent from the transcript of the plea hearing that the issues sought to be raised in the out-of-time appeal completely lacked merit. Hicks v. State, 281 Ga. 836, 642 S.E.2d 31 (2007).

Certificate of clerk is best evidence. — Certificate of clerk, entered upon paper at time of filing, is best evidence of filing as required by section. Bailey v. Bonaparte, 125 Ga. App. 512, 188 S.E.2d 119 (1972).

Request to file out-of-time appeal construed as habeas motion. — Construing the defendant's request for an out-of-time appeal from a 1995 resentencing on various convictions as one seeking habeas corpus relief, and in light of the language in O.C.G.A. § 9-14-43, the trial court's order denying the defendant relief on jurisdictional grounds was reversed, and the matter was remanded for the trial court to consider the defendant's motion as one for a writ of habeas corpus. Anderson v. State, 284 Ga. App. 776, 645 S.E.2d 362 (2007).

What constitutes filing within meaning of section. — Bailey v. Bonaparte, 125 Ga. App. 512, 188 S.E.2d 119 (1972).

Appeal or notice of appeal filed other than when law directs. — No other court has jurisdiction to accept or file an appeal, and the filing or attempted filing of the appeal in some other court does not and cannot toll the statutory time for filing the appeal. Bailey v. Bonaparte, 125 Ga. App. 512, 188 S.E.2d 119 (1972).

Content of Notice of Appeal

Editor's notes. — In light of the similarity of the issues dealt with in the provisions, decisions under former Civil Code 1910, § 6176 and under former Code 1933, §§ 6-912, 6-1202, and 6-1304, as they read prior to revision by Ga. L. 1965, p. 18 are included in the annotations below.

Notice of appeal must specify appealable judgment from which appeal is entered, absent which appeal must be dismissed. Parish v. Georgia R.R. Bank & Trust Co., 115 Ga. App. 540, 154 S.E.2d 750 (1967); Ballew v. State, 225 Ga. 547, 170 S.E.2d 242 (1969); Bish v. State, 232 Ga. App. 121, 501 S.E.2d 283 (1998); Zachery v. State, 233 Ga. App. 519, 504 S.E.2d 466 (1998).

It is the duty of the appellate courts to inquire into the court's own jurisdiction and dismiss the appeal when an appealable judgment or order is not included in the notice of appeal. Interstate Fire Ins. Co. v. Chattam, 222 Ga. 436, 150 S.E.2d 618, answer conformed to 114 Ga. App. 332, 151 S.E.2d 486 (1966).

Fact that appealable judgment is shown to exist, or that antecedent interlocutory ruling on motion would be reviewable when enumerated as error on proper designation of appealable judgment, does not cure fatal defect in notice of appeal arising from failure to appeal from such judgment. Ruth v. Kennedy, 117 Ga. App. 632, 161 S.E.2d 410 (1968).

Mere mention of judgment overruling motion to set aside verdict and judgment. — Mere mention in a notice of appeal of a judgment overruling a motion to set aside verdict and judgment does not constitute appeal from the final judgment so as to satisfy the requirements of O.C.G.A. § 5-6-37. Omission in notice of appeal to designate any appealable judgment or order as ruling that entitles appellant to take appeal is fatal. Williams v. Keebler, 222 Ga. 437, 150 S.E.2d 674, answer conformed to 114 Ga. App. 332, 151 S.E.2d 483 (1966).

Failure to state offense and punishment prescribed. — Deficiencies in the defendant's notice of appeal, which did not state the offense and punishment prescribed, did not justify dismissal of the appeal when the notice did provide the specific case number, style, court, and date on which the final judgment appealed from was entered and information contained in the notice, considered in conjunction with even a cursory inspection of the record, would make clear the judg-

Content of Notice of Appeal (Cont'd)

ment appealed from, as well as the offense and punishment. Brumby v. State, 264 Ga. 215, 443 S.E.2d 613 (1994).

Statement that appeal is from jury verdict. — When notice of appeal states that the notice is an appeal from a jury verdict, this section does not authorize appellate courts to a cause notice of appeal to be perfected by requiring an appeal to be amended to show an appeal from a judgment or to treat an appeal from verdict as substantial compliance with the statute. Interstate Fire Ins. Co. v. Chattam, 222 Ga. 436, 150 S.E.2d 618, answer conformed to 114 Ga. App. 332, 151 S.E.2d 486 (1966).

Notice of appeal must specify date of order being appealed to avoid dismissal. — When a notice of appeal does not correctly specify date of order being appealed, appeal must be dismissed as notice of appeal does not set forth a judgment, ruling, or order entitling the appellant to take an appeal within the requirements of section. Hardnett v. United States Fid. & Guar. Co., 116 Ga. App. 732, 158 S.E.2d 303 (1967).

Dismissal is proper where there is no judgment of date and description of that appealed from. — When record discloses there is no judgment of the trial court of the date and description of that appealed from, the requirement of this section is not met. The omission is fatal and the appeal must be dismissed. Walker v. Walker, 222 Ga. 521, 150 S.E.2d 635 (1966); Bowers v. Gill, 222 Ga. 529, 150 S.E.2d 653 (1966).

When notice of appeal stated that appeal was from verdict and judgment dated February 15, and verdict was correctly dated but judgment was dated February 17, notice did not set forth a judgment, ruling, or order entitling the appellant to take an appeal, nor could there be an appeal from a verdict. Olson v. Austin Enters., Inc., 116 Ga. App. 197, 156 S.E.2d 655 (1967).

Transcript lacking and notice fails to specify whether it will be transmitted. — When notice of appeal does not specify whether or not the transcript of evidence and proceedings is to be transmitted as part of the record on appeal as required by this section, and the record does not contain such transcript, the judgment of trial court must be affirmed. Beasley v. Lamb, 227 Ga. 266, 180 S.E.2d 240 (1971); Hageman v. State, 205 Ga. App. 644, 423 S.E.2d 56 (1992).

Evidence missing from notice of appeal. — When some portion of the evidence upon which the superior court relied was omitted from the record on appeal, it is assumed that the judgment below is correct. Bennett v. Executive Benefits, Inc., 210 Ga. App. 429, 436 S.E.2d 544 (1993).

O.C.G.A. § 5-6-37 is designed to allow appellate courts to determine if the record before them contains the same evidence that was before the trial court at the time the trial court ruled. Since the discovery responses of the parties, which were filed before the motion for summary judgment, have been omitted based on the record designation in the notice of appeal and based on the absence of an affidavit and a deposition cited in the summary judgment documents, it is obvious that the party omitted material evidence from the record on appeal, and therefore it must be presumed that the superior court record properly supports the grant of summary judgment in favor of the defendants. Moulton v. Wood, 265 Ga. App. 389, 593 S.E.2d 911 (2004).

When transcript of evidence to resolve enumerations of error not forwarded, judgment affirmed. — When the record on appeal contains enumerations of error which can only be resolved by reference to the evidence, and the appellant instructed the clerk to transmit the entire record on appeal and to "omit nothing," but did not order any transcript of evidence to be filed, and, as a result, no transcript was forwarded, the appellate court must affirm the judgment of the trial court. Tempo Carpet Co. v. Collectible Classic Cars of Ga., Inc., 166 Ga. App. 564, 305 S.E.2d 26 (1983).

When the notice of appeal did not specify that a transcript of evidence and proceedings was to be transmitted as part of the record on appeal, although a portion of the argument and testimony was attached to the record, the Court of

Appeals was required to rely on the presumption in favor of the regularity of all proceedings in a court of competent jurisdiction, assume that the evidence was sufficient to support the trial court's summary judgment, and affirm the judgment. Acker v. Jenkins, 178 Ga. App. 393, 343 S.E.2d 160 (1986).

In a suit by homeowners for breach of an exclusive listing contract, a statement in the notice of appeal that the "entire record" should be transmitted to the appellate court, was insufficient to ensure the transmittal of a trial transcript and did not meet the burden under O.C.G.A. § 5-6-37 to state whether or not any transcript of evidence and proceedings was to be transmitted as a part of the record on appeal. West v. Austin, 274 Ga. App. 729, 618 S.E.2d 662 (2005).

Whene appellants choose to omit the transcript, and the transcript is necessary for a review of the claimed error, the appellants have failed to meet the appellants' burden of showing error. In such a case, the Court of Appeals will assume the evidence is sufficient and affirm. Hunnicutt v. Hunnicutt, 182 Ga. App. 578, 356 S.E.2d 679 (1987).

No abuse in considering untimely transcript of record. — It was not an abuse of discretion for the appellate court to consider a transcript of the record which was filed after expiration of the statutory period, when the notice of appeal was timely filed and the late filing of the transcript did not cause unreasonable delay. Hill Aircraft & Leasing Corp. v. Planes, Inc., 169 Ga. App. 161, 312 S.E.2d 119 (1983).

Nothing in law prohibits addition of specification to transmit record by amendment. AMOCO v. McCluskey, 116 Ga. App. 706, 158 S.E.2d 431 (1967), rev'd on other grounds, 224 Ga. 253, 161 S.E.2d 271 (1968).

Failure to include the ruling on the motion for summary judgment in the notice of appeal is of no consequence. Childers v. Tauber, 160 Ga. App. 713, 288 S.E.2d 5 (1981).

When the appellant's notice of appeal states, in essential part, only the following: "Comes now defendant in the above styled cause, and files his Notice of Appeal to the Court of Appeals of Georgia," the notice of appeal does not satisfy the requirements of the Appellate Practice Act and, therefore, must be dismissed. Fredericks v. State, 168 Ga. App. 278, 308 S.E.2d 693 (1983).

Sufficiency of notice. — Amended notice of appeal complied with the requirement of O.C.G.A. § 5-6-37 when an examination of the record clearly identified the judgment appealed from. In re Burton, 271 Ga. 491, 521 S.E.2d 568 (1999).

When it was apparent from the notice of appeal, the record, the enumeration of errors, or any combination of the foregoing, what judgment or judgments were appealed from or what errors were sought to be asserted upon appeal, the appeal was not subject to dismissal and shall be considered in accordance therewith. Carter v. Fayette County, 287 Ga. App. 175, 651 S.E.2d 108 (2007).

Failure to designate appealable judgment may be cured by amendment. — Failure to designate an appealable judgment, ruling, or order in the notice of appeal as required by O.C.G.A. § 5-6-37 can be corrected by amendment in light of O.C.G.A. § 5-6-48. Blackwell v. Cantrell, 169 Ga. App. 795, 315 S.E.2d 29 (1984).

Failure to include dismissal of city as defendant. — Because it is clear from the enumerations of error that plaintiffs sought to appeal from the trial court's dismissal of the city as a defendant, as well as the grant of summary judgment as to other defendants, the failure to include the dismissal of the city in the notice of appeal does not prevent the court's review of the matter. Rea v. Bunce, 179 Ga. App. 628, 347 S.E.2d 676 (1986), overruled on other grounds, Martin v. Department of Pub. Safety, 357 S.E.2d 569 (Ga. 1987), cert. denied, 484 U.S. 998, 108 S. Ct. 685, 98 L. Ed. 2d 638 (1988).

Notice of appeal must affirmatively and unequivocally show who parties are. — Bill of exceptions (see O.C.G.A. §§ 5-6-49, 5-6-50) should on its face affirmatively and unequivocally show who are parties thereto, and abbreviation "et al." when occurring in bill of exceptions after name of party therein designated, cannot be held to include any other person who

Content of Notice of Appeal (Cont'd)

figured as a party in the trial court. Lanier v. Bailey, 206 Ga. 161, 56 S.E.2d 515 (1949) (decided under former Code 1933, § 6-1202).

Designation of wrong appellate court. — Although the defendant's notice of appeal designated the wrong appellate court, that error provided no basis for dismissing the appeal. Evans v. State, 235 Ga. App. 877, 510 S.E.2d 619 (1999).

Plaintiff in error need not name persons who were not parties below. — Ordinarily, the plaintiff in error is not required to name any person as a party to a bill of exceptions (see O.C.G.A. §§ 5-6-49, 5-6-50) who was not a party in the trial court. Lassiter v. Bank of Dawson, 191 Ga. 208, 11 S.E.2d 910 (1940) (decided under former Code 1933, § 6-912).

Omission of essential party from notice of appeal. — When it appears from the record that parties to litigation in court below have not been made parties to appeal, the court is without jurisdiction to entertain an appeal and will dismiss the appeal. Malsby v. Shipp, 177 Ga. 54, 169 S.E. 308 (1933) (decided under former Civil Code 1910, § 6176).

When essential party is not made party in bill of exceptions (see O.C.G.A. §§ 5-6-49, 5-6-50), nor served with copy thereof, appellate court is without jurisdiction to entertain bill of exceptions; and it is not only the party's right, but the party's duty to raise question on the party's own motion, and if found to be without jurisdiction to entertain bill of exceptions, to dismiss writ of error. Fitzgerald Cotton Mills v. Murray, 69 Ga. App. 694, 26 S.E.2d 492 (1943) (decided under former Code 1933, § 6-1202).

Denial of motion for reconsideration was not appealable order. — First of two notices of appeals from an order denying a detainee habeas relief did not invoke the appellate court's jurisdiction as the denial of a motion for reconsideration of a final judgment was not subject to direct appeal. Ferguson v. Freeman, 282 Ga. 180, 646 S.E.2d 65 (2007).

Failure to name essential party may be cured by amendment. — Failure to name an essential party as a defendant in error will not work dismissal of writ of error, when counsel of record for such party makes timely acknowledgment of service and plaintiff in error tenders amendment to bill of exceptions (see O.C.G.A. §§ 5-6-49, 5-6-50) to make the plaintiff in error the party defendant in error. Howard v. Betts, 190 Ga. 530, 9 S.E.2d 742 (1940) (decided under former Code 1933, § 6-1304).

Parties to Appeal

Only parties to proceeding below may be parties on appeal. Samples v. Greene, 138 Ga. App. 823, 227 S.E.2d 456 (1976).

No person is entitled to prosecute writ of error (see § 5-6-50) for reversal of judgment, unless that person was a party to proceeding in which judgment complained of was rendered. Gates v. Rutledge, 151 Ga. App. 844, 261 S.E.2d 757 (1979).

Notwithstanding a settlement agreement in which the decedent's wife released any interest in the decedent's estate, given that the decedent's mother was not a party in the probate court, despite publication of notice and service by the wife, the mother lacked standing to appeal the probate court's decision to award the wife a year's support. Booker v. Booker, 286 Ga. App. 6, 648 S.E.2d 445 (2007).

Language of last sentence of section is all-inclusive and mandatory, with no exceptions provided. Munday v. Brissette, 113 Ga. App. 147, 148 S.E.2d 55, rev'd on other grounds, 222 Ga. 162, 149 S.E.2d 110 (1966).

Change of evidentiary posture. — Rule that the language of the last sentence of O.C.G.A. § 5-6-37 is all-inclusive and mandatory, with no exceptions provided, does not apply when the evidentiary posture of the case changes after the initial ruling of the appellate court. Navistar Int'l Transp. Corp. v. Ogletree, 199 Ga. App. 699, 405 S.E.2d 884 (1991).

All parties below are parties on appeal. — Once a notice of appeal is timely filed, all parties to all proceedings in the lower court are parties on appeal, and may, subject to the rules governing prac-

tice before the Court of Appeals, participate in the appellate process. Marsden v. Southeastern Sash & Door Co., 193 Ga. App. 597, 388 S.E.2d 730 (1989).

Nonappealing trust beneficiaries who were parties to trial court orders at issue on appeal were properly designated as parties to the appeal. Morrow v. Vineville United Methodist Church, 227 Ga. App. 313, 489 S.E.2d 310 (1997).

Third-party defendant has status of appellee on appeal from summary judgment. — When judgment rendered on motion for summary judgment in main case was against the defendant, nevertheless, the third-party defendant is an interested party and has such interest therein that the party has the status of an appellee in the main case, especially as the party was served with the appeal. Burroughs Corp. v. Outside Carpets, Inc., 127 Ga. App. 622, 194 S.E.2d 487 (1972).

Parent's right to appeal delinquency adjudication. — As parties to their child's delinquency action pursuant to O.C.G.A. § 15-11-39(b), the child's parents had the right to appeal the juvenile court's judgment and to participate in the appellate process. In the Interest of J.L.B., 280 Ga. App. 556, 634 S.E.2d 514 (2006).

Cross appeal. — Appellee may institute a cross-appeal against a party other than an appellant. Centennial Ins. Co. v. Sandner, Inc., 259 Ga. 317, 380 S.E.2d 704 (1989).

RESEARCH REFERENCES

Am. Jur. 2d. — 5 Am. Jur. 2d, Appellate Review, §§ 292 et seq., 312

Am. Jur. Pleading and Practice Forms. — 2 Am. Jur. Pleading and Practice Forms, Appeal and Error, § 67.

C.J.S. — 4 C.J.S., Appeal and Error, § 477 et seq., 491 et seq.

ALR. — Filing of notice of appeal as affecting jurisdiction of state trial court to consider motion to vacate judgment, 5 ALR5th 422.

Sufficiency of "designation" under Federal Appellate Procedure Rule 3(c) of judgment or order appealed from in civil cases by notice of appeal not specifically designating such judgment or order, 141 ALR Fed 445.

5-6-38. Time of filing notice of appeal; cross appeal; record and transcript for cross appeal; division of costs; appeals in capital offense cases for which death penalty is sought.

(a) A notice of appeal shall be filed within 30 days after entry of the appealable decision or judgment complained of; but when a motion for new trial, a motion in arrest of judgment, or a motion for judgment notwithstanding the verdict has been filed, the notice shall be filed within 30 days after the entry of the order granting, overruling, or otherwise finally disposing of the motion. In civil cases, the appellee may institute cross appeal by filing notice thereof within 15 days from service of the notice of appeal by the appellant; and the appellee may present for adjudication on the cross appeal all errors or rulings adversely affecting him; and in no case shall the appellee be required to institute an independent appeal on his own right, although the appellee may at his option file an independent appeal. The notice of cross appeal shall set forth the title and docket number of the case, the name of the appellee, the name and address of his attorney, and a designation of any portions of the record or transcript designated for omission by the appellant and which the appellee desires included and shall state that

the appellee takes a cross appeal. In all cases where the notice of appeal did not specify that a transcript of evidence and proceedings was to be transmitted as a part of the record on appeal, the notice of cross appeal shall state whether such transcript is to be filed for inclusion in the record on appeal. A copy of the notice of cross appeal shall be served on other parties of record in the manner prescribed by Code Section 5-6-32.

(b) Where a cross appeal is filed, only one record and, where specified, only one transcript of evidence and proceedings need be prepared and transmitted to the appellate court; but the cross appellant may, at his election, require that such a separate record (and transcript, if required) be transmitted. Where a cross appeal is filed and only one record (and transcript, where required) is sent up, the court shall by order provide for the division of costs therefor between the parties if they are unable to do so by agreement.

(c) Notwithstanding subsection (a) of this Code section, where either the state or the defendant wishes to appeal any judgment, ruling, or order in the pretrial proceedings of a criminal case involving a capital offense for which the death penalty is sought, such appeal shall be brought as provided in Code Section 17-10-35.1. (Ga. L. 1965, p. 18, § 5; Ga. L. 1966, p. 493, § 3; Ga. L. 1968, p. 1072, § 7; Ga. L. 1988, p. 1437, § 2.)

Cross references. — Extension of expiration date, Rules of the Supreme Court of the State of Georgia, Rule 3. Postmark date, Rules of the Supreme Court of the State of Georgia, Rule 4. Certification and transmittal of transcript and record, Rules of the Supreme Court of the State of Georgia, Rule 15. Objection to failure to comply with Appellate Practice Act, Rules of the Supreme Court of the State of Georgia, Rule 20. Filing notice of appeal and cross appeal, Rules of the Supreme Court of the State of Georgia, Rule 38. Postmark date, Rules of the Court of Appeals of the State of Georgia, Rule 4. Time of filing briefs and enumerations of error, Rules of the Court of Appeals of the State of Georgia, Rule 14. Time of filing application for interlocutory appeal, Rules of the Court of Appeals of the State of Georgia, Rule 30. Notices of appeal and cross appeal, Rules of the Court of Appeals of the State of Georgia, Rule 33.

Law reviews. — For article discussing Georgia court decision on questions of appellate practice and procedure, see 31 Mercer L. Rev. 1 (1979). For article, "Insuring a Party's Second Chance," see 16 Ga. St. B.J. 177 (1980). For article surveying appellate practice and procedure, see 34 Mercer L. Rev. 3 (1982). For survey article on domestic relations, see 34 Mercer L. Rev. 113 (1982). For annual survey of appellate practice and procedure, see 38 Mercer L. Rev. 47 (1986). For annual survey of trial practice and procedure, see 38 Mercer L. Rev. 383 (1986). For article, "Let's Revise Appellate Procedure in Georgia," see 27 Ga. St. B.J. 135 (1991). For annual survey of appellate practice and procedure, see 56 Mercer L. Rev. 61 (2004).

For comment on Sayers v. Rothberg, 222 Ga. 626, 151 S.E.2d 445 (1967), see 3 Ga. St. B.J. 489 (1967).

JUDICIAL DECISIONS

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General Consideration

Editor's notes. — In light of the similarity of the issues dealt with under the provisions, decisions under former Code 1933, Code Section 6-902, as it read prior to revision by Ga. L. 1965, p. 18 are included in the annotations for this Code section.

Requirements of section are jurisdictional and failure to comply with those requirements mandates dismissal of appeal. Thompkins v. State, 157 Ga. App. 203, 276 S.E.2d 885 (1981); Underwood v. Lanier Home Ctr., Inc., 239 Ga. App. 282, 521 S.E.2d 207 (1999).

Appeal dismissed when notice of appeal not timely filed and no extension obtained. Jenkins v. State, 120 Ga. App. 318, 170 S.E.2d 435 (1969); Associated Bldrs. Supply v. Georgia-Pacific Corp., 123 Ga. App. 222, 180 S.E.2d 273 (1971); Carroll v. Holland, 228 Ga. 649, 187 S.E.2d 531 (1972); Mayo v. State, 148 Ga. App. 213, 251 S.E.2d 80 (1978).

Fact that appellant was a fugitive from justice does not excuse noncompliance with O.C.G.A. § 5-6-38. Noncompliance with § 5-6-38 is not remedied simply because the appellant is a fugitive from justice until after expiration of time allowed for filing of notice of appeal. Thompkins v. State, 157 Ga. App. 203, 276 S.E.2d 885 (1981).

Defendant waives right to appeal by remaining a fugitive during period when the defendant is authorized by statute to file a motion for new trial or notice of appeal. Saleem v. State, 152 Ga. App. 552, 263 S.E.2d 490 (1979).

Substantial compliance sufficient. — It is sufficient if notification-of-appeal-process provisions are substantially complied with. Oller v. State, 187 Ga. App. 818, 371 S.E.2d 455 (1988).

This section specifically authorizes independent appeal. Each party has right to make motion for new trial independently of other and to test ruling thereon. Brissette v. Munday, 115 Ga. App. 131, 153 S.E.2d 606 (1967).

Subsection (a) of O.C.G.A. § 5-6-38 gives an appellant the right to file a cross-appeal, yet specifically preserves an appellant's option to file an independent appeal. Ammari v. Sohn, 197 Ga. App. 486, 398 S.E.2d 804 (1990).

Ga. L. 1967, p. 226, §§ 5, 6 (see O.C.G.A. § 9-11-6(e)) does not apply to Ga. L. 1968, p. 1072, § 7 (see O.C.G.A. § 5-6-38), filing time not being predicated on service of notice. Akin v. Sanders, 228 Ga. 251, 184 S.E.2d 660 (1971).

Construction when meaning of section is unambiguous. — When language is plain, unambiguous, and positive, and is not capable of two constructions, no court has a right to construe the statute to mean anything other than what the statute declares, and this rule, of course, precludes courts from construing the statute according to what is supposed to be legislative intent. Bailey v. Bonaparte, 125 Ga. App. 512, 188 S.E.2d 119 (1972).

Word "appellee" as used in section should be liberally construed. — In-

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terpretation of word "appellee," as used in section, to mean only party against whom appeal is taken and who has a particular interest adverse to setting aside judgment appealed is too restrictive because a liberal construction of section comports with policies of this article, enhances efficient administration of justice, and avoids multiplicity of appeals. Executive Jet Sales, Inc. v. Jet America, Inc., 242 Ga. 307, 248 S.E.2d 676 (1978).

Appellee is party in cause against whom appeal is taken. Glennville Wood Preserving Co. v. Riddlespur, 156 Ga. App. 578, 276 S.E.2d 248 (1980), aff'd in part and rev'd in part on other grounds, Centennial Ins. Co. v. Sandner, Inc., 259 Ga. 317, 380 S.E.2d 704 (1989).

Appellee becomes such when appeal is taken against appellee by appellant. Glennville Wood Preserving Co. v. Riddlespur, 156 Ga. App. 578, 276 S.E.2d 248 (1980), aff'd in part and rev'd in part on other grounds, Centennial Ins. Co. v. Sandner, Inc., 259 Ga. 317, 380 S.E.2d 704 (1989).

Words "otherwise finally disposing of" can mean only dismissal or withdrawal of motion. Golden v. Credico, Inc., 124 Ga. App. 700, 185 S.E.2d 578 (1971).

Disposition of appeal not res judicata regarding issues raised by subsequent motion for new trial. — When notice of appeal is filed before filing of extraordinary motion for new trial, disposition of appeal will not be res judicata as to issues raised by subsequently filed motion. Music v. State, 244 Ga. 832, 262 S.E.2d 128 (1979).

Unappealed sentence may not be later attacked. — When a sentence is not appealed within 30 days of the sentence's rendition, the sentence may not be later attacked. Beeks v. State, 169 Ga. App. 499, 313 S.E.2d 760 (1984).

Extraordinary motion for new trial. — Extraordinary motion for new trial was improper when the motion was based only on the general grounds and various evidentiary rulings made during the course of the trial, these are matters which could and should have been discovered and raised in a timely filed ordinary motion for new trial. Bohannon v. State, 203 Ga. App. 783, 417 S.E.2d 679 (1992).

Addressing of errors in first trial when new trial granted. — When the trial court grants a motion for a directed verdict, then grants a motion for a new trial, ruling that the directed verdict motion was improvidently granted, and a second trial is conducted, followed by an appeal by the losing party, the appellate court is concerned only with the trial court's orders in the second trial and cannot address any enumerations of error as to the final orders of the trial court in the previous trial, as these judgments were not timely appealed. Vanguard Ins. Co. v. Beasley, 167 Ga. App. 625, 307 S.E.2d 56 (1983).

Time is a jurisdictional element of appeal. Wren v. Josey, 97 Ga. App. 593, 103 S.E.2d 745 (1958) (decided under former Code 1933, § 6-902, as it read prior to the revision by Ga. L. 1965, p. 18).

Court had jurisdiction over appeal. — When a defendant filed a notice of appeal within 30 days of the judgment, having previously filed a motion for a new trial after the verdict but before the defendant was sentenced, and later withdrew the motion for new trial, the appellate court had jurisdiction to consider the merits of the defendant's appeal. Hann v. State, 292 Ga. App. 719, 665 S.E.2d 731 (2008).

Because the defendant filed a notice of appeal within 30 days after the trial court denied the defendant's motion for new trial, the defendant's appeal was properly before the court of appeals and would be considered on the motion's merits. Gomez-Oliva v. State, 312 Ga. App. 105, 717 S.E.2d 689 (2011).

Illness and death of sole counsel for nonresident litigant does not excuse noncompliance with section. — Not even illness and death of sole counsel for nonresident litigant, unaware of this fact, affords Supreme Court grounds for hearing and determining writ of error (see O.C.G.A. §§ 5-6-49, 5-6-50) not sued out within time required by section. Wren v. Josey, 97 Ga. App. 593, 103 S.E.2d 745 (1958) (decided under former Code 1933, § 6-902, as it read prior to the revision by Ga. L. 1965, p. 18).

Record controls when the record conflicts with notice of appeal as to date motion is overruled. — When there is a conflict between recitals in bill of exceptions (see O.C.G.A. §§ 5-6-49, 5-6-50) and record as to date motion for new trial was overruled, the record controls. Malone v. Evans, 74 Ga. App. 34, 38 S.E.2d 816 (1946) (decided under former Code 1933, § 6-902, as it read prior to the revision by Ga. L. 1965, p. 18).

Cited in Close v. Walker Land Corp., 221 Ga. 329, 145 S.E.2d 245 (1965); Stanford v. Evans, Reed & Williams, 221 Ga. 331, 145 S.E.2d 504 (1965); Williams v. State, 112 Ga. App. 566, 145 S.E.2d 765 (1965); Rhett v. State, 112 Ga. App. 567, 145 S.E.2d 823 (1965); Banks v. Banks, 221 Ga. 626, 146 S.E.2d 636 (1966); Mobley v. State, 221 Ga. 716, 146 S.E.2d 735 (1966); Taylor v. Haygood, 113 Ga. App. 30, 147 S.E.2d 48 (1966); Smith v. Smith, 113 Ga. App. 111, 147 S.E.2d 466 (1966); Birdwell v. Pippen, 113 Ga. App. 202, 147 S.E.2d 673 (1966); Seaton v. Redisco, Inc., 113 Ga. App. 256, 147 S.E.2d 828 (1966); Lanier v. Fuller, 113 Ga. App. 234, 147 S.E.2d 875 (1966); Munday v. Brissette, 113 Ga. App. 147, 148 S.E.2d 55 (1966); Bivens v. Todd, 222 Ga. 84, 148 S.E.2d 424 (1966); Black v. Miller, 114 Ga. App. 208, 150 S.E.2d 466 (1966); Walker v. Walker, 222 Ga. 521, 150 S.E.2d 635 (1966); Sayers v. Rothberg, 222 Ga. 626, 151 S.E.2d 445 (1966); Kahn v. Graper, 114 Ga. App. 572, 152 S.E.2d 10 (1966); Atlanta Funtown, Inc. v. Crouch, 114 Ga. App. 702, 152 S.E.2d 583 (1966); Daniel v. Daniel, 222 Ga. 861, 152 S.E.2d 873 (1967); Wiggin v. Wiggin, 223 Ga. 63, 153 S.E.2d 306 (1967); Hicks v. Maple Valley Corp., 223 Ga. 69, 153 S.E.2d 547 (1967); Langdale Co. v. Day, 115 Ga. App. 30, 153 S.E.2d 671 (1967); Condon v. Thornton, 115 Ga. App. 129, 153 S.E.2d 726 (1967); Turner v. Bogle, 115 Ga. App. 710, 155 S.E.2d 667 (1967); Bailey v. State, 224 Ga. App. 48, 159 S.E.2d 286 (1968); Mixon v. Hall, 117 Ga. App. 626, 161 S.E.2d 429 (1968); Maddox v. Maddox, 224 Ga. 313, 161 S.E.2d 870 (1968); Collins v. Southside Lumber Co., 118 Ga. App. 342, 163 S.E.2d 755 (1968); Lamas Co. v. Baldwin, 118 Ga. App. 437, 164 S.E.2d 236 (1968); Daniels v. Allen, 118 Ga. App. 722, 165 S.E.2d 449 (1968); Spadea v. Spadea, 225 Ga. 80, 165 S.E.2d 836 (1969); Smith v. Smith, 225 Ga. 241, 167 S.E.2d 597 (1969); Shepherd v. Shepherd, 225 Ga. 455, 169 S.E.2d 314 (1969); Atlanta Gas Light Co. v. Roberson, 120 Ga. App. 361, 170 S.E.2d 587 (1969); Genins v. Genins, 226 Ga. 70, 172 S.E.2d 416 (1970); Campbell v. Carroll, 121 Ga. App. 497, 174 S.E.2d 375 (1970); State Hwy. Dep't v. Sullivan, 121 Ga. App. 767, 175 S.E.2d 152 (1970); Merchants & Mfrs. Transf. Co. v. Auto Rental & Leasing, Inc., 121 Ga. App. 729, 175 S.E.2d 156 (1970); Hughes v. State, 226 Ga. 721, 177 S.E.2d 243 (1970); G.E.C. Corp. v. Southern Fabricators, Inc., 122 Ga. App. 452, 177 S.E.2d 497 (1970); Alf v. Alf, 226 Ga. 880, 178 S.E.2d 187 (1970); Petty v. Petty, 227 Ga. 521, 181 S.E.2d 859 (1971); Kokotis v. Lightsey, 227 Ga. 800, 183 S.E.2d 383 (1971); Chaffin v. Stynchcombe, 228 Ga. 582, 187 S.E.2d 140 (1972); Moss v. Strother Ford, Inc., 125 Ga. App. 347, 187 S.E.2d 570 (1972); Wood v. Atkinson, 229 Ga. 179, 190 S.E.2d 46 (1972); McDonald v. Rogers, 229 Ga. 369, 191 S.E.2d 844 (1972); City of Harrison v. Harrison, 229 Ga. 692, 194 S.E.2d 87 (1972); Model Cleaners & Laundry, Inc. v. Per Corp., 127 Ga. App. 559, 194 S.E.2d 258 (1972); Shaddrix v. Womack, 231 Ga. 628, 203 S.E.2d 225 (1974); Irby v. Christian, 130 Ga. App. 375, 203 S.E.2d 284 (1973); Wilson v. City of Waycross, 130 Ga. App. 253, 203 S.E.2d 301 (1973); A & D Barrel & Drum Co. v. Fuqua, 132 Ga. App. 827, 209 S.E.2d 272 (1974); Thomas v. Allstate Ins. Co., 133 Ga. App. 193, 210 S.E.2d 361 (1974); Flintwood, Inc. v. Johnson, 134 Ga. App. 78, 213 S.E.2d 180 (1975); Thibadeau v. Henley, 233 Ga. 884, 213 S.E.2d 657 (1975); Fastenberg v. Associated Distribs., Inc., 134 Ga. App. 213, 213 S.E.2d 898 (1975); Gresham v. John Roth Assocs., 134 Ga. App. 691, 215 S.E.2d 538 (1975); In re Thomas, 134 Ga. App. 728, 215 S.E.2d 735 (1975); Curry v. Hopper, 234 Ga. 642, 217 S.E.2d 155 (1975); Horton v. Horton, 235 Ga. 227, 219 S.E.2d 88 (1975); Shannon Co. v. Heneveld, 235 Ga. 635, 221 S.E.2d 200 (1975); Miller v. Georgia Real Estate Comm'n, 136 Ga. App. 718, 222 S.E.2d 183 (1975); Venable v. Block, 138 Ga. App. 215, 225 S.E.2d 755

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(1976); Dargan, Whitington & Conner, Inc. v. Kitchen, 138 Ga. App. 414, 226 S.E.2d 482 (1976); Davis v. Davis, 139 Ga. App. 599, 229 S.E.2d 81 (1976); Beatty v. Underground Atlanta, 237 Ga. 844, 229 S.E.2d 615 (1976); Rollins Communications, Inc. v. Henderson, Few & Co., 140 Ga. App. 504, 231 S.E.2d 412 (1976); Smith v. State, 140 Ga. App. 492, 231 S.E.2d 493 (1976); DOT v. Knight, 238 Ga. 225, 232 S.E.2d 72 (1977); McEver v. State, 141 Ga. App. 429, 233 S.E.2d 504 (1977); Heller v. Board of Comm'rs, 238 Ga. 501, 233 S.E.2d 761 (1977); Beatty v. Underground Atlanta, Inc., 141 Ga. App. 542, 233 S.E.2d 886 (1977); Smith v. State, 238 Ga. 655, 235 S.E.2d 375 (1977); Pugmire Lincoln Mercury, Inc. v. Sorrells, 142 Ga. App. 444, 236 S.E.2d 113 (1977); Deroller v. Powell, 144 Ga. App. 585, 241 S.E.2d 469 (1978); Love v. State, 144 Ga. App. 728, 242 S.E.2d 278 (1978); Miller v. State, 146 Ga. App. 7, 245 S.E.2d 442 (1978); United States Fire Ins. Co. v. Farris, 146 Ga. App. 177, 245 S.E.2d 868 (1978); Hartley v. State, 146 Ga. App. 658, 247 S.E.2d 126 (1978); Bozard v. J.A. Jones Constr. Co., 146 Ga. App. 877, 247 S.E.2d 605 (1978); Kiplinger v. Kiplinger, 242 Ga. 465, 249 S.E.2d 254 (1978); Moski v. Public Serv. Comm'n, 148 Ga. App. 28, 251 S.E.2d 9 (1978); Jenkins v. State, 149 Ga. App. 401, 254 S.E.2d 914 (1978); Black v. Cotton States Ins. Co., 149 Ga. App. 71, 253 S.E.2d 565 (1979); Garrett v. Heisler, 149 Ga. App. 240, 253 S.E.2d 863 (1979); Jones v. Monroe Nursing Home, Inc., 149 Ga. App. 582, 254 S.E.2d 902 (1979); Canup v. State, 150 Ga. App. 794, 258 S.E.2d 907 (1979); Shipman v. Horizon Corp., 151 Ga. App. 242, 259 S.E.2d 221 (1979); Hardy v. Georgia Power Co., 151 Ga. App. 805, 261 S.E.2d 748 (1979); Southern Disct. Co. v. Ector, 152 Ga. App. 244, 262 S.E.2d 457 (1979); Moore v. Reeves, 153 Ga. App. 517, 266 S.E.2d 810 (1980); Bergen v. Martindale-Hubbell, Inc., 245 Ga. 742, 267 S.E.2d 10 (1980); Oxley v. Little Switz. Brewing Co., 154 Ga. App. 36, 267 S.E.2d 460 (1980); Bennett v. Caton, 154 Ga. App. 515, 268 S.E.2d 786 (1980); Parker v. State, 156 Ga. App. 299, 274 S.E.2d 694 (1980); Ballenger Corp. v. Dresco Mechanical Contractors, 156 Ga. App. 425, 274 S.E.2d 786 (1980); Cook v. State, 157 Ga. App. 23, 276 S.E.2d 84 (1981); Kaplan v. City of Atlanta, 158 Ga. App. 58, 279 S.E.2d 307 (1981); Village Ctrs., Inc. v. DeKalb County, 248 Ga. 177, 281 S.E.2d 522 (1981); Black v. Georgia Power Co., 158 Ga. App. 620, 281 S.E.2d 639 (1981); Hall v. Hall, 159 Ga. App. 52, 282 S.E.2d 699 (1981); Washington v. State, 158 Ga. App. 829, 282 S.E.2d 776 (1981); Pessolano v. George R. Price & Assocs., 159 Ga. App. 340, 283 S.E.2d 317 (1981); Austin v. Carter, 248 Ga. 775, 285 S.E.2d 542 (1982); Graves v. American Alloy Steel, Inc., 160 Ga. App. 378, 287 S.E.2d 94 (1981); Joiner v. Perkerson, 160 Ga. App. 343, 287 S.E.2d 327 (1981); Ross v. State, 160 Ga. App. 380, 287 S.E.2d 337 (1981); Godfrey v. Kirk, 161 Ga. App. 474, 288 S.E.2d 301 (1982); Hooks v. Gates, 162 Ga. App. 434, 291 S.E.2d 569 (1982); Shepherd v. Metropolitan Property & Liab. Ins. Co., 163 Ga. App. 650, 294 S.E.2d 638 (1982); Freeman v. Gold & White, Inc., 163 Ga. App. 467, 294 S.E.2d 718 (1982); Marshall Erdman & Assocs. v. Georgia State Bd. for Examination, Qualification & Registration of Architects, 164 Ga. App. 283, 296 S.E.2d 219 (1982); Ponder v. State, 164 Ga. App. 574, 298 S.E.2d 561 (1982); Georgia Dep't of Labor v. Sims, 164 Ga. App. 856, 298 S.E.2d 562 (1982); Chadwick v. Frix, 165 Ga. App. 20, 299 S.E.2d 93 (1983); Sayre v. State, 165 Ga. App. 225, 299 S.E.2d 749 (1983); Officenters Int'l Corp. v. Interstate N. Assocs., 166 Ga. App. 93, 303 S.E.2d 292 (1983); Scott v. Liberty Mut. Ins. Co., 168 Ga. App. 815, 310 S.E.2d 772 (1983); Saylor v. Vasconez, 169 Ga. App. 210, 312 S.E.2d 199 (1983); Joseph v. Joseph, 169 Ga. App. 894, 315 S.E.2d 470 (1984); Abney v. State, 170 Ga. App. 265, 316 S.E.2d 845 (1984); State v. Cook, 172 Ga. App. 433, 323 S.E.2d 634 (1984); Savage v. Newsome, 173 Ga. App. 271, 326 S.E.2d 5 (1985); Crimminger v. Habif, 174 Ga. App. 440, 330 S.E.2d 164 (1985); Whitton v. State, 174 Ga. App. 634, 331 S.E.2d 10 (1985); Henry v. State, 174 Ga. App. 687, 331 S.E.2d 66 (1985); Melton v. State, 177 Ga. App. 134, 338 S.E.2d 701 (1985); Carpets 'N Colors, Inc. v. Hollycraft Carpets, Inc., 177 Ga. App. 534, 339 S.E.2d 793

(1986); International Indem. Co. v. Smith, 178 Ga. App. 4, 342 S.E.2d 4 (1986); City of Atlanta v. Brown, 180 Ga. App. 513, 350 S.E.2d 55 (1986); Hight v. Burden, 180 Ga. App. 716, 350 S.E.2d 471 (1986); Sikes v. State, 181 Ga. App. 210, 351 S.E.2d 732 (1986); Williamson v. State, 182 Ga. App. 49, 354 S.E.2d 868 (1987); Melton v. J.M. Kenith Co., 182 Ga. App. 184, 355 S.E.2d 115 (1987); Rimes v. State, 182 Ga. App. 721, 356 S.E.2d 897 (1987); Attwell v. Lane Co., 182 Ga. App. 813, 357 S.E.2d 142 (1987); Martin v. State, 185 Ga. App. 145, 363 S.E.2d 765 (1988); Robinson v. Kemp Motor Sales, Inc., 185 Ga. App. 492, 364 S.E.2d 623 (1988); Willis v. State, 186 Ga. App. 197, 366 S.E.2d 778 (1988); Booker v. Amdur, 186 Ga. App. 276, 367 S.E.2d 94 (1988); In re Booker, 186 Ga. App. 614, 367 S.E.2d 850 (1988); Hargrove v. Phillips, 186 Ga. App. 525, 368 S.E.2d 123 (1988); McKinney v. State, 187 Ga. App. 702, 371 S.E.2d 196 (1988); In re Doe, 188 Ga. App. 255, 372 S.E.2d 822 (1988); Aldridge v. State, 188 Ga. App. 729, 374 S.E.2d 223 (1988); Shouse v. State, 189 Ga. App. 531, 376 S.E.2d 911 (1988); Gully v. Glover, 190 Ga. App. 238, 378 S.E.2d 411 (1989); Paytee v. State, 190 Ga. App. 291, 380 S.E.2d 92 (1989); Friedman v. Friedman, 259 Ga. 530, 384 S.E.2d 641 (1989); Jones v. Perkins, 192 Ga. App. 343, 384 S.E.2d 927 (1989); McClure v. Gower, 259 Ga. 678, 385 S.E.2d 271 (1989); All Phase Elec. Supply Co. v. Foster & Cooper, Inc., 193 Ga. App. 232, 387 S.E.2d 429 (1989); Southern Farm Bureau Life Ins. Co. v. Douglas, 193 Ga. App. 476, 388 S.E.2d 67 (1989); Clay v. State, 194 Ga. App. 354, 391 S.E.2d 143 (1990); Atlanta Obstetrics & Gynecology Group v. Abelson, 195 Ga. App. 274, 392 S.E.2d 916 (1990); City of Fairburn v. Cook, 195 Ga. App. 265, 393 S.E.2d 70 (1990); Baker v. State, 195 Ga. App. 424, 394 S.E.2d 801 (1990); Moore v. Sinclair, 196 Ga. App. 667, 396 S.E.2d 557 (1990); Dollar v. Department of Human Resources, 196 Ga. App. 698, 396 S.E.2d 913 (1990); Auld v. Weaver, 196 Ga. App. 782, 397 S.E.2d 51 (1990); Precise v. City of Rossville, 196 Ga. App. 870, 397 S.E.2d 133 (1990); O'Kelly v. State, 196 Ga. App. 860, 397 S.E.2d 197 (1990); Walker v. State, 197 Ga. App. 265, 398 S.E.2d 217 (1990); Lytle v. State, 197 Ga. App. 462, 398 S.E.2d 733 (1990); Ferguson v. State, 197 Ga. App. 443, 398 S.E.2d 738 (1990); Jones v. McCoy, 197 Ga. App. 430, 398 S.E.2d 786 (1990); Stevens v. McCarty, 198 Ga. App. 412, 401 S.E.2d 605 (1991); Austin v. State, 199 Ga. App. 54, 404 S.E.2d 477 (1991); Pinkney v. Union, 199 Ga. App. 529, 405 S.E.2d 521 (1991); Stirling v. State, 199 Ga. App. 877, 406 S.E.2d 282 (1991); Bank S. v. Roswell Jeep Eagle, Inc., 200 Ga. App. 489, 408 S.E.2d 503 (1991); Walker v. State, 201 Ga. App. 774, 412 S.E.2d 291 (1991); Southern Gen. Ins. Co. v. Buck, 202 Ga. App. 103, 413 S.E.2d 481 (1991); Hipple v. Brick, 202 Ga. App. 571, 415 S.E.2d 182 (1992); Watson v. State, 202 Ga. App. 667, 415 S.E.2d 306 (1992); Nodvin v. West, 204 Ga. App. 280, 419 S.E.2d 120 (1992); Wal-Mart Stores, Inc. v. Curry, 206 Ga. App. 775, 426 S.E.2d 581 (1992); Vance v. Lomas Mtg. USA, Inc., 263 Ga. 33, 426 S.E.2d 873 (1993); Anaya v. Brooks Auto Parts, Inc., 208 Ga. App. 491, 430 S.E.2d 825 (1993); Calvert Enter., Inc. v. American Medical Int'l, Inc., 208 Ga. App. 525, 431 S.E.2d 132 (1993); Hubbard v. State, 208 Ga. App. 719, 431 S.E.2d 479 (1993); Griffin v. Loper, 209 Ga. App. 504, 433 S.E.2d 653 (1993); Citizens & S. Trust Co. v. Hicks, 216 Ga. App. 338, 454 S.E.2d 207 (1995); Henderson v. State, 265 Ga. 317, 454 S.E.2d 458 (1995); Tranakos v. Miller, 220 Ga. App. 829, 470 S.E.2d 440 (1996); Goodman v. Lake Buckhorn Estates Homeowners Ass'n, 224 Ga. App. 765, 481 S.E.2d 882 (1997); Carter v. Fayette County, 228 Ga. App. 47, 491 S.E.2d 115 (1997); Adams v. State, 234 Ga. App. 696, 507 S.E.2d 538 (1998); Wimberly v. State, 235 Ga. App. 388, 508 S.E.2d 699 (1998); Bodiford v. State, 238 Ga. App. 531, 517 S.E.2d 356 (1999); Merchant v. Mitchell, 241 Ga. App. 173, 525 S.E.2d 710 (1999); Brown v. E.I. du Pont de Nemours & Co., 240 Ga. App. 893, 525 S.E.2d 731 (1999); Brasuell v. State, 243 Ga. App. 176, 531 S.E.2d 732 (2000); Cox v. State, 242 Ga. App. 334, 528 S.E.2d 871 (2000); NF Invs., Inc. v. Whitfield, 245 Ga. App. 72, 537 S.E.2d 207 (2000); Veasley v. State, 272 Ga. 837, 537 S.E.2d 42 (2000); Board of Comm'rs v. Guthrie, 273 Ga. 1, 537 S.E.2d 329 (2000); Johnson v. State, 246 Ga. App. 239, 539 S.E.2d 914 (2000);

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Coleman v. Grimes, 250 Ga. App. 880, 553 S.E.2d 185 (2001); Smith v. State, 257 Ga. App. 468, 571 S.E.2d 446 (2002); Gulledge v. State, 276 Ga. 740, 583 S.E.2d 862 (2003); Craig v. Holsey, 264 Ga. App. 344, 590 S.E.2d 742 (2003); Bailey v. McNealy, 277 Ga. App. 848, 627 S.E.2d 893 (2006); Green v. Benton, No. CV 305-113, 2006 U.S. Dist. LEXIS 13296 (S.D. Ga. Mar. 13, 2006); Kappelmeier v. HSBC USA, Inc., 280 Ga. App. 349, 634 S.E.2d 133 (2006); Jackson v. Jackson, 282 Ga. 459, 651 S.E.2d 92 (2007); McRae v. SSI Dev., LLC, 283 Ga. 92, 656 S.E.2d 138 (2008); In re Estate of Boss, 293 Ga. App. 769, 668 S.E.2d 283 (2008); Liu v. Boyd, 294 Ga. App. 224, 668 S.E.2d 843 (2008); Barnaby v. Scott, 299 Ga. App. 691, 683 S.E.2d 333 (2009); Jackson v. State, 286 Ga. 407, 688 S.E.2d 351 (2010); Truelove v. Buckley, 318 Ga. App. 207, 733 S.E.2d 499 (2012).

Appealable Judgments or Orders

Notice of appeal must specify an appealable judgment from which appeal is entered, absent which appeal must be dismissed. Parish v. Georgia R.R. Bank & Trust Co., 115 Ga. App. 540, 154 S.E.2d 750 (1967).

Judgment cannot be considered appealable until actually entered. — Court of Appeals lacked jurisdiction to consider enumerations of error arising from breach of contract claim, since the jury's verdict on the claim was never reduced to judgment because of the plaintiff's election to have judgment entered on the plaintiff's theory of fraud. Miner v. Harrison, 205 Ga. App. 523, 422 S.E.2d 899, cert. denied, 205 Ga. App. 900, 422 S.E.2d 899 (1992).

No requirement to appeal within 30 days when order appealed from not final judgment. — Trial court erred in denying the children's petition for writ of mandamus to compel a judge to allow the children to appeal from the order dismissing the children's appeals because the judge's prior orders were not final judgments within the meaning of O.C.G.A. § 5-6-34(a)(1); thus, the children were not required to appeal from the rulings within 30 days after entry in order to preserve the children's right to pursue appellate review under O.C.G.A. § 5-6-38(a). Sotter v. Stephens, 291 Ga. 79, 727 S.E.2d 484 (2012).

Verdict is not an appealable decision or judgment within purview of section. Williams v. Keebler, 222 Ga. 437, 150 S.E.2d 674, answer conformed to 114 Ga. App. 332, 151 S.E.2d 483 (1966).

Judgment, and not verdict, is the appealable decision. Herrington v. Herrington, 230 Ga. 94, 195 S.E.2d 654 (1973), overruled on other grounds, Gillen v. Bostick, 234 Ga. 308, 215 S.E.2d 676 (1975).

Judgment entered on consent verdict or guilty plea. — Timely-filed direct appeal will lie from judgment entered on consent verdict or guilty plea. Neal v. State, 232 Ga. 96, 205 S.E.2d 284 (1974).

Defendant's appeals did not qualify as direct appeals from the entry of the defendant's guilty pleas because the defendants were from a ruling on a motion filed ten years after the entry of judgment and sentence and were filed pursuant to notices of appeal that referred to the denial of the motion to void judgment. Orr v. State, 276 Ga. 91, 575 S.E.2d 444 (2003).

Dismissal of motion for new trial is a final disposition and does not require the appellate court to dismiss an appeal of dismissal. Gold Kist, Inc. v. Stokes, 135 Ga. App. 382, 217 S.E.2d 352, rev'd on other grounds, 235 Ga. 643, 221 S.E.2d 49 (1975).

Dismissal or denial of a new trial due to failure to provide the transcript is, for purposes of subsection (a) of O.C.G.A. § 5-6-38, an order "finally disposing" of the motion, triggering the 30 days for filing of an appeal. Evans v. State, 230 Ga. App. 728, 497 S.E.2d 248 (1998).

Order sustaining motion to dismiss on merits and providing self-executing dismissal provision. — Order sustaining general demurrer (now motion to dismiss) on merits and providing self-executing dismissal provision is a final order. If no notice of appeal is filed beforehand, case is not automatically dismissed until expiration of time allowed for amendments and an appeal within 30 days after such date is timely. Chambers v. Peacock Constr. Co., 115 Ga. App. 670,

155 S.E.2d 704, aff'd, 223 Ga. 515, 156 S.E.2d 348 (1967).

Oral order is not final nor appealable until and unless the order is reduced to writing, signed by the judge, and filed with the clerk. This constitutes "entry" and it is only an "entered" decision or judgment which is appealable. Sharp v. State, 183 Ga. App. 641, 360 S.E.2d 50 (1987).

Order affecting earlier final judgment. — Trial court's corrective action in clarifying an omission as to post-trial interest in the court's earlier partial summary judgment, which had been certified as final, constituted a final order which was directly appealable. Nodvin v. West, 197 Ga. App. 92, 397 S.E.2d 581 (1990).

Judgment not final as to all parties. — In the absence of an express determination and express direction pursuant to O.C.G.A. § 9-11-54(b), the denial of a motion for a new trial as to fewer than all the parties against whom a new trial has actually been sought is not itself a final judgment, does not otherwise terminate the action even as to those in whose favor judgment has previously been entered, and is subject to revision at any time prior to the entry of a judgment as to all parties. Accordingly, the denial of such a motion is not an order "otherwise finally disposing of the motion" so as to trigger the 30-day period established by subsection (a) of O.C.G.A. § 5-6-38 for the filing of a notice appeal, unless and until there has been compliance with O.C.G.A. § 9-11-54(b). Crumbley v. Wyant, 183 Ga. App. 802, 360 S.E.2d 276, cert. denied, 183 Ga. App. 905, 360 S.E.2d 276 (1987).

Although a trial court made no factual determination concerning the defendant's failure to pursue a direct appeal, a habeas court had previously determined that the defendant knowingly and voluntarily withdrew the new trial motion against the advice of counsel and waived the right to a direct appeal; as a result, the trial court properly denied the defendant's motion for an out-of-time appeal under O.C.G.A. § 5-6-38(a) and properly limited the record. Simmons v. State, 276 Ga. 525, 579 S.E.2d 735 (2003).

Dismissal of complaint against one of two defendants. — Because an insured could not use a voluntary dismissal of one of the defendants as the vehicle for appellate review of rulings entered by the trial court more than 30 days from the filing of the notice of appeal, and no other final appealable ruling existed in the record, the insured's appeal was dismissed based on the appellate court's lack of jurisdiction. Waye v. Continental Special Risks, Inc., 289 Ga. App. 82, 656 S.E.2d 150 (2007), cert. denied, 2008 Ga. LEXIS 392 (Ga. 2008).

Jurisdiction

Trial court exceeded its authority. — When a trial court effectively granted the defendant an 11-month extension of time under O.C.G.A. § 5-6-39(c) in which to file a notice of appeal, the appeal was dismissed because the trial court lacked authority under O.C.G.A. § 5-6-38(a) to do so. Cody v. State, 277 Ga. 553, 592 S.E.2d 419 (2004).

Timely filing of notice, delaying motion or grant of extension necessary. — When 30-day period after entry of judgment on verdict expires and no notice of appeal has been filed, no extension of time therefor obtained, nor motion filed which would toll time for filing of notice of appeal, judgment, is unappealed from and becomes law of case. Venable v. Block, 141 Ga. App. 523, 233 S.E.2d 878 (1977).

When an application for discretionary review was not filed, and a subsequent notice of direct appeal was filed untimely, there was no jurisdiction conferred on the court to hear the appeal. Boney v. State, 236 Ga. App. 179, 510 S.E.2d 892 (1999).

For Court of Appeals to acquire jurisdiction over case, notice of appeal must be filed within 30 days of entry of judgment appealed from, unless an extension is granted upon proper application to the trial court, and motion for reconsideration of order granting summary judgment and dismissing counterclaim does not extend deadline for filing notice of appeal from that order. Peppers House Restaurant, Inc. v. Siefferman, 156 Ga. App. 114, 274 S.E.2d 43 (1980).

Proper, timely filing of notice of appeal is absolute requirement to confer appellate jurisdiction. Jordan v. Caldwell, 229 Ga. 343, 191 S.E.2d 530

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(1972); Gillen v. Bostick, 234 Ga. 308, 215 S.E.2d 676 (1975); Camp v. Hamrick, 139 Ga. App. 61, 228 S.E.2d 288 (1976); May v. May, 139 Ga. App. 672, 229 S.E.2d 145 (1976); Patterson v. Professional Resources, Inc., 140 Ga. App. 315, 231 S.E.2d 88 (1976); Smith v. Forrester, 145 Ga. App. 281, 243 S.E.2d 575, cert. denied, 439 U.S. 863, 99 S. Ct. 185, 58 L. Ed. 2d 172 (1978); Hester v. State, 242 Ga. 173, 249 S.E.2d 547 (1978); Albert v. Bryan, 150 Ga. App. 649, 258 S.E.2d 300 (1979); Freeman v. State, 154 Ga. App. 344, 268 S.E.2d 727 (1980); Dunn v. State, 156 Ga. App. 483, 274 S.E.2d 828 (1980); Strauss v. Peachtree Assocs., 156 Ga. App. 536, 275 S.E.2d 90 (1980); Grant v. State, 157 Ga. App. 390, 278 S.E.2d 53 (1981); Long v. Long, 247 Ga. 624, 278 S.E.2d 370 (1981); Sands v. Lamar Properties, Inc., 159 Ga. App. 718, 285 S.E.2d 24 (1981); Hose v. State, 159 Ga. App. 842, 285 S.E.2d 588 (1981); Hunter v. Big Canoe Corp., 162 Ga. App. 629, 291 S.E.2d 726 (1982); Moncrief v. Tara Apts., Ltd., 162 Ga. App. 695, 293 S.E.2d 352 (1982); Boothe v. State, 178 Ga. App. 22, 342 S.E.2d 9 (1986); Knox v. State, 180 Ga. App. 564, 349 S.E.2d 753 (1986); Banks v. Green, 205 Ga. App. 589, 423 S.E.2d 31 (1992), cert. denied, 205 Ga. App. 899, 423 S.E.2d 31, 508 U.S. 941, 113 S. Ct. 2419, 124 L. Ed. 2d 642 (1993); Brown v. Webb, 224 Ga. App. 856, 482 S.E.2d 382 (1997).

When notice of appeal is given more than 30 days after entry of judgment, judgment is not reviewable and appeal must be dismissed. Buckhead Doctors' Bldg., Inc. v. Oxford Fin. Cos., 116 Ga. App. 503, 157 S.E.2d 767 (1967).

Unless jurisdiction of appellate court is invoked within 30-day period following filing of judgment in trial court by party to case, then appellate court is without jurisdiction to review judgment of trial court; and result is that judgment of trial court stands as rendered. Patterson v. Professional Resources, Inc., 140 Ga. App. 315, 231 S.E.2d 88 (1976).

Timely filing of a notice of appeal is essential to confer jurisdiction upon the appellate court. Bowen v. Clayton County Hosp. Auth., 160 Ga. App. 809, 288 S.E.2d 232 (1982); Mobley v. State, 162 Ga. App. 23, 288 S.E.2d 702 (1982); Raymond v. State, 162 Ga. App. 493, 292 S.E.2d 196 (1982).

Appellate court is without jurisdiction when the notice of appeal is not timely filed in accordance with the statutory requirements of O.C.G.A. § 5-6-38. McNeese v. State, 167 Ga. App. 770, 307 S.E.2d 303 (1983).

Court of Appeals is without jurisdiction whernthe notice of appeal is not timely filed in accordance with the statutory requirements. Westerfield v. State, 169 Ga. App. 510, 313 S.E.2d 768 (1984).

Although an order denying a motion to set aside summary judgment orders is an appealable judgment, notice of appeal filed a minimum of 33 days after the filing of the order denying the motion to vacate and set aside is untimely and confers no jurisdiction upon the Court of Appeals. Quarterman v. Quarterman, 170 Ga. App. 376, 317 S.E.2d 206 (1983).

When notice of appeal was filed approximately two and one-half months after the entry of the orders granting motions for summary judgments and when no motions for new trial, in arrest of judgment, or judgment n.o.v. were filed, the Court of Appeals had no jurisdiction to consider those orders. Quarterman v. Quarterman, 170 Ga. App. 376, 317 S.E.2d 206 (1983).

When, in a dispossessory action, a trial court dismissed a tenant's counterclaim and designated the dismissal as a final judgment under O.C.G.A. § 9-11-54(b), the tenant had to appeal any adverse rulings in that order within 30 days of the entry of judgment, under O.C.G.A. § 5-6-38, and, by failing to so appeal that judgment, the tenant's right to review of those rulings was lost. Lewis v. Carscallen, 274 Ga. App. 711, 618 S.E.2d 618 (2005).

Although counsel did not know order sought to be appealed had been filed the rule still applies. Cranman Ins. Agency, Inc. v. Wilson Marine Sales & Serv., Inc., 147 Ga. App. 590, 249 S.E.2d 631 (1978).

Untimeliness sought to be attributed to clerk or court. — This rule obtains even when untimeliness is sought to be attributed to the clerk's docket sheet,

to misstatements of the clerk of court, or, to the court. Cranman Ins. Agency, Inc. v. Wilson Marine Sales & Serv., Inc., 147 Ga. App. 590, 249 S.E.2d 631 (1978).

Prerequisite to Supreme Court jurisdiction over appeal. — Unless notice of appeal is timely filed in accordance with section, Supreme Court does not have jurisdiction to review original adverse judgment on appeal. Neal v. State, 232 Ga. 96, 205 S.E.2d 284 (1974).

Filing of notice of appeal within statutory period or securing of extension during such period is absolutely essential, to enable the Supreme Court to consider the case on the merits. Kennedy v. Brown, 239 Ga. 286, 236 S.E.2d 632 (1977).

Appeal or notice of appeal filed anywhere other than where law directs. No other court has jurisdiction to accept or file the appeal, and filing or attempted filing of the appeal in some other court does not and cannot toll the statutory time for filing. Bailey v. Bonaparte, 125 Ga. App. 512, 188 S.E.2d 119 (1972).

Immaterial amendment will not confer jurisdiction when earlier appeal dismissed for noncompliance. — When notice of appeal is not filed according to mandate of section, if appellate court dismisses appeal for this reason, an amendment which is not a material one will not give jurisdiction to entertain or rule on new motion to dismiss. City Stores Co. v. Henderson, 116 Ga. App. 114, 156 S.E.2d 818 (1967).

Appellate court without jurisdiction. — Unless the jurisdiction of the appellate court is invoked within the 30-day period following the filing of the judgment in the trial court by a party to the case, then the appellate court is without jurisdiction to review the judgment of the trial court; and the result is that the judgment of the trial court stands as rendered. Jarrard v. Copeland, 205 Ga. App. 20, 421 S.E.2d 84 (1992).

Because a judgment awarding a property owner damages was final, the residents' attempt to appeal that judgment two years later was untimely, and the Court of Appeals lacked jurisdiction to consider the residents' arguments; although the residents asserted error in other rulings by the trial court, those orders apparently were entered after the residents filed the residents' notice of appeal in the case, and the Court of Appeals could not consider the errors. Paine v. Nations, 301 Ga. App. 97, 686 S.E.2d 876 (2009).

Supreme court was without jurisdiction to review the propriety or substance of the trial court's order denying the property owners' motion for new trial because the owners failed to timely file a notice of appeal in regard to that order, and the builders' post-judgment motions for fees under O.C.G.A. §§ 9-11-68 and 9-15-14 did not toll the time for the owners' to appeal from the order denying the owners' motion for new trial; the trial court entered a final judgment on October 4, 2007, and the owners' filing of a motion for new trial tolled the time for appeal under O.C.G.A. § 5-6-38(a), but as soon as the trial court issued the court's order disposing of the motion for new trial, the thirty-day time period to file a notice of appeal began to run, and the owners' filed the motion for new trial on March 9, 2009. O'Leary v. Whitehall Constr., 288 Ga. 790, 708 S.E.2d 353 (2011).

Appellate court lacks jurisdiction to perfect untimely notice of appeal. — If notice of appeal is not filed within 30 days from judgment, ruling, or order entitling the appellant to take appeal, the Court of Appeals has no jurisdiction from outset and can do nothing to perfect the litigant's attempt to confer jurisdiction by amendment to notice of appeal. Hardnett v. United States Fid. & Guar. Co., 116 Ga. App. 732, 158 S.E.2d 303 (1967).

It is not necessary that judgment be attacked by a method provided in Ga. L. 1967, p. 226, §§ 26, 27, 30 (see O.C.G.A. § 9-11-60), as any final judgment may be timely appealed. Hiscock v. Hiscock, 227 Ga. 329, 180 S.E.2d 730 (1971).

Motion for reconsideration of new trial denial. — Supreme Court did not lack jurisdiction over a case because the defendant had pending in the trial court a motion for reconsideration of the denial of his motion for new trial. When the trial court denied the motion for new trial, the case became ripe for appeal. Holiday v. State, 258 Ga. 393, 369 S.E.2d 241, cert.

Jurisdiction (Cont'd)

denied, 488 U.S. 934, 109 S. Ct. 329, 102 L. Ed. 2d 346 (1988).

When appellee failed to file cross-appeal. — When a case on appeal in which the appellee filed a motion to remand the case, after a decision on the merits has been reached, and when the appellee wanted to remand the case for a hearing on the appellant's motion to proceed in forma pauperis and contending that the motion was filed and ruled upon without the appellee having had an opportunity to respond in opposition, the matter was not properly before the appellate court since the appellee had not filed a cross-appeal as required by O.C.G.A. § 5-6-38. Selfridge v. Morrison Cafeteria Co., 192 Ga. App. 469, 385 S.E.2d 137, cert. denied, 192 Ga. App. 903, 385 S.E.2d 137 (1989).

Notice of cross-appeal properly filed. — In a tenant's action against the leasing agent of an apartment complex alleging that soot from an apartment heating system caused the tenant to suffer respiratory and lymph node problems, the agent's jurisdictional challenge to the tenant's cross-appeal from a trial court ruling that granted the agent's motion for a directed verdict on the tenant's claim for punitive damages was unsuccessful; within 15 days of being served with the tenant's notice of appeal, the tenant filed a notice of cross-appeal stating that the tenant was appealing from the grant of a directed verdict in favor of the agent on the punitive damages issue, and that was the tenant's sole claim of error on the cross-appeal. Ambling Mgmt. Co. v. Purdy, 283 Ga. App. 21, 640 S.E.2d 620 (2006).

Filing

1. In General

Filing of notice of appeal serves to supersede judgment, and while on appeal, the trial court is without authority to modify such judgment. Dalton Am. Truck Stop, Inc. v. ADBE Distrib. Co., 146 Ga. App. 8, 245 S.E.2d 346 (1978).

Burden is on party desiring to take appeal. — Burden is on party desiring to take appeal to determine when judgment is filed in trial court, and to file the party's notice of appeal within the 30-day period or within the duly authorized extension of the 30-day period. Jordan v. Caldwell, 229 Ga. 343, 191 S.E.2d 530 (1972); Cranman Ins. Agency, Inc. v. Wilson Marine Sales & Serv., Inc., 147 Ga. App. 590, 249 S.E.2d 631 (1978).

Burden is upon party taking appeal to file within required 30 day period. Moncrief v. Tara Apts., Ltd., 162 Ga. App. 695, 293 S.E.2d 352 (1982).

Burden is not satisfied by relying on postal delivery but may be satisfied only by depositing notice of appeal with clerk within appropriate time frame. Moncrief v. Tara Apts., Ltd., 162 Ga. App. 695, 293 S.E.2d 352 (1982).

Burden is on appellant to ascertain whether clerk's office is open for filing of notice of appeal on specific date. Camp v. Hamrick, 139 Ga. App. 61, 228 S.E.2d 288 (1976); Blumenau v. Citizens & S. Nat'l Bank, 139 Ga. App. 188, 228 S.E.2d 302 (1976).

Judgment cannot be considered appealable until judgment is actually entered; therefore, when a notice of appeal is filed before entry of judgment, the appeal must be dismissed. Cunningham v. State, 131 Ga. App. 133, 205 S.E.2d 899, rev'd on other grounds, 232 Ga. 416, 207 S.E.2d 48 (1974).

Filing of notice of appeal constitutes entry of appeal. — Although notice of appeal is dated prior to entry of judgment intended to be appealed from, it is filing of notice of appeal which constitutes entering an appeal. Anthony v. Anthony, 120 Ga. App. 261, 170 S.E.2d 273 (1969).

Second notice of appeal was a nullity when the defendant had already filed a notice of appeal and the initial appeal was pending. Elrod v. State, 222 Ga. App. 704, 475 S.E.2d 710 (1996).

What constitutes filing within meaning of section. — Bailey v. Bonaparte, 125 Ga. App. 512, 188 S.E.2d 119 (1972).

Best evidence of filing. — Certificate of clerk, entered upon paper when it is filed, is best evidence of filing as required by section. Bailey v. Bonaparte, 125 Ga. App. 512, 188 S.E.2d 119 (1972).

Proof that notice was in clerk's office within time prescribed. — When a notice of appeal is alleged to have been in the clerk's office in time but not filed by that functionary within 30-day period, such proof does not furnish satisfactory compliance with the statutory requirement of filing. Bank of Coweta v. Lee, 153 Ga. App. 33, 264 S.E.2d 526 (1980).

Section 9-11-6(b) is inapplicable to time for filing. — Ga. L. 1967, p. 226, §§ 5, 6 (see O.C.G.A. § 9-11-6(b) does not apply to periods of time which are definitely fixed by statute, as time for filing of notice of appeal, as provided by Ga. L. 1968, p. 1072, § 7. Buckhead Doctors' Bldg., Inc. v. Oxford Fin. Cos., 116 Ga. App. 503, 157 S.E.2d 767 (1967).

Day of entry of decision. — When trial court's denial of the appellant's motion for judgment notwithstanding the verdict was filed the same day the appellant filed the appellant's notice of appeal, an appeal was timely. Bank of Tenn. v. Rochester, 165 Ga. App. 1, 299 S.E.2d 109 (1983).

Notice timely if filed within 30 days of entry of order. — So long as the notice of appeal is filed within 30 days following the entry of the order granting, overruling, or otherwise finally disposing of the motion for new trial, the appeal is timely. Phelps v. State, 158 Ga. App. 219, 279 S.E.2d 513 (1981); Jessup v. Newman, 191 Ga. App. 772, 383 S.E.2d 136, cert. denied, 191 Ga. App. 922, 383 S.E.2d 136 (1989).

Notice of appeal of order denying motions for directed verdict and judgment notwithstanding the verdict was timely. — Commercial vehicle liability insurer's notice of appeal of an order denying the insurer's motion for directed verdict and judgment notwithstanding the verdict was timely under O.C.G.A. §§ 5-6-38 and 9-11-50(b) because the notice of appeal was filed within 30 days of the trial court's order on the insurer's motion for judgment notwithstanding the verdict, which the insurer filed within 30 days of the entry of the judgment. Infinity Gen. Ins. Co. v. Litton, 308 Ga. App. 497, 707 S.E.2d 885 (2011), cert. denied, No. S11C1110, 2011 Ga. LEXIS 580 (Ga. 2011).

When application unnecessarily filed pursuant to § 5-6-35. — When the custodial parent in a child custody habeas corpus proceeding unnecessarily files an application for appeal in accordance with O.C.G.A. § 5-6-35, and the Supreme Court grants the application, and a notice of appeal then is timely filed, the Supreme Court has jurisdiction of the appeal even though no notice of appeal was filed in accordance with O.C.G.A. § 5-6-38 within 30 days from entry of judgment in the trial court. Wright v. Hanson, 248 Ga. 523, 283 S.E.2d 882 (1981).

Obvious error in notice of appeal. — As it was clear that the appellant was appealing the entry of judgment in favor of the appellee, the notice of appeal was deemed filed within 30 days of the entry of judgment, despite the fact that the notice erroneously stated that it was from the prior directed verdict. Horton v. Allstate Ins. Co., 171 Ga. App. 707, 320 S.E.2d 761 (1984), overruled on other grounds, Carter v. Banks, 254 Ga. 550, 330 S.E.2d 866 (1985).

Improper dismissal of an appeal from an order granting a motion for directed verdict occurred when, even though the notice of appeal was technically defective, final judgment had been rendered in the case and the notice of appeal was sufficient to notify the opposing party that an appeal was being taken. Steele v. Cincinnati Ins. Co., 252 Ga. 58, 311 S.E.2d 470 (1984).

Double extensions a nullity. — Since neither the trial court nor the Court of Appeals has jurisdiction to grant more than one extension, or any extension of more than 30 days for the filing of a notice of appeal, the trial court's two extensions purporting to extend the filing time for more than 30 days were a nullity. Gibson v. State, 207 Ga. App. 491, 428 S.E.2d 421 (1993).

Pro se filings. — Because all but three of a pro se defendant's notices of appeal were untimely, under O.C.G.A. § 5-6-38(a), the appellate court declined to consider the appeal. Owens v. State, 258 Ga. App. 647, 575 S.E.2d 14 (2002).

Defendant was not responsible for the defendant's failure to timely appeal since the trial court failed to advise the defendant of the defendant's right to counsel for purposes of filing a motion to withdraw

Filing (Cont'd)
1. In General (Cont'd)

the defendant's guilty plea or that the defendant could appeal the denial of the defendant's motion directly. Murray v. State, 265 Ga. App. 119, 592 S.E.2d 898 (2004).

Mother's challenge to deprivation order. — Because a mother's challenge to the unappealed February 11, 2004 deprivation order was brought on April 29, 2004, as part of a timely appeal from the April 21, 2004 disposition order entered in the same deprivation proceeding; motions filed by the Department of Children and Family Services requesting that the mother's appeals be dismissed were denied. In the Interest of S.P., 282 Ga. App. 82, 637 S.E.2d 802 (2006).

Transcript production appeal was untimely. — Defendant's appeal of the denial of the defendant's post-conviction motion requesting production of a trial transcript at government expense was dismissed as untimely. Coles v. State, 223 Ga. App. 491, 477 S.E.2d 897 (1996).

Time of appeal in mandamus action. — Because a prisoner's early petition for judicial review of the denial of parole was treated as a petition for a writ of mandamus, and using the starting date from the second denial of parole, the prisoner's habeas petition was timely filed under 28 U.S.C. § 2244(d) in that the petition was filed within ten days of the denial of mandamus under O.C.G.A. § 5-6-38 and within the one year period. Day v. Hall, 528 F.3d 1315 (11th Cir. 2008).

2. Running of Time for Filing

Filing of judgment, not its entry on docket starts running. — It is filing of judgment, signed by the judge, with clerk which starts running of applicable 30-day limit and not clerk's subsequent entry on docket. Lewis & Sheron Enterprises, Inc. v. Great A & P Tea Co., 136 Ga. App. 910, 222 S.E.2d 659 (1975).

Judgment must be signed and filed for notice of appeal time to begin running. — O.C.G.A. § 5-6-31 plainly provides that the filing with the clerk of a judgment, signed by the judge, constitutes the entry of a judgment within the meaning of the Appellate Practice Act, and as a result the 30-day limit under O.C.G.A. § 5-6-38(a) for filing a notice of appeal does not begin to run until a judgment, signed by the judge, is filed with the clerk; to the extent that Ross v. State, 259 Ga. App. 246 (2003) holds otherwise, it is hereby overruled. Rocha v. State, 287 Ga. App. 446, 651 S.E.2d 781 (2007).

Notice to party of entry of judgment is not prerequisite to commencement of 30-day period during which appeal must be filed. Alexander v. Blackmon, 129 Ga. App. 214, 199 S.E.2d 376 (1973).

Effect of notice of entry. — Counsel are not entitled to notice of entry of judgment to start 30-day period running. Cranman Ins. Agency, Inc. v. Wilson Marine Sales & Serv., Inc., 147 Ga. App. 590, 249 S.E.2d 631 (1978).

When judgment is set aside and reentered. — When no notice of entry of judgment was sent by the trial court or by the clerk to the losing party, as required by Code 1933, §§ 24-2620, 24-2621 (see O.C.G.A. § 15-6-21), action may be brought under Ga. L. 1974, p. 1138, § 1 (see O.C.G.A. § 9-11-60(g)) to set aside earlier judgment; upon granting of such motion to set aside and reentry of judgment, 30-day period within which losing party must appeal will begin to run from date of reentry. Cambron v. Canal Ins. Co., 246 Ga. 147, 269 S.E.2d 426 (1980); Fremichael v. Doe, 221 Ga. App. 698, 472 S.E.2d 440 (1996).

When 30th day falls on Saturday. — When 30th day from entering of judgment fell on Saturday, under former Code 1933, § 102-102 (see O.C.G.A. § 1-3-1(d)(3)), notice of appeal could be filed on the following Monday. Thomas v. Allstate Ins. Co., 133 Ga. App. 193, 210 S.E.2d 361 (1974), rev'd on other grounds, Culwell v. Lomas & Nettleton Co., 242 Ga. 242, 248 S.E.2d 641 (1978).

When a defendant voluntarily abandons the defendant's motion for a new trial and, therefore, no order was entered granting, overruling, or otherwise finally disposing of the motion, notice of appeal must still be filed within 30 days after entry of an appealable judgment. Taylor v. State, 173 Ga. App. 745, 327 S.E.2d 860 (1985).

Unconditional withdrawal of the new trial motion, by filing of a written order of the court, starts anew the running of the statutory 30-day period of subsection (a) of O.C.G.A. § 5-6-38 in which the appellant can timely file a notice of appeal. Ailion v. Wade, 190 Ga. App. 151, 378 S.E.2d 507 (1989).

Deadline not extended by motion to vacate summary judgment. — Party's motion to vacate a grant of summary judgment for the opposing party did nothing to extend the deadline for filing a notice of appeal from the order granting the summary judgment. Thompson v. GMAC, 194 Ga. App. 526, 391 S.E.2d 2 (1990).

Nunc pro tunc entry. — Under O.C.G.A. §§ 5-6-31 and 5-6-38(a), the 30-day time period for filing a notice of appeal did not begin to run until a judgment, signed by the judge, was filed with the clerk; thus, a defendant's appeal was timely, as the 30 days did not begin to run on the nunc pro tunc date, but on the date the signed judgment was filed. Rocha v. State, 287 Ga. App. 446, 651 S.E.2d 781 (2007).

While a nunc pro tunc entry does not extend the statutory period for filing a notice of appeal, case law does not stand for the proposition that a nunc pro tunc entry can shorten the statutory period for filing a notice of appeal provided in O.C.G.A. § 5-6-38(a), which begins to run when judgment is entered in accordance with O.C.G.A. § 5-6-31. Rocha v. State, 287 Ga. App. 446, 651 S.E.2d 781 (2007).

Pro se appellant did not have time extension. — Court could not put patient, acting pro se, on a different standard from that of the physician represented by counsel, and when the patient submitted a letter to the court, and erroneously thought the patient had been given an extension of time to file a notice of appeal (as opposed to the hearing transcript), the court properly dismissed the patient's appeal, filed well after the 30 day deadline, as untimely. Campbell v. McLarnon, 265 Ga. App. 87, 593 S.E.2d 21 (2003).

Forfeiture order. — In a civil forfeiture proceeding, the state's motion to dismiss a claimant's appeal was denied since the claimant's notice of appeal was timely filed within 30 days following the entry of the order of distribution. Weaver v. State, 299 Ga. App. 718, 683 S.E.2d 361 (2009), cert. denied, No. S10C0024, 2010 Ga. LEXIS 128 (Ga. 2010).

3. Premature Filing

Appeal from judgment while case is pending on motion for new trial is premature and will be dismissed. Smith v. Smith, 128 Ga. App. 29, 195 S.E.2d 269 (1973).

Notice of appeal from judgment filed while motion for new trial is pending is premature and of no validity. Moody v. Moody, 141 Ga. App. 185, 233 S.E.2d 385 (1977); Strauss v. Peachtree Assocs., 156 Ga. App. 536, 275 S.E.2d 90 (1980).

Premature filing of a notice of appeal from denial of a motion for a new trial was treated as effectively filed upon entry of the order denying the motion; overruling Staton v. State, 219 Ga. App. 316, 464 S.E.2d 888 (1995). Livingston v. State, 221 Ga. App. 563, 472 S.E.2d 317 (1996).

Appeal filed while motion for new trial or for judgment n.o.v. remain pending. — Notice of appeal is prematurely filed when motion for new trial or motion for judgment n.o.v. or both motions remain undisposed of by trial court and appeal must be dismissed; this is true even when both motions are filed pursuant to Ga. L. 1967, p. 226, §§ 22, 43, 48 (see O.C.G.A. § 9-11-50(b)) and one is denied and the other remains pending. Pirkle v. Triplett, 153 Ga. App. 524, 265 S.E.2d 854 (1980).

Effect of denial of new trial motion. — Disposition of the motion for new trial obviated all need for an out-of-time appeal, since the defendant had 30 days after entry of that judgment in which to file an ordinary appeal. Nevertheless, while the denial of the new trial motion was the demise of the notice of appeal, filed earlier, as an out-of-time appeal, it served to vitalize it as a timely appeal. As a premature notice of appeal it became effective upon entry of a final judgment. Shirley v. State, 188 Ga. App. 357, 373 S.E.2d 257 (1988).

Service of notice by mail prior to filing of original. — It is no ground for

Filing (Cont'd)
3. Premature Filing (Cont'd)

dismissal of appeal that service of notice of appeal was made by mail three days before original was filed, or that order was in first instance erroneously dated. Fidelity & Cas. Co. v. Whitehead, 117 Ga. App. 200, 160 S.E.2d 241 (1968).

Premature notice of appeal when no prejudice will result. — If notice of appeal is sufficient to advise opposing party that appeal is being taken from specific judgment, and if no prejudice will result to appellee in allowing appeal, then an appeal should not be dismissed merely because the notice is premature. Kenerly v. Yancey, 144 Ga. App. 295, 241 S.E.2d 28 (1977).

When premature notice of appeal not dismissed, subsequent notice will be dismissed. — When premature notice of appeal, which was filed before judgment was entered, was not subject to dismissal, subsequently filed notice of appeal was dismissed as redundant. Elwell v. Nesmith, 246 Ga. 430, 271 S.E.2d 827 (1980).

Withdrawal of initial notice of appeal until disposition of codefendant's new-trial motion. — Defendant did not act improperly when the defendant withdrew the defendant's initial notice of appeal and did not file another until after the disposition of the codefendant tortfeasor's motion for new trial; defendant's notice of appeal, filed within 30 days of the denial of her codefendant's motion for new trial, was therefore timely. Denson v. Kloack, 177 Ga. App. 483, 339 S.E.2d 761 (1986).

4. Late Filing

Notice filed 31 days after rendition of judgment is too late. — When judgment appealed from is final, notice of appeal filed 31 days after rendition of judgment is too late and the Court of Appeals is without jurisdiction to entertain appeal. Hull v. Campbell, 130 Ga. App. 637, 204 S.E.2d 312 (1974).

When notice of appeal was filed only one day late, court was powerless to deny motion to dismiss filed by appellee. Associated Bldrs. Supply v. Georgia-Pacific Corp., 123 Ga. App. 222, 180 S.E.2d 273 (1971).

When an order was entered on January 13 and a notice of appeal was filed on February 13, the notice of appeal was not timely as there was no proper extension of time. Patel v. Georgia Power Co., 234 Ga. App. 141, 505 S.E.2d 787 (1998).

Notice of appeal filed after expiration of 30-day filing requirement. — When the defendant's notice of appeal (from an order entered in the county superior court on October 12, 1988) although dated November 9, 1988, was not filed with the clerk of the county superior court until November 21, the appeal is therefore untimely and must be dismissed. Howard v. Wilkes, 191 Ga. App. 239, 382 S.E.2d 434 (1989).

Notice of appeal filed within 30 days of the filing of an order allowing an out-of-time appeal is timely. Davis v. State, 192 Ga. App. 47, 383 S.E.2d 615 (1989).

Notice not amendable in appellate court nor in trial court after expiration of time for filing. — Notice is not amendable in Court of Appeals nor is the notice amendable in the trial court after expiration of the time for filing prescribed by section. Teppenpaw v. Blalock, 121 Ga. App. 320, 173 S.E.2d 442, aff'd, 226 Ga. 619, 176 S.E.2d 711 (1970).

Application for extension must be within 30-day period. — Trial court has no jurisdiction to grant extension of time for filing notice of appeal when application for an extension is not made before expiration of 30-day period prescribed by section. Morris v. State, 115 Ga. App. 715, 155 S.E.2d 735 (1967).

Effect of vacating order denying motion for new trial. — Although the case became ripe for appeal when the trial court denied the motion for new trial, an appeal was timely when the trial court vacated the court's order denying the motion for new trial. Animashaun v. State, 216 Ga. App. 104, 453 S.E.2d 126 (1995).

Vacating judgment and entering new one to give appellant additional time. — After appeal is dismissed for untimely filing of notice of appeal, although allegedly caused by repeated misstatements of clerk, the trial court may

not vacate the court's original judgment and enter a new one in order to give the appellant an opportunity to enter a fresh appeal. Cranman Ins. Agency, Inc. v. Wilson Marine Sales & Serv., Inc., 147 Ga. App. 590, 249 S.E.2d 631 (1978).

Effect of voluntary dismissal after 30-day period. — Trial court cannot reinstate notice of appeal after plaintiffs have voluntarily dismissed appeal after 30-day period during which appeal is allowed by this section. Albert v. Bryan, 150 Ga. App. 649, 258 S.E.2d 300 (1979).

Grant of out-of-time appeals in criminal cases. — Out-of-time appeals are granted when the defendant in a criminal case is not advised of the right of appeal or defense counsel fails to appeal. Birt v. Hopper, 245 Ga. 221, 265 S.E.2d 276 (1980), cert. denied, 449 U.S. 855, 101 S. Ct. 150, 66 L. Ed. 2d 68 (1980).

State of Georgia recognizes the right to effective assistance of counsel at trial and on first appeal as of right and has provided for ameliorative relief in the form of an out-of-time appeal. An appellant who is denied effective assistance of counsel in attempting to appeal the appellant's conviction shall be allowed, if the appellant so desires, to file an out of time appeal to the proper appellate court. Brantley v. State, 190 Ga. App. 642, 379 S.E.2d 627 (1989).

When dismissal of a represented criminal defendant's appeal was appropriate and constitutionally permissible, because it was not timely filed by counsel, the defendant would be entitled to make application for an out-of-time appeal. Rowland v. State, 264 Ga. 872, 452 S.E.2d 756 (1995).

Defendant's motion for an out of time appeal was the functional equivalent of a timely notice of appeal and was treated as such when the document: (1) was filed within the 30-day time limit of O.C.G.A. § 5-6-38 for filing a notice of appeal since the notice was filed within 30 days of the filing date of the order which denied the defendant's motion for a new trial; (2) was served upon the state; and (3) undeniably evinced the defendant's intention to seek appellate review of the denial of the motion for a new trial and gave notice to the state of that intent. Cain v. State, 275 Ga. 784, 573 S.E.2d 46 (2002).

Out-of-time appeal is occasionally appropriate when, due to ineffective assistance of counsel, no appeal has been taken. But an appeal will lie from a judgment entered on a guilty plea only if the issue on appeal can be resolved by facts appearing in the record. Smith v. State, 268 Ga. App. 748, 602 S.E.2d 839 (2004).

While the Court of Appeals of Georgia initially stated that the defendant's appeal was subject to dismissal based on a failure to timely file a notice of appeal from the trial court's order denying an out-of-time motion for a new trial and for other relief, as required by O.C.G.A. § 5-6-38, the Appeals Court proceeded to address the defendant's claims in the interest of finality and to avert a claim of ineffective assistance of counsel because the court granted the defendant's application for a discretionary appeal. Segura v. State, 280 Ga. App. 685, 634 S.E.2d 858 (2006).

Defendant's reliance upon O.C.G.A. § 17-10-1(f) and a claim of ineffective assistance of counsel were unavailing as a basis for an out-of-time appeal under O.C.G.A. § 5-6-38(a) because the defendant failed to show entitlement to a hearing on the defendant's motion for reconsideration, and no order correcting, reducing, or modifying any sentence imposed upon the defendant had been entered. LaBrew v. State, 315 Ga. App. 865, 729 S.E.2d 33 (2012).

Motion to review or reconsider filed after 30 days. — When the appellant does not file a motion to review or reconsider until well after the 30 days allowed for notice of appeal, the appeal is not properly and timely filed so as to invoke the jurisdiction of the appellate court, and the appeal must be dismissed. Stonecypher v. State, 168 Ga. App. 507, 308 S.E.2d 639 (1983).

Dismissal for late filing. — Defendant's pro se motion appealing the denial of the defendant's motion for an out-of-time appeal and/or extraordinary motion for new trial was properly dismissed for untimeliness when the defendant waited until three months after the defendant's conviction to appeal, the defendant's appeal was not properly designated, and failed to enumerate any error

Filing (Cont'd)
4. Late Filing (Cont'd)

relating to the trial. Davis v. State, 233 Ga. App. 825, 505 S.E.2d 801 (1998).

Judgment complained of by parents was a trial court's finding that the parents' children were deprived pursuant to O.C.G.A. § 15-11-2(8)(A), and not a later order ruling that the case was closed; the parents' notice of appeal filed more than three months after the order finding deprivation was untimely, and the appeal was dismissed. In the Interest of I.S., 265 Ga. App. 759, 595 S.E.2d 528 (2004).

Because a lessee's notice of appeal was filed nearly a year after a superior court's order was entered, it was untimely and thus dismissed. Masters v. Clark, 269 Ga. App. 537, 604 S.E.2d 556 (2004), appeal dismissed, Clark v. Masters, 297 Ga. App. 794, 678 S.E.2d 538 (2009).

Because a litigant's appeal was untimely filed, despite evidence of mistaken delivery beyond the litigant's control, the superior court properly held that the court lacked discretion to find otherwise; thus, the court did not err in dismissing the appeal. Register v. Elliott, 285 Ga. App. 741, 647 S.E.2d 406 (2007).

Motion to dismiss an appeal on grounds that the appealing party failed to timely appeal an order granting summary judgment pursuant to O.C.G.A. § 5-6-38(a) was granted; moreover, the appeal was not taken from the final judgment entered in the case. Patterson v. Bristol Timber Co., 286 Ga. App. 423, 649 S.E.2d 795 (2007).

In a breach of contract action, a corporation's appeal of a default judgment entered against the corporation was dismissed as untimely as the notice of appeal was to have been filed within 30 days of the entry of the default judgment, but the corporation did not file an appeal until seven months later. GMC Group, Inc. v. Harsco Corp., 293 Ga. App. 707, 667 S.E.2d 916 (2008).

Time for filing expired. — It was not an abuse of discretion to deny the defendant's motion for a new trial, requested to facilitate the defendant's efforts to become a naturalized citizen, because the trial court considered that the defendant's sentence for giving a false name to an officer had long since been served, that six years had passed since sentencing, and that the sentence was within the statutory guidelines for misdemeanors; claims the defendant's guilty plea was not voluntary were of no avail as the defendant failed to move to withdraw the plea or to appeal and the times for doing so had expired. Elias v. State, 272 Ga. App. 506, 613 S.E.2d 157 (2005).

Failure of state to file cross-appeal. — When an inmate appealed a habeas court's original order granting the inmate a new appeal in the inmate's criminal case, and the state failed to file a cross-appeal from that original order, the state was not allowed to pursue an appeal of the habeas court's later order on remand granting the inmate a new trial; the merits of the issue were reached and resolved in the habeas court's earlier final order, and the state's attempt to challenge those merits in the instant appeal was untimely. Stewart v. Milliken, 277 Ga. 659, 593 S.E.2d 344 (2004).

Ineffective assistance of counsel. — Out-of-time appeal was appropriate when, as the result of ineffective assistance of counsel, a timely direct appeal was not taken, and the movant for an out-of-time appeal needed to establish a good and sufficient reason entitling the movant to such an appeal; the defendant's motion for an out-of-time appeal was properly denied when the defendant claimed that the defendant's trial counsel did not provide the defendant with a copy of the plea hearing transcript, but also stated that the defendant first tried to obtain a copy of the transcript nearly eight months after the defendant's guilty plea and conviction, well after the time for a direct appeal had passed. Pearson v. State, 265 Ga. App. 574, 594 S.E.2d 769 (2004).

Motion for out-of-time appeal denied. — Denial of the defendant's motion for an out-of-time appeal from the defendant's conviction and sentence after the entry of a guilty plea was not an abuse of discretion. Defendant's claims that the defendant received ineffective assistance of counsel did not show that defense counsel's conduct frustrated the defendant's right to appeal, the defendant did not

have an unqualified right to appeal after the entry of a guilty plea, defendant failed to show how the trial court deviated from the negotiated plea as the record showed that the sentence matched the recommendation, and the defendant was not entitled to expand the record in an attempt to meet the defendant's burden for an out-of-time appeal. Jackson v. State, 266 Ga. App. 461, 597 S.E.2d 535 (2004).

Trial court properly denied a defendant's motion for an out-of-time direct appeal after the defendant plead guilty. The defendant had not shown that the issues raised could be decided upon facts appearing in the record and did not contend that ineffectiveness of counsel frustrated the defendant's right to file a timely direct appeal; rather, the defendant asserted that counsel failed to investigate, failed to object to the sufficiency of the accusation, failed to personally negotiate the plea agreement, and failed to file a material document. Smith v. State, 291 Ga. App. 459, 662 S.E.2d 253 (2008).

Defendant's pro se motion for an out-of-time direct appeal was properly denied because the defendant's claims were meritless. A plea petition and a transcript showed that the defendant's guilty plea was knowing, intelligent, and voluntary, and by not objecting to the failure to be placed under oath at the guilty plea hearing, the defendant waived the requirement of an oath. Sweeting v. State, 291 Ga. App. 693, 662 S.E.2d 785 (2008).

Trial court properly denied a defendant's motion for an out-of-time appeal. Based on a plea acknowledgment form, counsel's certification, and the plea colloquy, there was no merit to the defendant's claims that the defendant had not been informed of the nature of the charges and that the trial court failed to establish a factual basis for the defendant's guilty plea. Colbert v. State, 284 Ga. 81, 663 S.E.2d 158 (2008).

Trial court properly denied a defendant's motion for an out-of-time appeal. The defendant clearly stated the defendant's desire to discontinue the services of trial counsel and accept punishment; in addition, although counsel informed the defendant of the appeal deadline after giving the defendant notice of counsel's intent to withdraw, the defendant waited 18 years before seeking an out-of-time appeal. Duncan v. State, 297 Ga. App. 499, 677 S.E.2d 691 (2009).

Notice of appeal filed within 30 days of order of distribution of damages, which is incidental to and does not affect the validity of the prior judgment, but beyond 30 days after the entry of judgment, cannot invoke the jurisdiction of this court and therefore must be dismissed. Duke v. Metropolitan Atlanta Rapid Transit Auth., 166 Ga. App. 773, 305 S.E.2d 404 (1983).

Momentary incapacity of attorney. — Contention that the defendant was denied effective assistance of counsel when the defendant entered the defendant's guilty plea because the defendant's attorney suffered from laryngitis was not a sufficient reason for granting an out-of-time appeal, there being no claim of substantive or technical ineffectiveness on the part of counsel. Holbrook v. State, 171 Ga. App. 449, 320 S.E.2d 637 (1984).

Effect of attorney's incompetency in filing. — Although the defendant alleged in the defendant's motion for an out-of-time appeal that the defendant asked trial counsel to file an appeal from the defendant's criminal convictions and the defendant's trial counsel performed inadequately by failing to do so, the trial court did not err in denying the defendant's motion as the defendant was also required to allege, but did not allege, the issues that the defendant would have raised if the out-of-time appeal were granted and that those issues could be resolved by reference to the facts in the record. White v. State, 261 Ga. App. 866, 584 S.E.2d 5 (2003).

Opposing counsel's consent to late filing. — Without proper and timely filing of notice of appeal, dismissal is required in spite of the fact of consent given by opposing counsel to the late appeal, as parties may not give jurisdiction to a court by consent, express or implied, as to the person or subject matter of an action. Clark v. State, 182 Ga. App. 752, 357 S.E.2d 109 (1987).

Motion in arrest of judgment did not toll appeal time. — Defendant's motion in arrest of judgment did not toll

Filing (Cont'd)
4. Late Filing (Cont'd)

the time for filing an appeal of the defendant's conviction under O.C.G.A. § 5-6-38(a) as the appeal was filed after the term of the trial court in which the defendant was convicted and was untimely under O.C.G.A. § 17-9-61(b); the fact that the trial court was late in sending the defendant written notice of its ruling on the motion in arrest of judgment did not deny the defendant the right to appeal the conviction, which was lost years earlier when the motion in arrest of judgment was untimely filed. Smith v. State, 263 Ga. App. 414, 587 S.E.2d 787 (2003).

Court reporter delayed filing transcript. — Appeal was timely as the notice of appeal was filed within 30 days after entry of an appealable judgment as required by O.C.G.A. § 5-6-38(a); although the court reporter inexplicably did not file the transcript with the court until two years later, the defendant did not cause an unreasonable and inexcusable delay in filing the appeal. Johnson v. State, 259 Ga. App. 452, 576 S.E.2d 911 (2003).

State prisoner should have been aware of alleged civil rights claims against a court reporter and clerk prior to the dismissal of untimely habeas petition because the prisoner had one year and 30 days from the time the conviction became final under O.C.G.A. § 5-6-38(a) and 28 U.S.C. § 2244(d)(1) to file a habeas petition and the prisoner should have known sometime within the three years until the court received the record that the prisoner's right to file a habeas petition had been compromised. Further, the prisoner waited more than two years after the court received the record to file the civil rights claims. Salas v. Pierce, No. 08-11129, 2008 U.S. App. LEXIS 22075 (11th Cir. Oct. 23, 2008) (Unpublished).

Automatic Extension of Time for Filing

1. In General

Section limits motions that extend filing date for notice of appeal to motions for new trial, motions in arrest of judgment, or motions notwithstanding verdict. Donnelly v. Stynchcombe, 246 Ga. 118, 269 S.E.2d 10 (1980); Parker v. State, 156 Ga. App. 299, 274 S.E.2d 694 (1980).

No automatic extension except as specifically provided. — Date for filing notice of appeal is not automatically extended by proceedings following final judgment except in those instances specifically set forth. This section contains no provision which would permit time for filing notice of appeal to be extended further by filing motion for rehearing after motion for new trial has been overruled when judgment overruling motion is not vacated. Hogan v. State, 118 Ga. App. 398, 163 S.E.2d 889 (1968). (But see Johnson v. Barnes, 237 Ga. 502, 229 S.E.2d 70 (1976)).

Appeal is not timely when motion on which the appeal is based is not included among motions enumerated in this section, which automatically extend filing date for notice of appeal. Robinson v. Carswell, 147 Ga. App. 521, 249 S.E.2d 331 (1978). (But see Johnson v. Barnes, 237 Ga. 502, 229 S.E.2d 70 (1976)).

"Has been filed," regarding a delaying motion, means filed within 30 days after entry of judgment. Smith v. Forrester, 145 Ga. App. 281, 243 S.E.2d 575 (1978); Mayo v. State, 148 Ga. App. 213, 251 S.E.2d 80 (1978).

Reaffirmance of dismissal of counterclaims does not extend time for filing. — When the time for filing the notice of appeal runs from the date of the voluntary dismissal of the appellees' counterclaims, the trial court is powerless to extend the time by entering a subsequent order reaffirming the dismissal of the complaint, even had the court intended to do so. Caswell v. Caswell, 157 Ga. App. 710, 278 S.E.2d 452 (1981).

2. What Motions Extend Time for Filing

Motion to set aside judgment. — There is at least one motion not enumerated in subsection (a) which has effect of extending time for filing notice of appeal, to wit: a motion to set aside judgment. Johnson v. Barnes, 237 Ga. 502, 229 S.E.2d 70 (1976). (But see MMT Enters.,

Inc. v. Cullars, 218 Ga. App. 559, 462 S.E.2d 771 (1995)).

Motion to set aside, even though based on a nonamendable defect and/or lack of jurisdiction, cannot extend the time for filing a notice of appeal. MMT Enters., Inc. v. Cullars, 218 Ga. App. 559, 462 S.E.2d 771 (1995).

Pendency of motion for new trial extends time for filing a notice of appeal. Hughes v. Newell, 152 Ga. App. 618, 263 S.E.2d 505 (1979).

Motion to dismiss appeal on ground that notice of appeal was filed more than 30 days after judgment of conviction was without merit, when intervening time was tolled by motion for new trial, the judgment denying which was filed 29 days prior to filing of notice of appeal. Reed v. State, 163 Ga. App. 364, 295 S.E.2d 108 (1982).

Motion for new trial must be timely filed to toll time. — When purported motion for new trial was not filed within 30 days as required by former Code 1933, § 70-301 (see O.C.G.A. § 5-5-40), it was thus void and of no effect, and therefore did not toll time for filing notice of appeal under Ga. L. 1968, p. 1072, § 7. Johnson v. State, 227 Ga. 219, 180 S.E.2d 94 (1971).

An untimely motion for new trial is void and does not operate to toll the time for filing of the notice of appeal. Wright v. Rhodes, 198 Ga. App. 269, 401 S.E.2d 35 (1990).

Motions for modification of sentence and to correct a void and illegal sentence did not toll or extend the time for appeal. Syms v. State, 232 Ga. App. 724, 502 S.E.2d 741 (1998).

Application for new trial is made only by filing motion for new trial. Smith v. Forrester, 145 Ga. App. 281, 243 S.E.2d 575, cert. denied, 439 U.S. 863, 99 S. Ct. 185, 58 L. Ed. 2d 172 (1978).

"Arrest of judgment" refers to criminal appeals. — Exclusive method by which civil judgments may be attacked is set forth in O.C.G.A. § 9-11-60 and an arrest of judgment is not enumerated therein. Thus, even though O.C.G.A. § 5-6-38 lists "arrest of judgment" as one of the motions which extends the time for filing a notice of appeal, it apparently refers to criminal appeals. Daniels v. McRae, 180 Ga. App. 732, 350 S.E.2d 317 (1986).

Motion to amend findings of fact and conclusions of law is not a motion which extends the time for filing a notice of appeal in a civil case. American Flat Glass Distribs., Inc. v. Michael, 260 Ga. 312, 392 S.E.2d 855 (1990).

Petition to set aside probate court determination. — Claimant's "petition to set aside" a probate court determination that she was not the widow of the decedent was properly treated as a motion for new trial, which tolled the time for appeal to the superior court. Reid v. Reid, 201 Ga. App. 530, 411 S.E.2d 754 (1991).

3. When Time for Filing Not Extended

Motion for reconsideration is not one of the three statutory motions which extend time for filing of notice of appeal. Ellis v. Continental Ins. Co., 141 Ga. App. 809, 234 S.E.2d 377 (1977); Lawler v. Georgia Mut. Ins. Co., 156 Ga. App. 265, 276 S.E.2d 646 (1980); Hunter v. Big Canoe Corp., 162 Ga. App. 629, 291 S.E.2d 726 (1982); Littlejohn v. Tower Assocs., 163 Ga. App. 37, 293 S.E.2d 33 (1982), overruled on other grounds, MMT Enters., Inc. v. Cullars, 218 Ga. App. 559, 462 S.E.2d 771 (1995); Rockdale County v. Water Rights Comm., Inc., 189 Ga. App. 873, 377 S.E.2d 730 (1989).

Motion for reconsideration of order denying summary judgment is not included among those motions enumerated in section which automatically extend filing date for notice of appeal. Adamson v. Adamson, 226 Ga. 719, 177 S.E.2d 241 (1970); Bernath Barrel & Drum Co. v. Ostrum Boiler Serv., Inc., 131 Ga. App. 140, 205 S.E.2d 459 (1974); Presley v. Greene, 137 Ga. App. 788, 225 S.E.2d 60 (1976); Powell v. Darby Bank & Trust Co., 163 Ga. App. 524, 295 S.E.2d 222 (1982).

Motion for reconsideration of order granting summary judgment and dismissing the counterclaim, both final and appealable judgments, is not included among those motions enumerated in this section, which automatically extend filing date for notice of appeal. Fowler v. Lewis, 150 Ga. App. 174, 257 S.E.2d 21 (1979);

Automatic Extension of Time for Filing (Cont'd)
3. When Time for Filing Not Extended (Cont'd)

Peppers House Restaurant, Inc. v. Siefferman, 156 Ga. App. 114, 274 S.E.2d 43 (1980); Morton v. Morton, 163 Ga. App. 830, 296 S.E.2d 362 (1982).

Motion for reconsideration does not extend the time for filing a notice of appeal. Becker v. Fairman, 167 Ga. App. 708, 307 S.E.2d 520 (1983); Guthrie v. D.L. Claborn Buick/Opel, Inc., 180 Ga. App. 128, 348 S.E.2d 523 (1986).

Denial of a motion which does not purport to be based either on a nonamendable defect or on a lack of jurisdiction but is simply a request for the trial court to reconsider the court's decision, is not appealable in the motion's own right pursuant to O.C.G.A. § 9-11-60(d), and the filing of such a motion does not extend the time for filing a notice of appeal. Dougherty County v. Burt, 168 Ga. App. 166, 308 S.E.2d 395 (1983).

When the mother's parental rights were terminated by order of the juvenile court, her motion for reconsideration, based solely on sufficiency of the evidence, did not extend the time for filing a notice of appeal and it could not be regarded as a reason to vacate or modify the judgment of the court. In re A.C.J., 211 Ga. App. 865, 440 S.E.2d 751 (1994).

Motion to amend judgment. — Appeal from a motion to amend judgment of a probate court is not a final judgment and thus, is not an appealable decision within the meaning of O.C.G.A. § 5-3-2(a). Nor will such a motion extend the date for filing a notice of appeal under the plain and literal language of O.C.G.A. § 5-3-20(a). Jabaley v. Jabaley, 208 Ga. App. 179, 430 S.E.2d 119 (1993).

Motion to withdraw findings of fact and conclusions of law. — W.T.A. Assocs. v. Beamon, 141 Ga. App. 25, 232 S.E.2d 373 (1977).

Motion for a new trial as to grant of summary judgment. — Motion for new trial is not proper vehicle for obtaining re-examination of grant of summary judgment and motion so filed has no validity and will not extend filing date of notice of appeal. Shine v. Sportservice Corp., 140 Ga. App. 355, 231 S.E.2d 130 (1976); Moore v. First Nat'l Bank, 148 Ga. App. 631, 252 S.E.2d 60 (1979).

Time not extended when motion for new trial not proper. — When new-trial motion is not proper vehicle for review of the trial court's action, the motion has no validity and will not extend the time for filing the notice of appeal. Pillow v. Seymour, 255 Ga. 683, 341 S.E.2d 447 (1986).

Motion for new trial. — When new-trial motion is not proper vehicle for review of the trial court's action, the motion has no validity and will not extend the time for filing the notice of appeal. Pillow v. Seymour, 255 Ga. 683, 341 S.E.2d 447 (1986).

Motion for new trial that was not filed within 30 days as required by O.C.G.A. § 5-5-40 was void, had no effect and did not toll the time for filing a notice of appeal under O.C.G.A. § 5-6-38. Peters v. State, 237 Ga. App. 625, 516 S.E.2d 331 (1999).

O.C.G.A. § 5-6-38 requires a trial court order granting, denying, or otherwise finally disposing of a party's motion for new trial in order to extend the time for filing a notice of appeal more than 30 days after the entry of judgment; a party's voluntary withdrawal of the party's motion for new trial, standing alone, is not the statutorily required court order finally disposing of the motion for new trial. Heard v. State, 274 Ga. 196, 552 S.E.2d 818 (2001).

Second application for appeal untimely. — Because plaintiff filed a second application for discretionary appeal on June 28, 2010, after withdrawing the plaintiff's motion for new trial, the motion was untimely as the motion was filed 61 days after the entry of the judgment on April 28, 2010; pursuant to O.C.G.A. § 5-6-38, the trial court had to dispose of the motion for new trial to extend the time for filing a notice of appeal. Cooper v. Spotts, 309 Ga. App. 361, 710 S.E.2d 159 (2011).

Improper motion for new trial. — Alleged motion for new trial which did not contest factual issues or errors contributing to the verdict, but instead challenged only the trial court's legal conclusions and judgment, was not a proper motion for

new trial and did not entitle party an automatic stay in filing the party's notice of appeal. Bank S. Mtg., Inc. v. Starr, 208 Ga. App. 19, 429 S.E.2d 700 (1993).

Nunc pro tunc entry does not extend the statutory period for filing a notice of appeal. Bowen v. Clayton County Hosp. Auth., 160 Ga. App. 809, 288 S.E.2d 232 (1982).

Motion to set aside. — Although the denial of a motion to set aside is final and appealable, such a motion is not one which will automatically extend the time for a filing notice of appeal on the underlying judgment. Dutton v. Dykes, 159 Ga. App. 48, 283 S.E.2d 28 (1981). (But see Johnson v. Barnes, 237 Ga. 502, 229 S.E.2d 70 (1976)).

When the defendant chose to denominate the defendant's motion as one to vacate and set aside the summary judgment, but the motion was nothing more than a request for a reconsideration of the trial court's summary judgment award, the motion did not extend the time for the filing of a notice of appeal, and therefore the notice of appeal was not timely filed. Perryman v. Georgia Power Co., 180 Ga. App. 259, 348 S.E.2d 762 (1986), overruled on other grounds, MMT Enters., Inc. v. Cullars, 218 Ga. App. 559, 462 S.E.2d 771 (1995).

Motion to set aside the judgment, which was not predicated upon a nonamendable defect or a lack of jurisdiction, did not extend the time for the filing of a notice of appeal. Rockdale County v. Water Rights Comm., Inc., 189 Ga. App. 873, 377 S.E.2d 730 (1989).

Motion to reinstate an action dismissed as a sanction for failure to comply with the trial court's order to answer interrogatories timely cannot be considered as one of the three types of motions which toll the running of the time for appeal from the judgment of dismissal. Daniels v. McRae, 180 Ga. App. 732, 350 S.E.2d 317 (1986).

Motion for rehearing order denying motion coram nobis. — Motion for a rehearing of order denying motion coram nobis and other motions of this type is not one of the three motions which automatically toll 30-day filing period. Allanson v. State, 239 Ga. 154, 236 S.E.2d 348 (1977).

Modification of summary judgment order. — Granting of summary judgment is an appealable order under Ga. L. 1975, p. 757, § 3 (see O.C.G.A. § 9-11-56(h)) and a modification of that order does not automatically extend filing date for notice of appeal under Ga. L. 1968, p. 1072, § 7. Wilson v. Coite Somers Co., 138 Ga. App. 455, 226 S.E.2d 277 (1976).

Demand for jury trial subsequent to judgment of trial court in suit to quiet title cannot be regarded as one of the enumerated ways specified in section to toll 30-day period in which notice of appeal must be filed from final judgment. Thornton v. Reb Properties, Inc., 237 Ga. 59, 226 S.E.2d 741 (1976).

Motion to vacate and set aside final judgment is not a motion included among those motions enumerated in this section. Williams v. Keebler, 222 Ga. 437, 150 S.E.2d 674, answer conformed to 114 Ga. App. 332, 151 S.E.2d 483 (1966); Shannon Co. v. Heneveld, 135 Ga. App. 252, 217 S.E.2d 424, rev'd on other grounds, 238 Ga. 635, 221 S.E.2d 200 (1975); Lawler v. Georgia Mut. Ins. Co., 156 Ga. App. 265, 276 S.E.2d 646 (1980).

Motion to vacate and set aside final judgment does not extend the time for filing a notice of appeal. Law Offices of Johnson & Robinson v. Fortson, 175 Ga. App. 706, 334 S.E.2d 33 (1985), overruled on other grounds, MMT Enters., Inc. v. Cullars, 218 Ga. App. 559, 462 S.E.2d 771 (1995).

Motion to strike a portion of the jury verdict and the judgment is not one of the three statutory motions which extend the time for filing a notice of appeal, and the appellant's failure to follow the procedures for discretionary appeal require the appeal's dismissal. Jones v. Robertson, 191 Ga. App. 537, 382 S.E.2d 382 (1989).

Motion to vacate and/or amend an order of dismissal is not one of the three statutory motions which extend the time of filing of the notice of appeal. Mathis v. Hegwood, 169 Ga. App. 547, 314 S.E.2d 122, cert. denied, 469 U.S. 830, 105 S. Ct. 115, 83 L. Ed. 2d 58 (1984), overruled on other grounds, MMT Enters., Inc. v. Cullars, 218 Ga. App. 559, 462 S.E.2d 771 (1995).

Automatic Extension of Time for Filing (Cont'd)
3. When Time for Filing Not Extended (Cont'd)

Attempt to amend notice of appeal, which was timely as to summary judgment in one case, to incorporate previously unfiled notice of appeal in a companion case was untimely when summary judgment in companion case had been granted 75 days earlier. Newton v. K.B. Property Mgt. of Ga., Inc., 166 Ga. App. 901, 306 S.E.2d 5 (1983).

Lack of notice of entry of judgment does not extend time for filing a notice of appeal. Atlantic-Canadian Corp. v. Hammer, Siler, George Assocs., 167 Ga. App. 257, 306 S.E.2d 22 (1983).

Supersedeas is not among exceptions which automatically extend filing date for notices of appeal. Wilson v. McQueen, 224 Ga. 420, 162 S.E.2d 313 (1968), overruled on other grounds, Austin v. Carter, 248 Ga. 776, 285 S.E.2d 542 (1982).

Jurisdiction of probate court in county without more than 100,000 persons. — Probate court of county that did not have a population of more than 100,000 persons according to either the 1980 or 1990 decennial census lacked authority to entertain a motion for new trial, and any such motion therefore being without legal force and effect before the county probate court, would not serve to extend the time for filing a notice of appeal under either subsection (a) of O.C.G.A. § 5-6-38 or O.C.G.A. § 5-3-20. Jabaley v. Jabaley, 208 Ga. App. 179, 430 S.E.2d 119 (1993).

Construction of "holidays." — Because the plain language of O.C.G.A. § 1-3-1(a) and § 5-6-38(a) make no provisions for extending the filing time for notices of appeal to compensate for county declared holidays and O.C.G.A. § 1-4-2 limits religious holidays to Sundays, Good Friday did not constitute a holiday for purposes of extending the filing date. In re Estate of Dasher, 259 Ga. App. 201, 575 S.E.2d 921 (2002).

Cross Appeals

Cross appeal not required. — Ruling that becomes material to an enumeration of error urged by an appellant may be considered by the appellate court without the necessity of a cross-appeal. Dunn v. Five Star Dodge-Jeep-Eagle-Mazda, Inc., 245 Ga. App. 378, 537 S.E.2d 782 (2000).

Because the trial court had entered an order denying several of the appellee's motions, including summary judgment motions, after the appellants filed their notice of appeal from a contempt order, the appellate court had jurisdiction to consider the appellee's cross-appeal pursuant to O.C.G.A. § 5-6-38(a); the appellee's cross-appeal was preceded by the trial court's denial order and, therefore, it could be considered on appeal. Rhone v. Bolden, 270 Ga. App. 712, 608 S.E.2d 22 (2004).

By appellee. — Appellee may institute a cross-appeal against a party other than an appellant. Centennial Ins. Co. v. Sandner, Inc., 259 Ga. 317, 380 S.E.2d 704 (1989).

Cross appeal need not be grounded upon same ruling as main appeal. — Section expressly declares that appellee may raise all errors or rulings on cross appeal, and it need not be grounded upon same ruling as main appeal. Nager v. Lad'n Dad Slacks, 148 Ga. App. 401, 251 S.E.2d 330 (1978).

Valid appeal must be perfected before cross appeal can be perfected. — Valid appeal from judgment must be perfected in accordance with this article so as to give appellate court jurisdiction, before cross appeal by any other party to case can be perfected so as to give appellate court jurisdiction of cross appeal. Wood v. Atkinson, 229 Ga. 179, 190 S.E.2d 46 (1972); Ewing Holding Corp. v. Egan-Stanley Invs., Inc., 154 Ga. App. 493, 268 S.E.2d 733 (1980).

Cross-appeal to appealable order. — Appeal which, standing alone, would be subject to discretionary appeal procedures, is appealable as a matter of right if the appeal is classifiable as a cross-appeal to an appealable order. Buschel v. Kysor/Warren, 213 Ga. App. 91, 444 S.E.2d 105 (1994).

Independent appeal authorized by O.C.G.A. § 5-6-38 was not the direct appeal to a discovery ruling attempted by a codefendant in a breach of contract action,

but was an application for discretionary review of a timely certified interlocutory discovery order, and failure to properly perfect this appeal resulted in dismissal of the appeal. Reliance Ins. Co. v. Cobb County, 235 Ga. App. 685, 510 S.E.2d 129 (1998).

Cross appeal from nonfinal judgment permissible though main appeal is from judgment disposing of only one party and case remains pending in court below. Garrett v. Heisler, 149 Ga. App. 240, 253 S.E.2d 863 (1979).

Codefendant in a breach of contract action was an "appellee" within the meaning of O.C.G.A. § 5-6-38, and was entitled to file a notice of cross-appeal within 15 days from service of the notice of appeal of a pre-final judgment discovery ruling by the other codefendant. Reliance Ins. Co. v. Cobb County, 235 Ga. App. 685, 510 S.E.2d 129 (1998).

Cross appeal may concern motion to dismiss while main appeal concerns judgment dismissing party. — Ga. L. 1968, p. 1072, § 7 and Ga. L. 1973, p. 303, § 1 (see O.C.G.A. §§ 5-6-37 and 5-6-38) allow appellee to file, as a matter of right, a cross appeal as to the trial court's judgment denying the appellee's motion to dismiss when the appellant appeals the trial court's judgment dismissing another party from the case. Executive Jet Sales, Inc. v. Jet America, Inc., 242 Ga. 307, 248 S.E.2d 676 (1978).

Because challengers who opposed a decision of the Coastal Marshlands Protection Committee granting a permit to a developer failed to comply with O.C.G.A. § 50-13-19(b), the trial court lacked jurisdiction to consider their untimely petition; nevertheless, because the committee and the developer filed timely petitions for review in the trial court, and then appealed to the court of appeals, the challengers' appeals were properly before the court of appeals as cross-appeals filed pursuant to O.C.G.A. § 5-6-38(a). Coastal Marshlands Prot. Comm. v. Ctr. for a Sustainable Coast, 286 Ga. App. 518, 649 S.E.2d 619 (2007), aff'd, 284 Ga. 736, 670 S.E.2d 429 (2008).

Cross-appeal to a cross-appeal is not contemplated by O.C.G.A. § 5-6-38(a). Jones v. White, 311 Ga. App. 822, 717 S.E.2d 322 (2011).

Although entitled a "cross-appeal," when defendant's appeal was actually an attempted independent appeal from the trial court's subsequent award of post-judgment interest to the plaintiff, the defendant's appeal was not subject to dismissal under O.C.G.A. § 5-6-38 for not having been filed within 15 days of service of plaintiff's notice of appeal. Beavers v. Gilstrap, 210 Ga. App. 46, 435 S.E.2d 267 (1993).

Notice of cross appeal required. — Appellee may not present enumerations of error concerning rulings adverse to it without filing a notice of cross appeal. Chester v. Georgia Mut. Ins. Co., 165 Ga. App. 783, 302 S.E.2d 594 (1983).

When the appellee has filed briefs in the appellate court in support of a cross appeal attacking the grant of summary judgment to appellants but no such cross appeal has been docketed in the appellate court, the correctness of the trial court's grant of summary judgment to appellants is not before the appellate court and will not be considered. Chester v. Georgia Mut. Ins. Co., 165 Ga. App. 783, 302 S.E.2d 594 (1983).

Notice held untimely. — When cross-appellants contended that because appellant in August 1986 successfully moved the trial court to allow the appellant to amend the appellant's notice of appeal merely to change the designated parts of the record necessary to the appellant's appeal and thus to delete certain portions of the record, this constituted a novation or extension of the appellant's original notice of appeal of April 11, 1986, it was held that the filing of the cross appeal in the Supreme Court on August 25 must be related to the original notice of appeal filed by appellant April 11 and could draw life from a mere modification of the notice of appeal reducing the amount of record as originally noticed in the original appeal. It followed that the filing of the notice of cross appeal on August 25, 1986, was far beyond the 15 days allowed for the filing of such a cross appeal. Mobley v. Coast House, Ltd., 182 Ga. App. 305, 355 S.E.2d 686 (1987).

When a habeas corpus petitioner cross-appealed the trial court's decision

Cross Appeals (Cont'd)

after the warden appealed the decisiont, the petitioner's cross-appeal was timely because the cross-appeal was filed within the 15 days allowed by O.C.G.A. § 5-6-38(a) plus the 3-day extension provided in O.C.G.A. § 9-11-6(e) as the warden's notice of appeal was mailed to the petitioner. Head v. Thomason, 276 Ga. 434, 578 S.E.2d 426, cert. denied, 540 U.S. 957, 124 S. Ct. 409, 157 L. Ed. 2d 294 (2003).

Failure to file notice of cross appeal makes review of brief unnecessary. — When appellee denominates one section of the appellee's brief a "cross appeal," but the record reveals that no notice of cross appeal was ever filed, the Court of Appeals need not address this contention in view of subsections (a) and (b) of O.C.G.A. § 5-6-38. Life Ins. Co. v. Helmuth, 182 Ga. App. 750, 357 S.E.2d 107, cert. denied, 182 Ga. App. 910, 357 S.E.2d 107 (1987).

When appellee asserted in a pro se responsive brief that the trial court erred in finding that the appellee was indebted to the appellant for post-acceleration interest on the accelerated balance, the court of appeals was unable to address this assertion since no cross-appeal had been filed. Karr v. Ryback, 186 Ga. App. 842, 368 S.E.2d 799 (1988).

Motion to have costs of preparing transcript and record for appeal divided equally between the plaintiff and the defendant deals with costs incurred in the trial court and should be addressed to that court subject to review on appeal. Van Geter v. Housing Auth., 167 Ga. App. 432, 306 S.E.2d 707 (1983), aff'd, 252 Ga. 196, 312 S.E.2d 309 (1984).

Cross appeal permitted after interlocutory appeal granted. — Because the Court of Appeals of Georgia granted an application for interlocutory appeal to the Department of Transportation in a slip and fall case, a city's cross-appeal was properly before the court. Ga. DOT v. Strickland, 279 Ga. App. 753, 632 S.E.2d 416 (2006).

Criminal defendants cannot cross appeal suits brought by state. — Despite resultant justice and judicial economy, the court will not allow criminal defendants to cross appeal suits brought before the court by the state pursuant to O.C.G.A. § 5-7-1; O.C.G.A. § 5-6-38 limits that right to civil parties and the court will not encroach upon the legislature's prerogative by extending that right. State v. Crapse, 173 Ga. App. 100, 325 S.E.2d 620 (1984), overruled on other grounds, Hubbard v. State, 176 Ga. App. 622, 337 S.E.2d 60 (1985).

Cross-appeal of claims not ruled upon. — Prisoner's ineffective-assistance-of-counsel claim under 28 U.S.C. § 2254 was improperly found procedurally barred because it was not firmly established under O.C.G.A. § 9-14-52 or O.C.G.A. § 5-6-38 and was not a regularly followed state practice for a prisoner to cross appeal claims upon which a state habeas court did not rule when the prisoner was successful on the prisoner's other state habeas claim. Mancill v. Hall, 545 F.3d 935 (11th Cir. 2008).

RESEARCH REFERENCES

Am. Jur. 2d. — 5 Am. Jur. 2d, Appellate Review, § 252 et seq.

Am. Jur. Pleading and Practice Forms. — 2 Am. Jur. Pleading and Practice Forms, Appeal and Error, § 69.

C.J.S. — 4 C.J.S., Appeal and Error, §§ 361 et seq., 494.

ALR. — Lower court's consideration, on the merits, of unseasonable application for new trial, rehearing, or other re-examination, as affecting time in which to apply for appellate review, 148 ALR 795.

Amendment of judgment as affecting time for taking or prosecuting appellate review proceedings, 21 ALR2d 285.

Exclusion or inclusion of terminal Sunday or holiday in computing time for taking or perfecting appellate review, 61 ALR2d 482.

Participation in, acceptance of, or submission to new trial as precluding appellate review of order granting it or of issue determined in first trial, 67 ALR2d 191.

Retroactive effect on appeal from judgment previously entered of statute short-

ening time allowed for appellate review, 81 ALR2d 417.

Right to perfect appeal, against party who has not appealed, by cross appeal filed after time for direct appeal has passed, 32 ALR3d 1290.

Filing of notice of appeal as affecting jurisdiction of state trial court to consider motion to vacate judgment, 5 ALR5th 422.

Effect of escape by, or fugitive status of, state criminal defendant on availability of appeal or other post-verdict or post-conviction relief — State cases, 105 ALR5th 529.

5-6-39. Extensions of time for filing notice of appeal, notice of cross appeal, transcript of evidence, designation of record and other similar motions.

(a) Any judge of the trial court or any justice or judge of the appellate court to which the appeal is to be taken may, in his discretion, and without motion or notice to the other party, grant extensions of time for the filing of:

(1) Notice of appeal;

(2) Notice of cross appeal;

(3) Transcript of the evidence and proceedings on appeal or in any other instance where filing of the transcript is required or permitted by law;

(4) Designation of record referred to under Code Section 5-6-42; and

(5) Any other similar motion, proceeding, or paper for which a filing time is prescribed.

(b) No extension of time shall be granted for the filing of motions for new trial or for judgment notwithstanding the verdict.

(c) Only one extension of time shall be granted for filing of a notice of appeal and a notice of cross appeal, and the extension shall not exceed the time otherwise allowed for the filing of the notices initially.

(d) Any application to any court, justice, or judge for an extension must be made before expiration of the period for filing as originally prescribed or as extended by a permissible previous order. The order granting an extension of time shall be promptly filed with the clerk of the trial court, and the party securing it shall serve copies thereof on all other parties in the manner prescribed by Code Section 5-6-32. (Ga. L. 1965, p. 18, § 6.)

Cross references. — Extension of expiration date, Rules of the Supreme Court of the State of Georgia, Rule 3. Postmark date, Rules of the Supreme Court of the State of Georgia, Rule 4. Certification and transmittal of transcript and record, Rules of the Supreme Court of the State of Georgia, Rule 15. Objection to failure to comply with Appellate Practice Act, Rules of the Supreme Court of the State of Georgia, Rule 20. Filing notice of appeal and cross appeal, Rules of the Supreme

Court of the State of Georgia, Rule 38. Extension of expiration dates, Rules of the Court of Appeals of the State of Georgia, Rule 3. Extensions of time for filing, Rules of the Court of Appeals of the State of Georgia, Rule 28. Notices of appeal and cross appeal, Rules of the Court of Appeals of the State of Georgia, Rule 33.

Law reviews. — For article, "Insuring a Party's Second Chance," see 16 Ga. St. B.J. 177 (1980). For article surveying appellate practice and procedure, see 34 Mercer L. Rev. 3 (1982). For annual survey on administrative law, see 64 Mercer L. Rev. 39 (2012).

For comment on Davis v. Davis, 222 Ga. 579, 151 S.E.2d 123 (1966), see 4 Ga. St. B. J. 259 (1967).

JUDICIAL DECISIONS

Analysis

General Consideration
Timeliness of Application
Grants of Extensions
1. Notice of Appeal
2. Transcripts

General Consideration

For proper reasons, appellate courts will entertain an out of time appeal. Mitchell v. State, 157 Ga. App. 181, 276 S.E.2d 864 (1981), but see Gable v. State, 290 Ga. 81, 720 S.E.2d 170 (2011).

Grounds for out of time appeal. — Motion for out of time appeal was properly denied when the appellant alleged only that the appellant's attorney's inadequate performance was the reason why no timely appeal was filed and appellant failed to set forth the questions the appellant would raise in an out of time appeal and that the questions could be resolved by facts in the record. Wheeler v. State, 269 Ga. 547, 499 S.E.2d 629 (1998).

Because a direct appeal cannot be taken from a guilty plea on the ground of ineffective assistance of counsel unless that issue was developed through a post-plea hearing, it cannot be said that the defendant's right of appeal was frustrated; simply put, the defendant had no right of appeal and the defendant's remedy lay in a habeas corpus proceeding. Rice v. State, 278 Ga. 707, 606 S.E.2d 261 (2004).

Court has broad discretion in granting extensions of time. Brookshire v. J.P. Stevens Co., 133 Ga. App. 97, 210 S.E.2d 46 (1974).

Ga. L. 1967, p. 226, §§ 26, 27, 30 (see O.C.G.A. § 9-11-6(e)) does not apply to this Ga. L. 1965, p. 18, § 6 (see O.C.G.A. § 5-6-39), the filing time not being predicated on service of notice. Akin v. Sanders, 228 Ga. 251, 184 S.E.2d 660 (1971).

Fact that section does not provide for notice and hearing does not render the statute void. Rogers v. McDonald, 226 Ga. 329, 175 S.E.2d 25 (1970).

Notice and hearing are not always necessary for due process. — Often, with time about to run out, notice and hearing are impossible, and are not necessary for due process. Rogers v. McDonald, 226 Ga. 329, 175 S.E.2d 25 (1970).

When appeal involves criminal defendant who has been ineffectively represented by counsel at trial, this section is inapplicable. Ingram v. State, 134 Ga. App. 935, 216 S.E.2d 608 (1975).

Proper, timely filing of notice of appeal is absolute requirement to confer appellate jurisdiction. Jordan v. Caldwell, 229 Ga. 343, 191 S.E.2d 530 (1972); Associated Distribs., Inc. v. Willard, 242 Ga. 247, 248 S.E.2d 645 (1978); Mitchell v. State, 157 Ga. App. 181, 276 S.E.2d 864 (1981), but see Gable v. State, 290 Ga. 81, 720 S.E.2d 170 (2011).

Burden is on party desiring to take appeal. — Burden is on party desiring to take appeal to determine when judgment is filed in trial court, and to file the party's notice of appeal within the 30-day period or within the duly authorized extension of the 30-day period. Jordan v. Caldwell, 229 Ga. 343, 191 S.E.2d 530 (1972); Associated Distribs., Inc. v. Willard, 242 Ga. 247, 248 S.E.2d 645 (1978).

Because a litigant's appeal was untimely filed, despite evidence of mistaken delivery beyond the litigant's control the superior court properly held that the court lacked discretion to find otherwise, as the burden to timely file an appeal could not be relieved by providential cause and excusable neglect; thus, the court did not err in dismissing the appeal. Register v. Elliott, 285 Ga. App. 741, 647 S.E.2d 406 (2007).

Dismissal for failure to comply. — Defendant's failure to timely file transcript or obtain extension of time requires dismissal of appeal. Blackstone v. State, 131 Ga. App. 666, 206 S.E.2d 553 (1974).

Failure to file notice of appeal or obtain extension within 30-day period, subjects appeal to dismissal. Mayo v. State, 148 Ga. App. 213, 251 S.E.2d 80 (1978).

Failure to get extension. — Failure to get an extension is not, standing alone, a sufficient basis for dismissal. Boulden v. Fowler, 202 Ga. App. 237, 414 S.E.2d 263 (1991), cert. denied, 202 Ga. App. 905, 414 S.E.2d 263 (1992).

Trial court properly dismissed the debtors' appeal as a transcript was not filed until over two months after the statutory due date, and the debtors did not request an extension of time to file the transcript; any delay in completing the record past the 30 days granted by statute was presumptively unreasonable and inexcusable. Dye v. U.S. Bank Nat'l Ass'n, 273 Ga. App. 652, 616 S.E.2d 476 (2005).

Failure to obtain an extension in the filing of transcripts is not, in and of itself, a sufficient basis for dismissal. Welch v. Welch, 212 Ga. App. 667, 442 S.E.2d 857 (1994).

Requirements of section must be followed to confer jurisdiction upon appellate court. Associated Distribs., Inc. v. Willard, 242 Ga. 247, 248 S.E.2d 645 (1978).

Provisions of section are mandatory and unless complied with, an appeal must be dismissed. Herrington v. Leathers, 115 Ga. App. 282, 154 S.E.2d 621 (1967); Gilmore v. State, 127 Ga. App. 249, 193 S.E.2d 219 (1972).

Ga. L. 1965, p. 18, §§ 6 and 11 (see O.C.G.A. §§ 5-6-39 and 5-6-42) are mandatory, and unless complied with, the appeal must be dismissed. Walker v. State Hwy. Dep't, 115 Ga. App. 461, 154 S.E.2d 768 (1967); Martin Theaters of Ga., Inc. v. Lloyd, 118 Ga. App. 835, 165 S.E.2d 909 (1968); Calloway v. State, 119 Ga. App. 194, 166 S.E.2d 613 (1969); Baxter v. Long, 122 Ga. App. 500, 177 S.E.2d 712 (1970).

Counsel filing nonstatutory motions attacking final judgments should invoke protection of this section. Johnson v. Barnes, 237 Ga. 502, 229 S.E.2d 70 (1976).

Party wishing more time than permitted for appealing, should apply for extension under Ga. L. 1965, p. 18, § 6 (see O.C.G.A. § 5-6-39). Where appellant fails to exercise this right and the appellee files a motion to dismiss appeal under Ga. L. 1966, p. 493, § 10 (see O.C.G.A. § 5-6-48), the court has no alternative but to grant motion and dismiss the appeal. Hearn v. DeKalb County, 118 Ga. App. 730, 165 S.E.2d 467 (1968).

This section expressly negatives any motion for extension having to be made, and requires filing only order granting extension. Elliott v. Leathers, 223 Ga. 497, 156 S.E.2d 440 (1967).

Extending time for filing application for discretionary appeal. — Although extensions of time could be granted for applications for discretionary appeal, pursuant to O.C.G.A. § 5-6-39(a)(5), a trial court did not have the authority to grant an out-of-time discretionary appeal in a criminal case as a remedy for counsel's failure to timely file the application under O.C.G.A. § 5-6-35(d) absent a violation of the appellant's constitutional rights. Gable v. State, 290 Ga. 81, 720 S.E.2d 170 (2011).

Second extension not authorized. — Trial court did not have authority to grant defendant a second 30-day extension of time to file a notice of appeal. Hughes v. State, 210 Ga. App. 833, 437 S.E.2d 841 (1993).

Paragraph (a)(1) of O.C.G.A. § 5-6-39 gives courts authority to grant an extension of time to file a notice of appeal but this authority is limited by subsection (c) of § 5-6-39 which provides that only one extension shall be granted for filing a notice of appeal and the extension shall

General Consideration (Cont'd)

not exceed the 30 days allowed for initial filing. Legare v. State, 269 Ga. 468, 499 S.E.2d 640 (1998).

Granting of out of time appeal by superior court is ineffective to confer jurisdiction upon the Supreme Court in civil cases. Woodall v. Woodall, 248 Ga. 172, 281 S.E.2d 619 (1981).

Attempt to amend notice of appeal, which was timely as to summary judgment in one case, to incorporate previously unfiled notice of appeal in a companion case was untimely when summary judgment in companion case had been granted 75 days earlier. Newton v. K.B. Property Mgt. of Ga., Inc., 166 Ga. App. 901, 306 S.E.2d 5 (1983).

Cited in Stanford v. Evans, Reed & Williams, 221 Ga. 331, 145 S.E.2d 504 (1965); Lanier v. Fuller, 113 Ga. App. 234, 147 S.E.2d 875 (1966); Davis v. Davis, 222 Ga. 579, 151 S.E.2d 123 (1966); Sayers v. Rothberg, 222 Ga. 626, 151 S.E.2d 445 (1966); Benecke v. Boyer, 115 Ga. App. 99, 153 S.E.2d 668 (1967); Fleming v. Sanders, 223 Ga. 172, 154 S.E.2d 14 (1967); Threatt v. McElreath, 223 Ga. 153, 154 S.E.2d 20 (1967); Winn v. Powell, 223 Ga. 257, 154 S.E.2d 233 (1967); Joiner v. State, 223 Ga. 367, 155 S.E.2d 8 (1967); Wilcox v. Wilcox, 223 Ga. 396, 156 S.E.2d 84 (1967); Culver v. Sisk, 223 Ga. 519, 156 S.E.2d 352 (1967); Brown v. State, 223 Ga. 540, 156 S.E.2d 454 (1967); Poss v. State, 116 Ga. App. 264, 157 S.E.2d 33 (1967); Strickland v. Staten, 223 Ga. 726, 157 S.E.2d 740 (1967); Buckhead Doctors' Bldg., Inc. v. Oxford Fin. Cos., 116 Ga. App. 503, 157 S.E.2d 767 (1967); Gates v. Southern Ry., 118 Ga. App. 201, 162 S.E.2d 893 (1968); Hogan v. State, 118 Ga. App. 398, 163 S.E.2d 889 (1968); Hardy v. D.G. Mach. & Gage Co., 224 Ga. 818, 165 S.E.2d 127 (1968); Thomas v. State, 118 Ga. App. 748, 165 S.E.2d 477 (1968); Spadea v. Spadea, 225 Ga. 80, 165 S.E.2d 836 (1969); O'Quinn v. State, 121 Ga. App. 231, 173 S.E.2d 409 (1970); Richardson v. Nu-Way Cleaners & Laundry, 121 Ga. App. 425, 174 S.E.2d 202 (1970); Johnson v. State, 122 Ga. App. 785, 178 S.E.2d 743 (1970); Associated Bldrs. Supply v. Georgia-Pacific Corp., 123 Ga. App. 222, 180 S.E.2d 273 (1971); Hardwick v. State, 227 Ga. 467, 181 S.E.2d 376 (1971); Lowe v. Lowe, 123 Ga. App. 525, 181 S.E.2d 715 (1971); Bramlett v. Smith, 227 Ga. 523, 181 S.E.2d 849 (1971); O'Kelley v. McLain, 123 Ga. App. 669, 182 S.E.2d 189 (1971); Carroll v. Holland, 228 Ga. 649, 187 S.E.2d 531 (1972); Bretz v. Fitzgerald, 126 Ga. App. 367, 190 S.E.2d 619 (1972); Model Cleaners & Laundry, Inc. v. Per Corp., 127 Ga. App. 559, 194 S.E.2d 258 (1972); Irby v. Christian, 130 Ga. App. 375, 203 S.E.2d 284 (1973); Jackson v. State, 130 Ga. App. 581, 203 S.E.2d 923 (1974); Neal v. State, 232 Ga. 96, 205 S.E.2d 284 (1974); Taylor v. Whitmire, 234 Ga. 449, 216 S.E.2d 310 (1975); Johnson v. Clements, 135 Ga. App. 495, 218 S.E.2d 109 (1975); State v. Weeks, 136 Ga. App. 637, 222 S.E.2d 117 (1975); Lewis & Sheron Enters., Inc. v. Great A & P Tea Co., 136 Ga. App. 910, 222 S.E.2d 659 (1975); Wilson v. Coite Somers Co., 138 Ga. App. 455, 226 S.E.2d 277 (1976); Dargan, Whitington & Conner, Inc. v. Kitchen, 138 Ga. App. 414, 226 S.E.2d 482 (1976); May v. May, 139 Ga. App. 672, 229 S.E.2d 145 (1976); Smith v. State, 140 Ga. App. 492, 231 S.E.2d 493 (1976); Venable v. Block, 141 Ga. App. 523, 233 S.E.2d 878 (1977); Smith v. Forrester, 145 Ga. App. 281, 243 S.E.2d 575 (1978); Bozard v. J.A. Jones Constr. Co., 146 Ga. App. 877, 247 S.E.2d 605 (1978); Young v. Jones, 147 Ga. App. 65, 248 S.E.2d 49 (1978); Strother v. C. & S. Nat'l Bank, 147 Ga. App. 140, 248 S.E.2d 204 (1978); Hester v. State, 242 Ga. 173, 249 S.E.2d 547 (1978); Cranman Ins. Agency, Inc. v. Wilson Marine Sales & Serv., Inc., 147 Ga. App. 590, 249 S.E.2d 631 (1978); Albert v. Bryan, 150 Ga. App. 649, 258 S.E.2d 300 (1979); Canup v. State, 150 Ga. App. 794, 258 S.E.2d 907 (1979); Sheehan v. Sheehan, 244 Ga. 367, 260 S.E.2d 77 (1979); Music v. State, 244 Ga. 832, 262 S.E.2d 128 (1979); Middleton v. Continental Dev. Corp., 153 Ga. App. 144, 264 S.E.2d 689 (1980); Dampier v. First Bank & Trust Co., 153 Ga. App. 756, 266 S.E.2d 539 (1980); Freeman v. State, 154 Ga. App. 344, 268 S.E.2d 727 (1980); State v. Hart, 246 Ga. 212, 271 S.E.2d 133 (1980); Dunn v. State, 156 Ga. App. 483, 274 S.E.2d 828 (1980); Forrester v. Ladwig, 247 Ga. 426, 276 S.E.2d 613

(1981); Black v. Georgia Power Co., 158 Ga. App. 620, 281 S.E.2d 639 (1981); Hardin v. Macon Mall, 159 Ga. App. 139, 282 S.E.2d 753 (1981); Washington v. State, 158 Ga. App. 829, 282 S.E.2d 776 (1981); Godfrey v. Kirk, 161 Ga. App. 474, 288 S.E.2d 301 (1982); Stavrou v. Pleger, 249 Ga. 475, 291 S.E.2d 514 (1982); Raymond v. State, 162 Ga. App. 493, 292 S.E.2d 196 (1982); Freeman v. Gold & White, Inc., 163 Ga. App. 467, 294 S.E.2d 718 (1982); Morton v. Morton, 163 Ga. App. 830, 296 S.E.2d 362 (1982); Sayre v. State, 165 Ga. App. 225, 299 S.E.2d 749 (1983); Curtis v. State, 168 Ga. App. 235, 308 S.E.2d 599 (1983); In re G.W.H., 168 Ga. App. 845, 310 S.E.2d 573 (1983); Rimes v. State, 182 Ga. App. 721, 356 S.E.2d 897 (1987); Georgia Am. Ins. Co. v. Varnum, 182 Ga. App. 907, 357 S.E.2d 609 (1987); Willis v. State, 186 Ga. App. 197, 366 S.E.2d 778 (1988); Waite v. Harvey, 187 Ga. App. 276, 370 S.E.2d 34 (1988); McKinney v. State, 187 Ga. App. 702, 371 S.E.2d 196 (1988); Aldridge v. State, 188 Ga. App. 729, 374 S.E.2d 223 (1988); Jones v. Perkins, 192 Ga. App. 343, 384 S.E.2d 927 (1989); Baker v. Southern Ry., 260 Ga. 115, 390 S.E.2d 576 (1990); Baker v. State, 195 Ga. App. 424, 394 S.E.2d 801 (1990); Walker v. State, 197 Ga. App. 265, 398 S.E.2d 217 (1990); Hunter v. Roberts, 199 Ga. App. 318, 404 S.E.2d 645 (1991); Pinkney v. Union, 199 Ga. App. 529, 405 S.E.2d 521 (1991); Hall v. Bussey, 200 Ga. App. 311, 408 S.E.2d 430 (1991); Trinity v. Applebee's Neighborhood Grill & Bar, 201 Ga. App. 404, 411 S.E.2d 131 (1991); Snell v. State, 203 Ga. App. 27, 416 S.E.2d 360 (1992); Beavers v. Gilstrap, 210 Ga. App. 46, 435 S.E.2d 267 (1993); Hameed v. Hall, 234 Ga. App. 890, 508 S.E.2d 680 (1998); Durden v. Griffin, 270 Ga. 293, 509 S.E.2d 54 (1998); Bass v. Mercer, 240 Ga. App. 545, 524 S.E.2d 260 (1999); Crown Diamond Co. v. N.Y. Diamond Corp., 242 Ga. App. 674, 530 S.E.2d 800 (2000); In re Estate of Dasher, 259 Ga. App. 201, 575 S.E.2d 921 (2002); Smith v. State, 263 Ga. App. 414, 587 S.E.2d 787 (2003); Pistacchio v. Frasso, 314 Ga. App. 119, 723 S.E.2d 322 (2012).

Timeliness of Application

Applies to application not to grant of extension. — Section provides only that application for extension be made before expiration of period, and does not impose penalty of dismissal when application has been made but no extension granted before expiration of 30 days. Elliott v. Leathers, 223 Ga. 497, 156 S.E.2d 440 (1967).

Failure to apply for extension before expiration of period for filing. — Section provides that application for extension of time must be made before expiration of period for filing; where appellant did not comply with this provision, order granting extension of time for filing was nugatory and void. Almond v. Robertson, 138 Ga. App. 22, 225 S.E.2d 486 (1976).

Trial court has no jurisdiction to grant extension of time for filing notice of appeal where application for extension is not made before expiration of 30-day period prescribed by § 5-6-38. Morris v. State, 115 Ga. App. 715, 155 S.E.2d 735 (1967).

Since a construction company bringing an appeal of a jury verdict in favor of homeowners never sought an extension of time to file the transcript from the post-trial hearing on its motions for new trial and judgment notwithstanding the verdict, nor communicated with the court reporter during the nine-month period after the hearing, the record did not support the trial court's finding that the delay in filing that transcript caused by the construction company was excusable and the trial court's denial of the homeowners' motion to dismiss the appeal was error; the record showed that the construction company's actions delayed a just disposition of the case by delaying the docketing of the appeal and hearing of the case by the appellate court, and, consequently, the homeowners were forced to wait for a final disposition on the construction company's appeal of the verdict against it. Coptic Constr. Co. v. Rolle, 279 Ga. App. 454, 631 S.E.2d 475 (2006).

When an insurer's request for an extension of time to file transcripts in support of the insurer's appeal pursuant to O.C.G.A. § 5-6-39(a)(3) and (d) was not made until months after the initial filing period had expired, the motion was untimely; a trial court order granting the request was accordingly nugatory and void. ACCC Ins. Co. v. Pizza Hut of Am., Inc., 314 Ga. App.

Timeliness of Application (Cont'd)

655, 725 S.E.2d 767 (2012).

Nunc pro tunc order cannot correct failure to timely make application. Baxter v. Long, 122 Ga. App. 500, 177 S.E.2d 712 (1970); Gilmore v. State, 127 Ga. App. 249, 193 S.E.2d 219 (1972), overruled on other grounds, Gilman Paper Co. v. James, 235 Ga. 348, 219 S.E.2d 447 (1975).

Orders granting extensions of time for filing of transcript of evidence and proceedings on appeal cannot be granted nunc pro tunc on delayed application. Mingo v. State, 133 Ga. App. 385, 210 S.E.2d 835 (1974).

Immediate signature or order unnecessary. — If application is timely presented to court, the application does not have to be signed immediately by judge as order may be entered after expiration of the period. Gilmore v. State, 127 Ga. App. 249, 193 S.E.2d 219 (1972), overruled on other grounds, Gilman Paper Co. v. James, 235 Ga. 348, 219 S.E.2d 447 (1975).

Immaterial that order later entered. — Fact that written order granting extension was not entered until over a month after the court's previously ordered filing date does not invalidate an extension since the order vacated all previous orders and indicated prior, implicit extensions as of the previous filing date. Morris v. Townsend, 118 Ga. App. 572, 164 S.E.2d 869 (1968).

If application is made within time required, it is immaterial that order is later entered. Baxter v. Long, 122 Ga. App. 500, 177 S.E.2d 712 (1970).

No dismissal when appellant does not cause delay and judge denies extension. — To construe Ga. L. 1965, p. 18, § 6 (see O.C.G.A. § 5-6-39) as requiring dismissal when the appellant did not cause the delay and the trial judge declined to grant a requested extension would shut off the right of appeal, and would thus violate the constitutional mandate of Ga. Const. 1976, Art. VI, Sec. II, Para. V (see Ga. Const. 1983, Art. VI, Sec. IX, Para. II). Such construction would also be contrary to the legislative intent expressed in Ga. L. 1965, p. 18, § 23 and Ga. L. 1968, p. 1072, §§ 2, 3 (see O.C.G.A. §§ 5-6-30 and 5-6-48(b)) as to a decision upon merits. Elliott v. Leathers, 223 Ga. 497, 156 S.E.2d 440 (1967).

Delay is attributable to appellant. — Failure to make timely application as section requires is delay attributable to appellant. Baxter v. Long, 122 Ga. App. 500, 177 S.E.2d 712 (1970).

Evidence supported the trial court's order that the defendant was not entitled to an out-of-time appeal, as the defendant's own conduct, and not any error by the defendant's trial attorney, was the reason for the lack of a timely appeal; because the appeal was untimely, the appellate court lacked jurisdiction to hear the appeal, warranting dismissal. Edwards v. State, 263 Ga. App. 106, 587 S.E.2d 258 (2003).

Ineffectiveness of counsel. — An out-of-time appeal is not authorized in every criminal case which involves a failure by counsel to comply with applicable procedures; such an appeal is not authorized if the loss of the right to appeal is not attributable to ineffective assistance of counsel but to the fact that the defendant personally slept on the defendant's rights. Porter v. State, 271 Ga. 498, 521 S.E.2d 566 (1999).

Obtaining of extension does not per se excuse appellant from consequences. — Nothing in statutes or decisions provides that obtaining of extensions per se excuses appellant from consequences of the appellant's own unreasonable delay. Cox Enters., Inc. v. Southland, Inc., 226 Ga. 794, 177 S.E.2d 653 (1970), cert. denied, 401 U.S. 993, 91 S. Ct. 1231, 28 L. Ed. 2d 531 (1971).

Party cannot amend new trial motion after 30 days to move for judgment n.o.v. — When the party, after suffering an adverse judgment, filed only a motion for new trial within the 30-day period specified in O.C.G.A. § 9-11-50, then after the 30-day period expired party sought to file, in the form of an amendment to the new trial motion, a motion for judgment notwithstanding the verdict, the latter motion must be considered invalid. Preferred Risk Ins. Co. v. Boykin, 174 Ga. App. 269, 329 S.E.2d 900, cert. denied, 254 Ga. 349, 331 S.E.2d 879 (1985).

Grants of Extensions

1. Notice of Appeal

Computation of maximum extension allowable. — Under Ga. L. 1965, p. 18, § 6 (see O.C.G.A. § 5-6-39), neither the trial court nor the appeals court has jurisdiction to grant an extension of more than 30 days for filing of notice of appeal, unless the last day of filing falls on Saturday or Sunday, in which event the time for filing is extended through the following Monday pursuant to former Code 1933, §/b 102-102 (see O.C.G.A. § 1-3-1). Smith v. Smith, 113 Ga. App. 111, 147 S.E.2d 466 (1966); Rockdale County v. Water Rights Comm., Inc., 189 Ga. App. 873, 377 S.E.2d 730 (1989); Dillard v. State, 223 Ga. App. 405, 477 S.E.2d 674 (1996); Grovnor v. Board of Regents, 231 Ga. App. 120, 497 S.E.2d 652 (1998).

Indefinite extensions of time not authorized. — Consent judgment that was timely entered within 30 days of the appellant's motion for j.n.o.v., or new trial, but prior to the denial of the appellant's motion to set aside, would have been effective to grant the appellant a 30-day extension from the date on which it was entered, but it was not effective to extend the filing date for a notice of appeal after the date of a future ruling, viz., the denial of the appellant's motion to set aside. MMT Enters., Inc. v. Cullars, 218 Ga. App. 559, 462 S.E.2d 771 (1995).

Order granting 90 days to perfect appeal. — Order of trial court granting the defendant 90 days within which to perfect appeal due to the unavailability of a transcript, if intended to be a grant of an extension of time for filing of a notice of appeal, was an ineffective nullity insofar as it purported to grant an extension for a period of time greater than 30 days as such extension in excess of 30 days violates this section. Parker v. State, 156 Ga. App. 299, 274 S.E.2d 694 (1980).

11-month extension of time. — When a trial court effectively granted the defendant an 11-month extension of time under O.C.G.A. § 5-6-39(c) in which to file a notice of appeal, the appeal was dismissed because the trial court lacked authority under O.C.G.A. § 5-6-38(a) to do so. Cody v. State, 277 Ga. 553, 592 S.E.2d 419 (2004).

Motion for reconsidering order granting summary judgment and dismissing counterclaim. — For Court of Appeals to acquire jurisdiction over case, notice of appeal must be filed within 30 days of entry of judgment appealed from, unless extension is granted upon proper application to trial court, and motion for reconsideration of order granting summary judgment and dismissing counterclaim does not extend deadline for filing notice of appeal from that order. Peppers House Restaurant, Inc. v. Siefferman, 156 Ga. App. 114, 274 S.E.2d 43 (1980).

Reaffirmance of dismissal of counterclaim. — When the time for filing the notice of appeal runs from the date of the voluntary dismissal of the appellees' counterclaims, the trial court is powerless to extend the time by entering a subsequent order reaffirming the dismissal of the complaint, even had it intended to do so. Caswell v. Caswell, 157 Ga. App. 710, 278 S.E.2d 452 (1981).

Filing during unauthorized second extension. — Under O.C.G.A. § 5-6-39, the trial court is authorized to grant only one extension of time for filing of notice of appeal; thus, filing of notice of appeal during unauthorized second extension comes too late to satisfy requirement of O.C.G.A. § 5-6-48. Hamby v. State, 162 Ga. App. 348, 291 S.E.2d 724 (1982).

Trial court was permitted to deny the defendant's second request for an extension of time to file the defendant's notice of appeal because statutory law allowed only one extension of time to be granted for filing a notice of appeal; thus, the defendant's request for an out-of-time appeal after the defendant did not timely file the defendant's notice of appeal was properly denied as it was the defendant's own conduct which caused the defendant to fail to timely file the notice of appeal in spite of the fact the defendant knew both about the right to appeal and the right to obtain appointed counsel. DeLoach v. State, 257 Ga. App. 503, 571 S.E.2d 496 (2002).

Deadline not extended by motion to vacate summary judgment. — Party's motion to vacate a grant of summary judgment for the opposing party did noth-

Grants of Extensions (Cont'd)
1. Notice of Appeal (Cont'd)

ing to extend the deadline for filing a notice of appeal from the order granting the summary judgment. Thompson v. GMAC, 194 Ga. App. 526, 391 S.E.2d 2 (1990).

Untimely request for extension. — Plaintiff's request for an extension on the basis of inability to pay costs, filed a month after receiving the bill, was untimely, and the plaintiff's belated payment of costs did not eliminate the court's authority to determine the reasonableness and excusability of the payment delay, in ruling on dismissal. Hooper v. Southern Bell Tel. & Tel. Co., 195 Ga. App. 629, 394 S.E.2d 798 (1990).

Denial of extension request proper. — Trial court did not abuse the court's discretion in denying a condominium unit owner's (CUO) motion for a 90-day extension of time to file a notice of appeal in an action initiated by a neighboring condominium unit owner which was resolved in the neighboring owner's favor, as the CUO failed to refer to anything that would have constituted good cause for the extension, and there was no authority to grant an extension for longer than 30 days. Schroder v. Murphy, 282 Ga. App. 701, 639 S.E.2d 485 (2006), cert. denied, 2007 Ga. LEXIS 220 (Ga. 2007).

2. Transcripts

Burden is on appellant to request extension for filing transcript, and this burden cannot be shifted to court reporter by implying latter's duty to apply for extension. Dunbar v. Green, 232 Ga. 188, 205 S.E.2d 854 (1974).

Even though the initial delay in filing the transcript of the trial may not have been attributable to the minor, that did not excuse the filing delay in the absence of a proper request by the minor for an extension of time as required under O.C.G.A. § 5-6-39. In re C.F., 255 Ga. App. 93, 564 S.E.2d 524 (2002).

Unless the delay is caused by appellant, failure to timely file a transcript shall not work dismissal. Morris v. Townsend, 118 Ga. App. 572, 164 S.E.2d 869 (1968).

Delay in filing of transcript is not necessarily cause for dismissal. — Because there was no evidence that an 11-day delay in the filing of a transcript for transmission as part of the appellate record discernibly delayed the docketing of the record in the appellate court, the trial court abused the court's discretion by concluding that the delay was unreasonable, and erred by dismissing an appeal. Fulton County Bd. of Tax Assessors v. Love, 289 Ga. App. 252, 656 S.E.2d 576 (2008).

Delay must have been unreasonable and inexcusable. — Failure of the appellant to request an extension for the filing of the transcript is not in itself a ground for dismissal of the appeal absent a judicial determination that the resulting delay was both unreasonable and inexcusable. McGuirt v. Lawrence, 193 Ga. App. 611, 389 S.E.2d 2 (1989).

Trial court did not abuse the court's discretion in granting a dismissal of the plaintiff's appeal, pursuant to O.C.G.A. § 5-6-42, because the plaintiff failed to file a transcript for the plaintiff's appeal for more than 17 months after the plaintiff filed the notice of appeal, the plaintiff never sought an extension of time under O.C.G.A. § 5-6-39, and the court held that the plaintiff's action was unreasonable, inexcusable, and caused by the plaintiff's own conduct; there was no requirement that a hearing be held on the motion to dismiss, pursuant to O.C.G.A. § 5-6-48(c), as the plaintiff was only entitled to an opportunity to be heard, which the plaintiff received. Lemmons v. Newton, 269 Ga. App. 880, 605 S.E.2d 626 (2004).

When clerk is unable to timely transmit record. — Ga. L. 1965, p. 18, § 12 (see O.C.G.A. § 5-6-43) follows the Constitution by stating that the case shall not be dismissed if the clerk is unable to transmit the record within time required by statute or when the judge grants an extension of time, and the clerk shall attach the clerk's certificate attesting to the cause of the delay. George v. American Credit Control, Inc., 222 Ga. 512, 150 S.E.2d 683 (1966).

Determination of whether to grant extension without notice or hearing. — Court reporter is amenable to trial

judge for prompt and efficient performance of the court reporter's duties. This relationship ordinarily provides a judge with sufficient facts upon which to decide whether to grant or deny an application for an extension of time to file a transcript without the necessity of notice and hearing. Rogers v. McDonald, 226 Ga. 329, 175 S.E.2d 25 (1970).

Effect of failure to timely file transcript. — Trial court did not abuse the court's discretion by dismissing a security corporation's appeal of a civil judgment against the corporation as a result of having failed to have filed a transcript within 30 days as required by O.C.G.A. § 5-6-42. Since no transcript existed, the appellate court was unable to determine whether the security corporation had rebutted the presumption that the filing of the transcript 49 days after the 30-day statutory deadline for filing transcripts was unreasonable and no extension was requested. Pioneer Sec. & Investigations, Inc. v. Hyatt Corp., 295 Ga. App. 261, 671 S.E.2d 266 (2008).

Trial court did not abuse the court's discretion in ruling that an appellant had not satisfied O.C.G.A. §§ 5-6-42 and 5-6-48, that the appellant's delay in filing a transcript was unreasonable and inexcusable, and that the delay in the appeal process was the appellant's fault because the case was remanded to the trial court for the purpose of supplementing or reconstructing the transcript, and at the hearing more than a year later, the appellant offered no evidence as to efforts taken by the appellant to obtain the transcript or, if necessary, to file the appropriate motions to extend the time to file the transcript or to have the transcript reconstructed; at no time did the appellant file a motion to reconstruct the record, pursuant to O.C.G.A. § 5-6-41(g), or to extend the time to file the transcript, pursuant to O.C.G.A. § 5-6-39, after the case was remanded to the trial court. Lavalle v. Jarrett, 306 Ga. App. 260, 701 S.E.2d 886 (2010).

Trial court did not abuse the court's discretion in dismissing the parents' appeal under O.C.G.A. § 5-6-48(c) on the ground that the parents delay in the filing of the transcript was unreasonable, inexcusable, and caused by the parents because the parents took no steps whatsoever to have the transcript prepared until almost ten months after the parents filed the parents' notice of appeal, over seven months after the court reporter informed the parents of the necessary deposit, and almost five months after the trial court informed the parents that the parents would be responsible for bearing the full costs of having the transcript prepared; by waiting to pay the deposit and order the transcript, the parents prevented the case from being docketed and heard in the earliest possible appellate term of court. Bush v. Reed, 311 Ga. App. 328, 715 S.E.2d 747 (2011).

Trial court did not abuse the court's discretion in finding that a mother's failure to timely pursue the filing of the transcript from the mother's parental rights termination hearing or seek an extension of time for almost one year was unreasonable and inexcusable and in dismissing the appeal under O.C.G.A. § 5-6-48(a). In the Interest of T.H., 311 Ga. App. 641, 716 S.E.2d 724 (2011).

RESEARCH REFERENCES

ALR. — Power of trial court indirectly to extend time for appeal, 89 ALR 941; 149 ALR 740.

Lower court's consideration, on the merits, of unseasonable application for new trial, rehearing, or other re-examination, as affecting time in which to apply for appellate review, 148 ALR 795.

Motion or petition for rehearing in court below as affecting time within which appellate proceedings must be taken or instituted, 10 ALR2d 1075.

Exclusion or inclusion of terminal Sunday or holiday in computing time for taking or perfecting appellate review, 61 ALR2d 482.

5-6-40. Enumeration of errors.

The appellant and cross appellant shall file with the clerk of the appellate court, at such time as may be prescribed by its rules, an enumeration of the errors which shall set out separately each error relied upon. The enumeration shall be concise and need not set out or refer to portions of the record on appeal. It shall be served upon the appellee or cross appellee in the manner prescribed in Code Section 5-6-32, need not have approval of the trial court, and when filed shall become a part of the record on appeal. The appellate court, by rule, may permit the enumeration to be made a part of the brief. (Ga. L. 1965, p. 18, § 14; Ga. L. 1965, p. 240, § 2; Ga. L. 1968, p. 1072, § 8.)

Cross references. — Briefs of appellant and cross appellant, Rules of the Supreme Court of the State of Georgia, Rule 39. Service on opposing parties, Rules of the Supreme Court of the State of Georgia, Rule 43. Argument and citation of authority, Rules of the Supreme Court of the State of Georgia, Rule 45. Judgments deemed included and presented, Rules of the Supreme Court of the State of Georgia, Rule 46. Filing of enumeration of errors, Rules of the Court of Appeals of the State of Georgia, Rule 5. Structure and content of appellate brief, Rules of the Court of Appeals of the State of Georgia, Rule 15.

Law reviews. — For annual survey article discussing developments in criminal law, see 52 Mercer L. Rev. 167 (2000). For article, "'May It Please the Court:' Tips on Effective Appellate Advocacy from Start to Finish," see 16 (No. 1) Ga. St. B.J. 28 (2010).

For note discussing the reluctance of Georgia courts to grant appeals when overruled motion for new trial not enumerated as error in light of Hill v. Willis, 224 Ga. 263, 161 S.E.2d 281 (1968), see 5 Ga. St. B.J. 269 (1968).

For comment on Crider v. State, 115 Ga. App. 347, 154 S.E.2d 743 (1967), see 4 Ga. St. B.J. 265 (1967).

JUDICIAL DECISIONS

Analysis

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General Consideration

Editor's notes. — In light of the similarity of the issues dealt with by the provisions, decisions under former Penal Code 1910, former Civil Code 1910, § 6332, former Code 1933, § 6-901 as it read prior to revision by Ga. L. 1965, p. 18, § 14, and former Code 1933, § 6-1607 are included in the annotations below.

Appellate review is limited to grounds presented to and ruled upon by trial court. MacDonald v. MacDonald, 156 Ga. App. 565, 275 S.E.2d 142 (1980).

Objection urged below, but not argued on appeal, must be treated as abandoned. MacDonald v. MacDonald, 156 Ga. App. 565, 275 S.E.2d 142 (1980).

Although presented in brief, any error not enumerated shall be disregarded. Rider v. State, 226 Ga. 14, 172 S.E.2d 318 (1970); Slaughter v. Linder, 122 Ga. App. 144, 176 S.E.2d 450 (1970).

Assignments of error in brief cannot take place of enumeration of errors re-

quired by section. Benfield v. State, 224 Ga. 139, 160 S.E.2d 398 (1968); Craig v. State, 130 Ga. App. 689, 204 S.E.2d 307 (1974).

Even though alleged error was raised at trial, an adverse ruling received, and it is argued in brief, appellate courts will not consider it unless it is within enumerated error. MacDonald v. MacDonald, 156 Ga. App. 565, 275 S.E.2d 142 (1980).

Court of Appeals has no jurisdiction to consider grounds which though argued are not enumerated as error according to O.C.G.A. § 5-6-40. Sanders v. Hughes, 183 Ga. App. 601, 359 S.E.2d 396, cert. denied, 183 Ga. App. 907, 359 S.E.2d 396 (1987).

Matter raised in appellate brief will not be considered when the issue was not enumerated as error. Dean v. State, 163 Ga. App. 29, 293 S.E.2d 492 (1982); Smith v. State, 186 Ga. App. 303, 367 S.E.2d 573 (1988).

Alleged error raised for first time on brief, cannot be considered by appellate courts, for enumeration must fairly encompass error alleged to have been made at trial. MacDonald v. MacDonald, 156 Ga. App. 565, 275 S.E.2d 142 (1980).

Review of assertions of error. — Although appellate court could refuse to address any error not set out separately, the court may in the court's sound discretion elect to review any one or more of the assertions of error contained in a single enumeration and treat the rest as abandoned. Morris v. State Farm Mut. Auto. Ins. Co., 203 Ga. App. 839, 418 S.E.2d 119 (1992).

When an appellant asserts more than one error within a single enumeration, the appellate court in the court's discretion may elect to review none, or one or more, of the errors asserted within the single enumeration. Hall v. State, 235 Ga. App. 44, 508 S.E.2d 703 (1998).

Provision of Ga. Const. 1983, Art. VI, Sec. I, Par. IV that enables a court to take action to protect the efficacy of the court's judgment from a party's actions that endanger that judgment is not authority for an appellate court to protect an appellate adjudication from further appellate review by declining to reach the merits of an allegation of error sufficiently set forth pursuant to the Appellate Practice Act. Felix v. State, 271 Ga. 534, 523 S.E.2d 1 (1999).

Enumerations of error may not be amended after time for filing has expired. Burke v. State, 153 Ga. App. 769, 266 S.E.2d 549 (1980); Parham v. State, 166 Ga. App. 855, 305 S.E.2d 599 (1983).

Failure to enumerate argument. — When the defendants failed to enumerate an argument on appeal, the appellate court would not consider the appeal. Smith v. Saulsbury, 286 Ga. App. 322, 649 S.E.2d 344 (2007).

Any attempt to amend or enlarge an enumeration upon appeal will not be permitted. MacDonald v. MacDonald, 156 Ga. App. 565, 275 S.E.2d 142 (1980).

Enumerations of error cannot be enlarged by statements in brief to include issues not made in former. Leniston v. Bonfiglio, 138 Ga. App. 151, 226 S.E.2d 1 (1976).

Burden is on party alleging error to show the error affirmatively by the record. Moye v. State, 127 Ga. App. 338, 193 S.E.2d 562 (1972).

Error must appear from record sent to appellate court by the clerk of the trial court. Moye v. State, 127 Ga. App. 338, 193 S.E.2d 562 (1972).

Any error shown upon record must stand or fall on the error's own merits and is not aided by accumulative effect of other claims of error. Hess Oil & Chem. Corp. v. Nash, 226 Ga. 706, 177 S.E.2d 70 (1970), cert. denied, 403 U.S. 922, 91 S. Ct. 2241, 29 L. Ed. 2d 700 (1971).

When defendant fails to provide transcript, the appellate court must assume the trial court's findings were authorized by the evidence. MacDonald v. MacDonald, 156 Ga. App. 565, 275 S.E.2d 142 (1980).

Testimony set forth in brief but not objected to at trial. — Portion of the testimony by a witness at trial contained in the defendant's brief but unobjected to at the trial may not be asserted as error for the first time on appeal. Pope v. Triangle Chem. Co., 157 Ga. App. 386, 277 S.E.2d 758 (1981).

Cited in Stanford v. Evans, Reed & Williams, 221 Ga. 331, 145 S.E.2d 504 (1965); Davenport v. Hall, 221 Ga. 543,

General Consideration (Cont'd)

145 S.E.2d 558 (1965); Hayes v. Strickland, 112 Ga. App. 567, 145 S.E.2d 728 (1965); Undercofler v. McLennan, 221 Ga. 613, 146 S.E.2d 635 (1966); Banks v. Banks, 221 Ga. 626, 146 S.E.2d 636 (1966); Cade v. Burson, 221 Ga. 715, 146 S.E.2d 761 (1966); Chambliss v. Hall, 113 Ga. App. 96, 147 S.E.2d 334 (1966); Jones v. Spindel, 113 Ga. App. 191, 147 S.E.2d 615 (1966); Coile v. Finance Co. of Am., 221 Ga. 863, 148 S.E.2d 328 (1966); Adams v. Morgan, 114 Ga. App. 180, 150 S.E.2d 556 (1966); Puckett v. Puckett, 222 Ga. 653, 151 S.E.2d 767 (1966); Hutchinson v. Georgia Power Co., 115 Ga. App. 666, 155 S.E.2d 643 (1967); Calhoun v. Patrick, 116 Ga. App. 303, 157 S.E.2d 31 (1967); Aetna Life Ins. Co. v. Greene, 116 Ga. App. 783, 159 S.E.2d 87 (1967); DeFee v. Williams, 224 Ga. 354, 162 S.E.2d 440 (1968); Kelley v. Holy Family Hosp. & Medical Ctr., Inc., 224 Ga. 641, 163 S.E.2d 716 (1968); Kay v. Vaughan, 224 Ga. 875, 165 S.E.2d 131 (1968); Dawson v. Garner, 119 Ga. App. 469, 167 S.E.2d 741 (1969); Smith v. Smith, 225 Ga. 474, 169 S.E.2d 820 (1969); Samples v. Hatcher, 225 Ga. 483, 170 S.E.2d 27 (1969); Brown v. Smith, 225 Ga. 496, 170 S.E.2d 28 (1969); Hatton v. State, 226 Ga. 18, 172 S.E.2d 427 (1970); Hull v. Campbell, 130 Ga. App. 637, 204 S.E.2d 312 (1974); Parris v. Slaton, 131 Ga. App. 92, 205 S.E.2d 67 (1974); Taylor v. Columbia County Planning Comm'n, 232 Ga. 155, 205 S.E.2d 287 (1974); Banks v. State, 131 Ga. App. 215, 205 S.E.2d 520 (1974); Lowe v. Royal Crown Cola Co., 132 Ga. App. 37, 207 S.E.2d 620 (1974); Doyal v. Ben O'Callaghan Co., 132 Ga. App. 336, 208 S.E.2d 136 (1974); Pritchett v. State, 134 Ga. App. 254, 214 S.E.2d 180 (1975); Brown v. State, 236 Ga. 333, 223 S.E.2d 642 (1976); Grant v. State, 139 Ga. App. 793, 229 S.E.2d 674 (1976); Nipper v. Crisp County, 141 Ga. App. 312, 233 S.E.2d 270 (1977); Atlanta Whses., Inc. v. Housing Auth., 143 Ga. App. 588, 239 S.E.2d 387 (1977); Duke v. State, 147 Ga. App. 101, 248 S.E.2d 176 (1978); Haynes v. Hoffman, 164 Ga. App. 236, 296 S.E.2d 216 (1982); Georgia Dep't of Labor v. Sims, 164 Ga. App. 856, 298 S.E.2d 562 (1982); Strickland v. State, 165 Ga. App. 197, 300 S.E.2d 537 (1983); Eunice v. Citicorp Homeowners, Inc., 167 Ga. App. 335, 306 S.E.2d 395 (1983); Whisenhunt v. State, 172 Ga. App. 742, 324 S.E.2d 570 (1984); Hester v. Baker, 180 Ga. App. 627, 349 S.E.2d 834 (1986); Holmes v. State, 180 Ga. App. 787, 350 S.E.2d 497 (1986); California Fed. Sav. & Loan Ass'n v. Hudson, 185 Ga. App. 384, 364 S.E.2d 582 (1987); Palmer v. State, 186 Ga. App. 892, 369 S.E.2d 38 (1988); Bryant v. BMC of Ga., Inc., 188 Ga. App. 124, 372 S.E.2d 280 (1988); Floyd v. State, 188 Ga. App. 24, 372 S.E.2d 287 (1988); Johncox v. State, 189 Ga. App. 188, 375 S.E.2d 139 (1988); Brown v. State, 190 Ga. App. 324, 378 S.E.2d 908 (1989); Seligman v. Milam Bldrs., Inc., 191 Ga. App. 224, 381 S.E.2d 401 (1989); Hoffer v. State, 192 Ga. App. 378, 384 S.E.2d 902 (1989); Boatright v. State, 192 Ga. App. 112, 385 S.E.2d 298 (1989); Seabolt v. Edghill, 192 Ga. App. 715, 386 S.E.2d 376 (1989); Fulton County v. Collum Properties, Inc., 193 Ga. App. 774, 388 S.E.2d 916 (1989); Sentry Ins. v. Majeed, 194 Ga. App. 276, 390 S.E.2d 269 (1990); Murphy v. State, 195 Ga. App. 878, 395 S.E.2d 76 (1990); Allain v. State, 202 Ga. App. 706, 415 S.E.2d 315 (1992); Campbell v. State, 207 Ga. App. 902, 429 S.E.2d 538 (1993); Johnson v. State, 212 Ga. App. 190, 441 S.E.2d 509 (1994); Obiozor v. State, 213 Ga. App. 523, 445 S.E.2d 553 (1994); Evans v. DOT, 226 Ga. App. 74, 485 S.E.2d 243 (1997); Green v. State, 226 Ga. App. 467, 486 S.E.2d 691 (1997); Griffin v. State, 228 Ga. App. 200, 491 S.E.2d 437 (1997); Wozniuk v. Kitchin, 229 Ga. App. 359, 494 S.E.2d 247 (1997); Oliver v. State, 232 Ga. App. 816, 503 S.E.2d 28 (1998); Gibson v. State, 233 Ga. App. 838, 505 S.E.2d 63 (1998); Carl v. State, 234 Ga. App. 61, 506 S.E.2d 207 (1998); Felix v. State, 234 Ga. App. 509, 507 S.E.2d 172 (1998); Cantrell v. Northeast Ga. Medical Ctr., 235 Ga. App. 365, 508 S.E.2d 716 (1998); Rolleston v. Cherry, 237 Ga. App. 733, 521 S.E.2d 1 (1999); Krieger v. Walton County Bd. of Comm'rs, 241 Ga. App. 373, 525 S.E.2d 147 (1999); Dole v. State, 256 Ga. App. 146, 567 S.E.2d 756 (2002); Walker v. State, 285 Ga. App. 529, 646 S.E.2d 734 (2007); Levy v. Reiner, 290 Ga. App. 471, 659 S.E.2d 848 (2008);

Johnson v. State, 290 Ga. App. 255, 659 S.E.2d 638 (2008); Thomas v. State, 291 Ga. App. 795, 662 S.E.2d 849 (2008); Ray v. State, 292 Ga. App. 575, 665 S.E.2d 345 (2008); Bee v. State, 294 Ga. App. 199, 670 S.E.2d 114 (2008); Biederbeck v. Marbut, 294 Ga. App. 799, 670 S.E.2d 483 (2008); Collins v. State, 300 Ga. App. 657, 686 S.E.2d 305 (2009); Willis v. Willis, 288 Ga. 577, 707 S.E.2d 344 (2010); Futch v. State, 314 Ga. App. 294, 723 S.E.2d 714 (2012); Simon v. State, 320 Ga. App. 15, 739 S.E.2d 34 (2013).

What May Be Enumerated As Error

Only alleged errors occurring in lower court may be enumerated in appeal, and a statute may not be constitutionally attacked for first time in enumerations of error so as to give the Supreme Court jurisdiction of the appeal. Kohl v. Manning, 223 Ga. 755, 158 S.E.2d 375 (1967).

Any ruling or judgment of court affecting judgment appealed from may be enumerated as error by the appellant. Allen v. Rome Kraft Co., 114 Ga. App. 717, 152 S.E.2d 618 (1966).

Overruling of motion for new trial does affect judgment on verdict, and may be enumerated. Allen v. Rome Kraft Co., 114 Ga. App. 717, 152 S.E.2d 618 (1966).

Setting forth erroneous ruling required. — Error of law has as its basis a specific ruling made by the trial court. In order for an appellate court to review a trial court ruling for legal error, a party must set forth in the enumeration of errors the allegedly erroneous ruling. Felix v. State, 271 Ga. 534, 523 S.E.2d 1 (1999).

Setting forth arguments not required. — Because the arguments supporting a position concerning a legal ruling are not themselves legal rulings, they do not have to be enunciated in the enumeration of errors in order to merit appellate consideration. Felix v. State, 271 Ga. 534, 523 S.E.2d 1 (1999).

Denial of motion to suppress. — Remand was required when the defendants adequately set out in the defendants' enumeration of errors that the defendants sought appellate review of the trial court's denial of the defendants' motion to suppress and the Court of Appeals did not address all the arguments raised by the defendants in support of the defendants' enumerated error. Felix v. State, 271 Ga. 534, 523 S.E.2d 1 (1999).

Content and Form of Enumeration

1. In General

Each enumeration may contain only one error. MacDonald v. MacDonald, 156 Ga. App. 565, 275 S.E.2d 142 (1980); Garvey v. State, 176 Ga. App. 268, 335 S.E.2d 640 (1985); Hayes v. State, 189 Ga. App. 39, 375 S.E.2d 114 (1988).

On appeal each enumeration of error should address only one error. Pope v. Triangle Chem. Co., 157 Ga. App. 386, 277 S.E.2d 758 (1981).

When there are two separate bases for the argument made, each ground should be separately enumerated. Bounds v. State, 207 Ga. App. 665, 428 S.E.2d 673 (1993). But see Felix v. State, 271 Ga. 534, 523 S.E.2d 1 (1999).

When the defendant asserts several errors in one enumeration, the court will address only one asserted error, especially when the defendant raises new grounds for some of the defendant's objections for the first time on appeal. Rocha v. State, 234 Ga. App. 48, 506 S.E.2d 192 (1998).

Must clearly appear. — It is desirable that each enumeration be explicit, precise, intelligible, unambiguous, unmistakable, and unequivocal. But, a degree of generality may be tolerated. This is not to be used as a sword against an appellee to enlarge or amend an enumeration of error, or to encompass bases of objection not fairly included within legitimate parameters urged at trial, but is a shield to accommodate appeal of specific allegation of error. MacDonald v. MacDonald, 156 Ga. App. 565, 275 S.E.2d 142 (1980).

Each enumeration should be concise. Dean v. State, 163 Ga. App. 29, 293 S.E.2d 492 (1982).

Subject matter of enumeration need be indicated only in a general way. MacDonald v. MacDonald, 156 Ga. App. 565, 275 S.E.2d 142 (1980).

Sufficiency of enumeration. — Correct rule with respect to the legal sufficiency of any enumeration of error is that

Content and Form of Enumeration (Cont'd)
1. In General (Cont'd)

it need be only sufficient to point out the error complained of. Childers v. Tauber, 160 Ga. App. 713, 288 S.E.2d 5 (1981).

Error sufficiently "set out separately." — In order to take into account the duty imposed by O.C.G.A. § 5-6-48(f), when the enumeration of errors filed in the appellate court identifies the trial court ruling asserted to be error, the error relied upon is sufficiently "set out separately" to require the appellate court to shoulder the court's constitutional responsibility to be a court of review. Felix v. State, 271 Ga. 534, 523 S.E.2d 1 (1999).

Pro se litigants. — Enumerations of error that were not in compliance with appellate rules would be considered in deference to the appellant's pro se status. Bennett v. Moody, 225 Ga. App. 95, 483 S.E.2d 350 (1997).

Effect of several assertions of error in single enumeration. — Court of Appeals may, in the exercise of the court's sound discretion, elect to review any one or more of the several assertions of error contained within a single enumeration and to treat the remaining assertions of error therein as abandoned. West v. Nodvin, 196 Ga. App. 825, 397 S.E.2d 567 (1990); Reid v. State, 237 Ga. App. 690, 515 S.E.2d 201 (1999). But see Felix v. State, 271 Ga. 534, 523 S.E.2d 1 (1999).

When several assertions of error are contained within a single enumeration, the court may elect to review any one or more of them, and treat the remaining assertions as abandoned. Mays v. Farah U.S.A., Inc., 236 Ga. App. 1, 510 S.E.2d 868 (1999).

When an appellant argues more than one error within a single enumeration, the appellate court in the court's discretion may elect to review none of the errors enumerated in violation of O.C.G.A. § 5-6-40, or may elect to review any one or more of the several assertions of error contained within the single enumeration and treat the remaining assertions of error therein as abandoned. Robinson v. State, 200 Ga. App. 515, 408 S.E.2d 820 (1991); Wingfield v. State, 229 Ga. App. 75, 493 S.E.2d 235 (1997). But see Felix v. State, 271 Ga. 534, 523 S.E.2d 1 (1999).

In the exercise of the court's discretion, the appellate court may elect to review any one or more of several assertions of error contained within a single enumeration, and treat the remaining assertions therein as abandoned. Phillips v. State, 236 Ga. App. 744, 512 S.E.2d 32 (1999).

Multiple assertions of errors in single enumeration were not reviewed. White v. State, 221 Ga. App. 860, 473 S.E.2d 539 (1996); In re D.A.D., 224 Ga. App. 527, 481 S.E.2d 262 (1997); Duggan v. State, 225 Ga. App. 291, 483 S.E.2d 373 (1997); Stubbs v. Harmon, 226 Ga. App. 631, 487 S.E.2d 91 (1997).

When it is apparent what errors are sought to be asserted, appeal shall be considered. — When it is apparent from notice of appeal, record, enumeration of errors, or any combination of the foregoing, what errors are sought to be asserted upon appeal, an appeal shall be considered notwithstanding that enumeration of errors fails to enumerate clearly the errors sought to be reviewed. MacDonald v. MacDonald, 156 Ga. App. 565, 275 S.E.2d 142 (1980).

Enumerated errors may still be ruled insufficient or held not to be meritorious from the record, even though the errors are in the proper form. MacDonald v. MacDonald, 156 Ga. App. 565, 275 S.E.2d 142 (1980).

Appellate brief not sufficient to raise error. — Arguments raised in the appellate brief are not made issues on appeal unless they are properly enumerated as error; thus, a food vendor's argument in an appeal in a personal injury action that a certain jury charge should have been given was not properly preserved for review where the issue was raised in the vendor's brief but was not enumerated as error. Imperial Foods Supply, Inc. v. Purvis, 260 Ga. App. 614, 580 S.E.2d 342 (2003).

2. Application

Vague enumeration may still be sufficient. — Motion to strike the appellant's enumeration of error should be denied when, though hazy, the motion still conforms to practically unlimited looseness

authorized by section. MacDonald v. MacDonald, 156 Ga. App. 565, 275 S.E.2d 142 (1980).

Effect of enumeration of error which is too vague. — When enumerated error is so general and does not contain a key which the brief clarifies to identify specific error enumerated, and neither record nor notice of appeal assists in determining which one specific error is enumerated, appellate court will consider only the general grounds as to sufficiency of facts to support judgment. MacDonald v. MacDonald, 156 Ga. App. 565, 275 S.E.2d 142 (1980).

Appeal not dismissed for erroneous reference. — Motion to dismiss appeal is not meritorious when based upon the fact that enumeration of errors refers to the wrong date as to order it complains of but when notice of appeal refers to correct date in record. Langford v. First Nat'l Bank, 122 Ga. App. 210, 176 S.E.2d 484 (1970).

Enumeration setting forth each demurrer by its paragraph number. — Requirement that enumeration of error set out separately errors relied upon does not make necessary a separate numbering as to each of various numbered demurrers (now motions to dismiss) sustained, but an enumeration of error on sustaining of such demurrers setting forth each demurrer by its paragraph number is sufficient. Mull v. Emory Univ., Inc., 114 Ga. App. 63, 150 S.E.2d 276 (1966). But see Felix v. State, 271 Ga. 534, 523 S.E.2d 1 (1999).

Where record includes motion. — In appeal from judgment of trial court overruling appellant-condemnor's motion for new trial, mere enumeration of judgment as error, without separately enumerating as error each ground of such motion, is sufficient compliance with section when motion as amended is included in the record and when the appellant's brief argues each ground separately. City of Douglas v. Rigdon, 116 Ga. App. 306, 157 S.E.2d 66 (1967).

Raising inadequacy of damages by enumerating general grounds of motion for new trial. — Although good practice would call for enumerating as error the inadequacy of the jury's verdict for damages, the question of inadequacy is sufficiently raised for consideration by the court when overruling of general grounds of motion for new trial is enumerated as error, and question of inadequacy of verdict is presented and argued in briefs. Kirkman v. Miller, 116 Ga. App. 78, 156 S.E.2d 558 (1967).

Mere general enumeration to denial of amended motion for new trial is insufficient. Dean v. State, 163 Ga. App. 29, 293 S.E.2d 492 (1982).

One enumeration is sufficient to reach all grounds. — When error alleged is in granting or denying of a new trial, one assignment of error is sufficient to reach all grounds of the motion on which grant or refusal was based. National Union Fire Ins. Co. v. Ozburn, 42 Ga. App. 393, 156 S.E. 305 (1930) (decided under former Civil Code 1910, § 6332).

Exception to sufficiency of evidence when error concerns sufficiency of petition. — When the plaintiff's failure to recover is dependent not upon insufficiency of evidence, but upon insufficiency of the petition, manifestly an assignment of error even in a direct bill of exceptions (see O.C.G.A. §§ 5-6-49, 5-6-50) in which insufficiency of the petition can be reached, which excepts only to sufficiency of evidence and does not except to sufficiency of the petition, is insufficient to present for decision any question respecting insufficiency of the petition to set out a cause of action; although it would be otherwise, perhaps, if it appeared affirmatively from the petition that the plaintiff was not entitled to recover. Huson v. Farmer, 53 Ga. App. 131, 185 S.E. 119 (1936) (decided under former Code 1933, § 6-901).

Enumeration regarding admission of allegedly prejudicial evidence. — Enumeration of error upon admission of evidence complaining that the admission created a false and prejudicial issue, in order to be complete, must set out how evidence was prejudicial and what false issue was created. Essig v. Cheves, 75 Ga. App. 870, 44 S.E.2d 712 (1947) (decided under former Code 1933, § 6-1607).

Complaint that illegal rulings were made without setting out nature of rulings, is insufficient as an assignment of error. Harbour v. Rittenbaum, 101 Ga.

Content and Form of Enumeration (Cont'd)
2. Application (Cont'd)

App. 878, 115 S.E.2d 573 (1960) (decided under former Code 1933, § 6-901).

General exception to entire charge is too broad when whole charge is not erroneous. Cheek v. State, 22 Ga. App. 788, 97 S.E. 203 (1918) (decided under former Penal Code 1910, § 1097).

Assignment of error based on statement of fact which is denied in answer cannot be considered. Jones v. City of Rome, 15 Ga. App. 41, 82 S.E. 593 (1914) (decided under former Penal Code 1910, § 1097).

Filing of Enumeration

Failure to file enumeration of errors, as required by section, requires dismissal of appeal. Lowery v. Smith, 225 Ga. 814, 171 S.E.2d 500 (1969).

Failure to file an enumeration of errors requires dismissal of an appeal, and arguments raised in an appellate brief are not made issues on appeal unless the issues are properly enumerated as error. Miles v. Emmons, 234 Ga. App. 487, 507 S.E.2d 762 (1998).

Failure to file enumeration within time specified may be deemed as failure to complete appeal. Watson v. Stynchcombe, 228 Ga. 193, 184 S.E.2d 580 (1971); Seigler v. Smith, 228 Ga. 270, 185 S.E.2d 377 (1971).

When enumeration of errors not timely filed and no extension granted. — Absent filing of enumeration of errors within time prescribed or, in the alternative, absent grant of extension of time on motion made before expiration of such time, appeal has not been perfected and must be dismissed. Thomas v. State, 118 Ga. App. 748, 165 S.E.2d 477 (1968).

Defendant's motion to amend the defendant's out-of-time appeal, presenting additional grounds, was denied because the motion was filed 49 days after the appeal was docketed, and enumerations of error must be filed within 20 days of docketing. Leverette v. State, 291 Ga. 834, 732 S.E.2d 255 (2012).

Timely filed enumeration of errors not affected by nonpayment. — When enumeration of errors was filed within time required for filing briefs, fact that brief was not marked "filed" within that time due to nonpayment of costs does not invalidate filing of enumeration of errors. Norton Realty & Loan Co. v. City of Gainesville, 224 Ga. 166, 160 S.E.2d 819 (1968).

When providential cause is shown, late filing of enumerations of error will not necessarily cause dismissal of appeal. Thomas v. State, 118 Ga. App. 748, 165 S.E.2d 477 (1968).

Enumeration of error must be filed at time brief is filed. Herrin v. Herrin, 225 Ga. 692, 171 S.E.2d 143 (1969).

Enumerations of error are required to be filed separately from brief. — Incorporation of enumerations of error in brief fails to comply with this rule and presents nothing for review by appellate court. Russell v. State, 225 Ga. 371, 169 S.E.2d 124 (1969).

Failure to file copy of enumeration of error with clerk will not vitiate appeal. — Requirement for filing copy of enumeration of error with clerk of trial court is not jurisdictional, and failure to follow this procedural requirement will not vitiate an appeal. Calloway v. State, 115 Ga. App. 158, 154 S.E.2d 291 (1967).

Failure to file copy of enumeration of errors with clerk of trial court is not ground for dismissal of appeal. Stark v. Lanier, 115 Ga. App. 229, 154 S.E.2d 289 (1967); Norton Realty & Loan Co. v. City of Gainesville, 224 Ga. 166, 160 S.E.2d 819 (1968).

RESEARCH REFERENCES

Am. Jur. 2d. — 5 Am. Jur. 2d, Appellate Review, § 575 et seq.

C.J.S. — 4 C.J.S., Appeal and Error, § 554 et seq.

ALR. — Will questions which might have been, but were not, raised on prior appeal or error, be considered on subsequent appeal or error, 1 ALR 725.

5-6-41. Reporting, preparation, and disposition of transcript; correction of omissions or misstatements; preparation of transcript from recollections; filing of disallowed papers; filing of stipulations in lieu of transcript; reporting at party's expense.

(a) In all felony cases, the transcript of evidence and proceedings shall be reported and prepared by a court reporter as provided in Code Section 17-8-5 or as otherwise provided by law.

(b) In all misdemeanor cases, the trial judge may, in the judge's discretion, require the reporting and transcribing of the evidence and proceedings by a court reporter on terms prescribed by the trial judge.

(c) In all civil cases tried in the superior and city courts and in any other court, the judgments of which are subject to review by the Supreme Court or the Court of Appeals, the trial judge thereof may require the parties to have the proceedings and evidence reported by a court reporter, the costs thereof to be borne equally between them; and, where an appeal is taken which draws in question the transcript of the evidence and proceedings, it shall be the duty of the appellant to have the transcript prepared at the appellant's expense. Where it is determined that the parties, or either of them, are financially unable to pay the costs of reporting or transcribing, the judge may, in the judge's discretion, authorize trial of the case unreported; and, when it becomes necessary for a transcript of the evidence and proceedings to be prepared, it shall be the duty of the moving party to prepare the transcript from recollection or otherwise.

(d) Where a trial in any civil or criminal case is reported by a court reporter, all motions, colloquies, objections, rulings, evidence, whether admitted or stricken on objection or otherwise, copies or summaries of all documentary evidence, the charge of the court, and all other proceedings which may be called in question on appeal or other posttrial procedure shall be reported; and, where the report is transcribed, all such matters shall be included in the written transcript, it being the intention of this article that all these matters appear in the record. Where matters occur which were not reported, such as objections to oral argument, misconduct of the jury, or other like instances, the court, upon motion of either party, shall require that a transcript of these matters be made and included as a part of the record. The transcript of proceedings shall not be reduced to narrative form unless by agreement of counsel; but, where the trial is not reported or the transcript of the proceedings for any other reason is not available and the evidence is prepared from recollection, it may be prepared in narrative form.

(e) Where a civil or criminal trial is reported by a court reporter and the evidence and proceedings are transcribed, the reporter shall com-

plete the transcript and file the original and one copy thereof with the clerk of the trial court, together with the court reporter's certificate attesting to the correctness thereof. In criminal cases where the accused was convicted of a capital felony, an additional copy shall be filed for the Attorney General, for which the court reporter shall receive compensation from the Department of Law as provided by law. The original transcript shall be transmitted to the appellate court as a part of the record on appeal; and one copy will be retained in the trial court, both as referred to in Code Section 5-6-43. Upon filing by the reporter, the transcript shall become a part of the record in the case and need not be approved by the trial judge.

(f) Where any party contends that the transcript or record does not truly or fully disclose what transpired in the trial court and the parties are unable to agree thereon, the trial court shall set the matter down for a hearing with notice to both parties and resolve the difference so as to make the record conform to the truth. If anything material to either party is omitted from the record on appeal or is misstated therein, the parties by stipulation, or the trial court, either before or after the record is transmitted to the appellate court, on a proper suggestion or of its own initiative, may direct that the omission or misstatement shall be corrected and, if necessary, that a supplemental record shall be certified and transmitted by the clerk of the trial court. The trial court or the appellate court may at any time order the clerk of the trial court to send up any original papers or exhibits in the case, to be returned after final disposition of the appeal.

(g) Where a trial is not reported as referred to in subsections (b) and (c) of this Code section or where for any other reason the transcript of the proceedings is not obtainable and a transcript of evidence and proceedings is prepared from recollection, the agreement of the parties thereto or their counsel, entered thereon, shall entitle such transcript to be filed as a part of the record in the same manner and with the same binding effect as a transcript filed by the court reporter as referred to in subsection (e) of this Code section. In case of the inability of the parties to agree as to the correctness of such transcript, the decision of the trial judge thereon shall be final and not subject to review; and, if the trial judge is unable to recall what transpired, the judge shall enter an order stating that fact.

(h) Where any amendment or other pleading or paper which requires approval or sanction of the court in any proceeding before being filed of record is disallowed or sanction thereof is refused, the amendment, pleading, or paper may nevertheless be filed, with notation of disallowance thereon, and shall become part of the record for purposes of consideration on appeal or other procedure for review.

(i) In lieu of sending up a transcript of record, the parties may by agreement file a stipulation of the case showing how the questions arose

and were decided in the trial court, together with a sufficient statement of facts to enable the appellate court to pass upon the questions presented therein. Before being transmitted to the appellate court, the stipulation shall be approved by the trial judge or the presiding judge of the court where the case is pending.

(j) In all cases, civil or criminal, any party may as a matter of right have the case reported at the party's own expense. (Ga. L. 1965, p. 18, § 10; Ga. L. 1993, p. 1315, § 1.)

Cross references. — Powers and duties of Judicial Council with regard to reporting of judicial proceedings, § 15-5-20 et seq. Court reporters generally, T. 15, C. 14. Filings in clerk's office, Rules of the Supreme Court of the State of Georgia, Rule 1. Certification and transmittal of transcript and record, Rules of the Supreme Court of the State of Georgia, Rule 15. Contents, form, and certification of transcript, Rules of the Supreme Court of the State of Georgia, Rule 18. Submission of physical evidence, Rules of the Supreme Court of the State of Georgia, Rule 19. Objection to failure to comply with Appellate Practice Act, Rules of the Supreme Court of the State of Georgia, Rule 20. Presenting issue where record supplemented, Rules of the Supreme Court of the State of Georgia, Rule 48. Preparation of records and transcripts, Rules of the Court of Appeals of the State of Georgia, Rule 42. Transmission of transcript, Rules of the Court of Appeals of the State of Georgia, Rule 44. Objections to records or transcripts, Rules of the Court of Appeals of the State of Georgia, Rule 47.

Law reviews. — For annual survey of appellate practice and procedure, see 38 Mercer L. Rev. 47 (1986). For article, "Let's Revise Appellate Procedure in Georgia," see 27 Ga. St. B.J. 135 (1991).

JUDICIAL DECISIONS

Analysis

General Consideration
Constitutionality
Judicial Discretion
Felony Cases
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Reporting of Voir Dire
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Incorrect or Incomplete Transcripts
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Expenses of Recordation and Transcription
Application

General Consideration

One purpose of requirement of filing transcript under subsections (a) and (e) is to afford local counsel in county where case was tried convenient access to exact duplicate copy of record so as to enable counsel to easily ascertain proper references to be included in counsel's brief and written argument. Law v. Smith, 226 Ga. 298, 174 S.E.2d 893 (1970).

Section provides means of obtaining brief of evidence when not recorded at trial. — When evidence was not reported, the only way of obtaining brief of evidence upon which the court may consider whether there should be a grant of the new trial is provided by this section and if the judge is unable to remember the evidence the evidence shall enter an order to that effect. Hill v. General Rediscount Corp., 116 Ga. App. 459, 157 S.E.2d 888 (1967).

Award of attorney fees. — Trial

General Consideration (Cont'd)

court's award of attorney fees to a corporation was upheld as the sheriff challenging the award failed to file a transcript, and the appellate court had to assume that the trial court was authorized to award the fees. Barrett v. Marathon Inv. Corp., 268 Ga. App. 196, 601 S.E.2d 516 (2004).

When defendant claimed that the jury was not sworn, the defendant's remedy was to have the record corrected by following the provisions of subsection (f) of O.C.G.A. § 5-6-41. Grant v. State, 237 Ga. App. 892, 515 S.E.2d 872 (1999).

Filed transcript constitutes public record. — Once the prepared transcript is filed with the trial court clerk, it becomes a matter of public record to which all members of the public have reasonable access. Georgia Am. Ins. Co. v. Varnum, 182 Ga. App. 907, 357 S.E.2d 609 (1987).

Appellant not obligated to prepare record. — Obligation of the appellant relates to the transcript, and the obligation for the preparation of the record rests with the clerk. After the appellant has filed a notice of appeal, the appellant's duty as to the record is limited to the payment of costs. When the clerk fails to transmit the record, but there is no indication that this failure is occasioned by the failure of a party to pay costs, the trial court has no discretion to dismiss the appeal. Long v. City of Midway, 251 Ga. 364, 306 S.E.2d 639 (1983).

Right to transcription. — Although trial counsel failed to inform the appellant of the right to have the trial and proceedings transcribed, the appellant, through appellate counsel, did not attempt to file a transcript or stipulation of the case pursuant to O.C.G.A. § 5-6-41; accordingly, it is presumed that the lack of actual transcription was not prejudicial. Southerton v. State, 205 Ga. App. 366, 422 S.E.2d 251 (1992).

While any party in a civil case may, as a matter of right, have a case reported at the party's own expense, it is not incumbent upon the trial judge to arrange for the official reporter to take down the evidence, and when the plaintiff declined to have the hearing transcribed through a court reporter, the plaintiff could not later complain of the lack of a reporter. Hixson v. Hickson, 236 Ga. App. 894, 512 S.E.2d 648 (1999).

No transcript was either ordered or made for a trial. — When there is no direct proof of prejudice or bias on the part of a jury, an appellate court can set aside the verdict as excessive only when the amount, considered in connection with all the facts in evidence at trial, shakes the moral senses, i.e., the verdict must carry its death warrant on the verdict's face; however, such issues must be determined from the trial transcript, and when no transcript was either ordered or made for a trial in which a jury entered a judgment against a mortgage company, and the mortgage company made no attempt to have the trial court make a transcript or a reconstructed transcript of the proceedings approved by the trial judge, the appellate court assumed that the judgment was correct and supported by the evidence. Wells Fargo Home Mortg., Inc. v. Cook, 267 Ga. App. 368, 599 S.E.2d 319 (2004).

Burden on appellant to prepare transcript. — Burden is on the appellants to prepare a copy of the transcript for inclusion in the appellate record. Young v. First Am. Bank, 196 Ga. App. 348, 396 S.E.2d 73 (1990).

It is the duty of appellant to have transcript prepared, if the transcript is needed for a decision in the case. Graham v. Haley, 224 Ga. 498, 162 S.E.2d 346 (1968).

Appellate court presumed that a trial court's judgment granting a writ of possession was correct as the appellant failed to file a transcript of the proceedings and apparently did not attempt to reconstruct the transcript on appeal. Fisher v. One Stop Mtg., 258 Ga. App. 479, 574 S.E.2d 605 (2002).

Delay in filing of transcript is not necessarily cause for dismissal. — Because there was no evidence that an 11-day delay in the filing of a transcript for transmission as part of the appellate record discernibly delayed the docketing of the record in the appellate court, the trial court abused the court's discretion by concluding that the delay was unreason-

able, and erred by dismissing an appeal. Fulton County Bd. of Tax Assessors v. Love, 289 Ga. App. 252, 656 S.E.2d 576 (2008).

Defendant only allowed 45 minutes to employ court reporter. — Trial court did not err in only allowing defendant in forma pauperis 45 minutes in which to employ a court reporter after the defendant appeared at the hearing without one when the defendant was provided at least two weeks' notice of the date of the hearing and could have arranged for a court reporter to be present within this time period. Quaterman v. Weiss, 212 Ga. App. 563, 442 S.E.2d 813 (1994).

Filing of a pauper's affidavit does not relieve the appellant in a civil action from the responsibility of having the transcript prepared, pursuant to O.C.G.A. § 5-6-41. Wright v. Southern Inv. Properties, 204 Ga. App. 538, 419 S.E.2d 764 (1992).

Appellant must produce transcript from which existence of error may be determined. — Appellant bears burden of showing error below, and when the appellant fails to provide a transcript from which existence of such error may be determined, the appellate court has nothing to review. Blackshear v. Blackshear, 232 Ga. 312, 206 S.E.2d 429 (1974), cert. denied, 419 U.S. 968, 95 S. Ct. 232, 42 L. Ed. 2d 184 (1975).

Transcript or stipulation of record prerequisite to consideration of errors. — Enumeration of errors dependent upon transcript of evidence and proceedings cannot be reviewed by appellate court when it is not reported, there is a dispute between counsel of both parties as to what actually transpired at the hearing, and the trial court is unable to recall it. Cowart v. Cowart, 223 Ga. 487, 156 S.E.2d 94 (1967).

Absent transcript or stipulation of record, appellate court cannot consider evidentiary errors assigned. Mays v. Safeway Fin. Co., 139 Ga. App. 229, 228 S.E.2d 319 (1976).

When evidence is not brought before appellate court by any of the methods provided in this section, the judgment of the trial court on evidentiary matters cannot be reviewed. Burns v. Barnes, 154 Ga. App. 802, 270 S.E.2d 57 (1980); Williamson v. Williams, 156 Ga. App. 154, 274 S.E.2d 136 (1980); Welch v. Mercer, 165 Ga. App. 776, 302 S.E.2d 629 (1983); Blankenship v. Blankenship, 169 Ga. App. 715, 314 S.E.2d 491 (1984).

When the transcript of the trial has not been filed and transmitted to the Court of Appeals, there is no question presented upon which the Court of Appeals can pass. Harris v. Clark, 157 Ga. App. 549, 278 S.E.2d 132 (1981).

In the absence of a transcript, a record prepared from recollection, or a stipulation of the case, an appellate court cannot consider enumerations of error based on the evidence. Perry v. City of Hampton, 200 Ga. App. 329, 409 S.E.2d 92, cert. denied, 200 Ga. App. 897, 409 S.E.2d 92 (1991).

Superior court was required to presume, in the absence of a contrary showing, that the evidence introduced in the municipal court supported the defendant's convictions, because no transcript or summary of the evidence was contained in the record transmitted to the superior court by the municipal court. Giles v. City of Locust Grove, 203 Ga. App. 164, 416 S.E.2d 758, cert. denied, 203 Ga. App. 906, 416 S.E.2d 758 (1992).

It is the appellant's obligation to provide the record substantiating the appellant's claim, and in its absence, the appellate court must affirm as to that issue. State v. Dukes, 234 Ga. App. 343, 507 S.E.2d 147 (1998).

When the plaintiff, in appealing a personal injury verdict, challenges the sufficiency of the evidence as plaintiff's only enumeration of error on appeal, it is necessary that the plaintiff include a transcript or recreation of the proceedings. Moss v. Flav-O-Rich, Inc., 231 Ga. App. 288, 498 S.E.2d 361 (1998).

Questions regarding proceedings not incorporated in transcript. — Court of Appeals cannot consider questions with respect to proceedings on trial which are merely related in enumeration of errors but are not incorporated in properly authenticated transcript. Palmer v. Stevens, 115 Ga. App. 398, 154 S.E.2d 803 (1967); West v. State, 120 Ga. App. 390, 170 S.E.2d 698 (1969).

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Omission from record on appeal of necessary transcript requires affirmance. — When transcript is necessary for review and the appellant omits the transcript from the record on appeal, the appellate court must assume judgment below was correct and affirm. Brown v. Frachiseur, 247 Ga. 463, 277 S.E.2d 16 (1981); Deen v. United Dominion Realty Trust, 218 Ga. App. 443, 462 S.E.2d 384 (1995); Tidwell v. White, 220 Ga. App. 415, 469 S.E.2d 258 (1996); Watson/Winter Joint Venture v. Milledge, 224 Ga. App. 395, 480 S.E.2d 389 (1997); McKinney v. Alexander Properties Group, Inc., 228 Ga. App. 77, 491 S.E.2d 131 (1997).

Defendant's claim, that the test results from a blood test were improperly admitted in a criminal trial because the state failed to establish by a preponderance of the evidence that the blood tested was actually the defendant's blood, lacked merit, as the defendant failed to have a transcript created or attached to the appeal of a pretrial hearing on the motion in limine addressing that issue, and pursuant to O.C.G.A. § 5-6-41(g), the appellate court presumed the trial was conducted in a regular and proper manner. Verlangieri v. State, 273 Ga. App. 585, 615 S.E.2d 633 (2005).

When the appellant fails to bring up transcript or otherwise meet burden of affirmatively showing error by record, judgment below will not be disturbed. Burns v. Barnes, 154 Ga. App. 802, 270 S.E.2d 57 (1980); Welch v. Mercer, 165 Ga. App. 776, 302 S.E.2d 629 (1983).

Corrected transcripts. — Supplemental transcript submitted to the court some months after a hearing on a motion to suppress was permissible when the court reporter certified that corrections were required as a result of a proofing error in transcription. State v. Sneddon, 235 Ga. App. 739, 510 S.E.2d 566 (1998).

Uncertified transcript. — In an appeal from a will contest, the propounder waived the argument that a superior court erred in relying on an uncertified transcript of a probate court hearing; an objection to the lack of certification was not raised in the superior court, and the propounder did not contend that the transcript contained any mistakes. Land v. Burkhalter, 283 Ga. 54, 656 S.E.2d 834 (2008).

In an appeal from a will contest, the propounder's argument that a proper foundation was not laid for the tape from which a transcript of the probate court hearing was prepared was waived by the propounder's failure to raise that objection in the superior court. Land v. Burkhalter, 283 Ga. 54, 656 S.E.2d 834 (2008).

It is duty of party asserting error to show error by the record. Assertions of evidence in briefs or enumerations of error cannot satisfy this duty. York v. Miller, 168 Ga. App. 849, 310 S.E.2d 577 (1983).

Appeal in which a consideration of the enumeration of errors is dependent upon a consideration of the evidence heard by the trial court will be affirmed if a transcript is not included as a part of the appellant record. The party asserting error has a duty to show the error by the record. McClaskey v. Jiffy Lube, Inc., 197 Ga. App. 537, 398 S.E.2d 825 (1990).

When the defendant did not amend or supplement the trial court record in order to reflect the necessary facts pursuant to O.C.G.A. § 5-6-41(f), and when the parties did not stipulate to facts pursuant to O.C.G.A. § 5-6-41(i), it was found that the defendant did not carry the burden of showing by the record that there were facts necessary to prove the defendant's claim under Batson of racial and gender discrimination in the jury; the trial court record on that issue only consisted of colloquy between counsel and the court, which was not competent evidence of the facts and was not a proper record upon which to establish a prima facie case of discrimination. Bowden v. State, 261 Ga. App. 422, 582 S.E.2d 564 (2003).

Absent transcript, court must assume evidence authorized judgment. — When there is no transcript of evidence prepared by court reporter, nor transcript prepared from recollection, agreed to by parties, the Supreme Court must assume evidence authorized judgment. Drake v. Drake, 231 Ga. 193, 200 S.E.2d 719 (1973).

Absent transcript or stipulation of re-

cord as provided in section, appellate court must assume that rulings of the trial court judge were correct. Mays v. Safeway Fin. Co., 139 Ga. App. 229, 228 S.E.2d 319 (1976).

When no transcript is included in record on appeal, the Court of Appeals must assume that evidence was sufficient to support the judgment. Burns v. Barnes, 154 Ga. App. 802, 270 S.E.2d 57 (1980).

Appeal with enumerations of error dependent upon consideration of evidence heard by trial court will, absent transcript, be affirmed. Russell v. State, 155 Ga. App. 555, 271 S.E.2d 689 (1980).

In the absence of a transcript it must be assumed as a matter of law that the evidence adduced at the hearing supported the findings of the court. Smith v. State, 160 Ga. App. 26, 285 S.E.2d 749 (1981).

Lacking a transcript of the evidence considered by the trial court, an appellate court must presume that the judge correctly ruled on the issues presented. Attwell v. Heritage Bank Mt. Pleasant, 161 Ga. App. 193, 291 S.E.2d 28 (1982).

When there is no transcript (none having been requested) and no agreed statement of the facts is furnished, the appellate court is bound to assume that the trial court's findings are supported by sufficient competent evidence, for there is a presumption in favor of the regularity of all proceedings in a court of competent jurisdiction. Siegel v. General Parts Corp., 165 Ga. App. 339, 301 S.E.2d 292 (1983).

When appellant brings an appeal contending that the trial court erred in giving one of appellee's requested charges because the evidence did not support such a charge, but no transcript is included as a part of the record on appeal, the appellate court must affirm. Welch v. Mercer, 165 Ga. App. 776, 302 S.E.2d 629 (1983).

Whenever the enumerations of error require a review of the evidence and a transcript is not included in the record on appeal, the enumerations must be deemed meritless and the judgment of the trial court affirmed. Camp v. Jordan, 168 Ga. App. 339, 309 S.E.2d 384 (1983).

When, on appeal from termination of his parental rights, appellant contends he was denied due process, a fair and impartial hearing, and the opportunity to present his case, and also maintains the trial court was biased, each of the appellant's enumerated errors requires review of the hearing transcript or the accepted substitute therefor, and in the absence of a transcript, the appellate court must assume the trial court's findings were supported by the evidence presented and the actions taken by the trial court during the hearing were appropriate. Baugh v. Robinson, 179 Ga. App. 571, 346 S.E.2d 918 (1986).

There being a presumption in favor of the regularity of proceedings in courts of competent jurisdiction, the Court of Appeals must assume that the trial court's findings are supported by sufficient competent evidence. Smallwood v. Mulkey, 198 Ga. App. 496, 402 S.E.2d 99 (1991).

When judge did not affirmatively state that the judge did not recall the voir dire proceedings, the absence of such an order was not error, when the error enumerated by the defendant is dependent on a transcript of evidence, and no transcript existed. Shuman v. Strickland Transport-Leasing Co., 203 Ga. App. 456, 416 S.E.2d 885 (1992).

When the evidence is not brought before the appellate court by transcript or any other method provided in O.C.G.A. § 5-6-41, judgment on evidentiary matters cannot be reviewed and the appellate court must assume that the judgment on appeal is correct. Wright v. Southern Inv. Properties, 204 Ga. App. 538, 419 S.E.2d 764 (1992).

For a civil litigant to present for appellate review a claim of error made during the course of the proceedings at trial, the litigant must include, at the barest minimum, a transcript of that portion of the proceedings in which the alleged error occurred; or, in the alternative, a sufficiently detailed stipulation approved by an appropriate judge of the court in which the proceedings were conducted. Tadlock v. Duncan, 215 Ga. App. 441, 451 S.E.2d 80 (1994).

In the absence of a trial transcript, the appellate court must assume as a matter of law that the evidence adduced at the hearing supported the trial court's findings, and thus, it could not consider the

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pro se defendant's assertion of the general grounds or the defendant's contention that the trial court failed to furnish the defendant with the accusation and a list of witnesses. Dunn v. State, 234 Ga. App. 623, 507 S.E.2d 170 (1998).

In the absence of either a transcript of lower court proceedings or an agreed statement of the events at trial, the appellate court must presume the trial judge ruled correctly on all issues presented and that the evidence was sufficient to support the judgment. Hixson v. Hickson, 236 Ga. App. 894, 512 S.E.2d 648 (1999).

When plaintiff law firm secured a default judgment against the defendant client and the client argued that the firm failed to provide competent evidence of the reasonableness of the fees that the firm charged the client, but the client failed to provide transcripts of the hearings which the trial court held regarding the reasonableness of the fees or a statement of facts made pursuant to O.C.G.A. § 5-6-41(g), the appellate court, in accordance with the presumption in favor of the regularity of court proceedings, was constrained to presume that the trial court's findings were supported by sufficient competent evidence. Sprewell v. Thomas & Hutson, 260 Ga. App. 312, 581 S.E.2d 322 (2003).

Motion for new trial is part of "proceedings" as contemplated by O.C.G.A. § 5-6-41. Hall v. State, 162 Ga. App. 713, 293 S.E.2d 862 (1982).

When local rules of court are not set out in the record on appeal, an appellate court cannot take judicial cognizance of the content of these rules and must, therefore, presume that the trial court properly interpreted and applied the court's own rules insofar as the rules affect the judgment appealed from. Attwell v. Heritage Bank Mt. Pleasant, 161 Ga. App. 193, 291 S.E.2d 28 (1982).

Document never admitted into evidence not part of appellate record. — Document which was never actually admitted into evidence at trial cannot properly become a part of the record on appeal, but is not reversible error when the document is merely cumulative of competent evidence to the same effect. Ray v. Standard Fire Ins. Co., 168 Ga. App. 116, 308 S.E.2d 221 (1983).

Evidence never actually admitted at trial cannot properly become a part of the record on appeal when O.C.G.A. § 5-6-41is solely for the purpose of making the record speak the truth, not for adding evidence to the record or supplying fatal deficiencies after the fact. Harp v. State, 204 Ga. App. 527, 420 S.E.2d 6 (1992), cert. denied, 204 Ga. App. 921, 420 S.E.2d 6 (1992).

Because the closing arguments in the defendant's child molestation trial were not transcribed, the defendant had the burden of having the record completed in the trial court under the provisions of O.C.G.A. § 5-6-41(f) in order to raise an argument on appeal regarding the prosecutor's closing argument; since the defendant failed to provide the necessary record to the appellate court, the defendant's claim of error was not reviewable. Jackson v. State, 256 Ga. App. 829, 570 S.E.2d 40 (2002).

Failure to properly supplement record. — When a party seeks to have a record on appeal supplemented under O.C.G.A. § 5-6-41 but does not follow statutory procedures there is nothing for an appellate court to review. Cox v. Fillingim, 184 Ga. App. 205, 361 S.E.2d 65 (1987).

Because the defendant's motion for a continuance was not made a part of the record in the court below, the defendant failed to preserve any error in that regard for appellate review; the defendant took no action on the record to renew the objection to the timing of the retrial or to make a record of the trial court's ruling, and failed to implement any of the mechanisms provided in O.C.G.A. § 5-6-41 for supplementing the record on appeal. Anderson v. State, 276 Ga. App. 216, 622 S.E.2d 898 (2005).

To the extent that a defendant's claim of ineffective assistance of counsel during the defendant's trial for felony murder and other offenses pertained to events that were not reflected in the record, an affidavit by the defendant's trial counsel asserting that trial counsel should have made certain objections that were not made did not serve to supplement the

record under O.C.G.A. § 5-6-41(f), and the affidavit's factual contentions, therefore, presented no issue for review on the defendant's appeal from the defendant's convictions and the denial of the defendant's motion for a new trial. White v. State, 281 Ga. 276, 637 S.E.2d 645 (2006).

When trial judge has no independent recollection of trial. — Criminal defendant's attempts to prepare and file a unilateral account of the proceedings below did not meet the requirements of O.C.G.A. § 5-6-41, when the trial court had no independent recollection of the defendant's battery trial, and no transcript was available. Dunn v. State, 234 Ga. App. 623, 507 S.E.2d 170 (1998).

Cited in American Int'l Indus., Inc. v. Ivan Allen Co., 110 Ga. App. 148, 138 S.E.2d 61 (1964); McCranie v. Mullis, 221 Ga. 617, 146 S.E.2d 723 (1966); Webb v. Jones, 221 Ga. 754, 146 S.E.2d 910 (1966); Salisbury v. State, 222 Ga. 549, 150 S.E.2d 819 (1966); Holloway v. Poppell, 114 Ga. App. 531, 152 S.E.2d 4 (1966); Ledbetter v. State, 116 Ga. App. 276, 157 S.E.2d 40 (1967); Hair v. Chilton, 223 Ga. 632, 157 S.E.2d 290 (1967); Wilbanks v. State, 116 Ga. App. 698, 158 S.E.2d 274 (1967); Delta Corp. of Am. v. Aiken, 224 Ga. 241, 161 S.E.2d 293 (1968); Herring v. R.L. Mathis Certified Dairy Co., 118 Ga. App. 132, 162 S.E.2d 863 (1968); Leiter v. Arnold, 118 Ga. App. 108, 163 S.E.2d 235 (1968); Price v. State, 118 Ga. App. 207, 163 S.E.2d 243 (1968); Smith v. Smith, 224 Ga. 689, 164 S.E.2d 225 (1968); Greene v. McIntyre, 119 Ga. App. 296, 167 S.E.2d 203 (1969); Stephens v. State, 119 Ga. App. 674, 168 S.E.2d 333 (1969); Cohran v. Sosebee, 120 Ga. App. 115, 169 S.E.2d 624 (1969); O'Quinn v. State, 121 Ga. App. 231, 173 S.E.2d 409 (1970); Richardson v. Nu-Way Cleaners & Laundry, 121 Ga. App. 425, 174 S.E.2d 202 (1970); McKinney v. State, 121 Ga. App. 815, 175 S.E.2d 893 (1970); Duncan v. Duncan, 226 Ga. 605, 176 S.E.2d 88 (1970); Bridges v. State, 227 Ga. 24, 178 S.E.2d 861 (1970); O'Gorman v. O'Gorman, 227 Ga. 468, 181 S.E.2d 490 (1971); Wisenbaker v. Wisenbaker, 227 Ga. 610, 182 S.E.2d 114 (1971); Miller v. Sparks, 124 Ga. App. 4, 183 S.E.2d 88 (1971); Taylor v. Taylor, 228 Ga. 173, 184 S.E.2d 471 (1971); Ellison v. Labor Pool of Am., Inc., 228 Ga. 147, 184 S.E.2d 572 (1971); Lamb Bros. v. Industrial Credit Co., 228 Ga. 213, 184 S.E.2d 585 (1971); Herring v. Herring, 228 Ga. 492, 186 S.E.2d 538 (1971); Heard v. State, 126 Ga. App. 62, 189 S.E.2d 895 (1972); Penland v. State, 229 Ga. 256, 190 S.E.2d 900 (1972); United States Fid. & Guar. Co. v. Georgia Farm Bureau Mut. Ins. Co., 126 Ga. App. 831, 191 S.E.2d 893 (1972); Dalton v. State, 127 Ga. App. 504, 194 S.E.2d 268 (1972); Cagle v. Atchley, 127 Ga. App. 668, 194 S.E.2d 598 (1972); Huckaby v. State, 128 Ga. App. 79, 195 S.E.2d 688 (1973); Johnson v. State, 230 Ga. 196, 196 S.E.2d 385 (1973); Morris v. Jones, 128 Ga. App. 847, 198 S.E.2d 354 (1973); Allen v. State, 230 Ga. 772, 199 S.E.2d 246 (1973); MacNerland v. Barnes, 129 Ga. App. 367, 199 S.E.2d 564 (1973); Jenkins v. Jenkins, 231 Ga. 371, 202 S.E.2d 52 (1973); Jackson v. State, 130 Ga. App. 581, 203 S.E.2d 923 (1974); Nicholson v. Nicholson, 231 Ga. 760, 204 S.E.2d 292 (1974); Ayers Enters., Ltd. v. Adams, 131 Ga. App. 12, 205 S.E.2d 16 (1974); Maddox v. State, 131 Ga. App. 86, 205 S.E.2d 31 (1974); Castile v. Rich's, Inc., 131 Ga. App. 586, 206 S.E.2d 851 (1974); Darsey v. Darsey, 232 Ga. 381, 207 S.E.2d 22 (1974); Umstead v. State, 131 Ga. App. 833, 207 S.E.2d 238 (1974); Banks v. State, 132 Ga. App. 809, 209 S.E.2d 252 (1974); Brand v. Montega Corp., 233 Ga. 35, 209 S.E.2d 583 (1974); Brown v. State, 133 Ga. App. 56, 209 S.E.2d 721 (1974); Freedle v. Galloway, 133 Ga. App. 424, 211 S.E.2d 29 (1974); Mullins v. State, 133 Ga. App. 554, 211 S.E.2d 631 (1974); Parrott v. State, 133 Ga. App. 931, 213 S.E.2d 77 (1975); Patterson v. State, 233 Ga. 724, 213 S.E.2d 612 (1975); Coop Mtg. Invs. Assocs. v. Pendley, 134 Ga. App. 236, 214 S.E.2d 572 (1975); Bouldin v. Baum, 134 Ga. App. 484, 214 S.E.2d 734 (1975); Millcreek Properties, Inc. v. Gregory, 136 Ga. App. 511, 221 S.E.2d 685 (1975); Gillen v. Bostick, 234 Ga. 308, 215 S.E.2d 676 (1975); Savage v. Savage, 234 Ga. 853, 218 S.E.2d 568 (1975); Diamond v. Chatham County Bd. of Tax Assessors, 135 Ga. App. 645, 218 S.E.2d 657 (1975); Anderson v. Anderson, 235 Ga. 115, 218 S.E.2d 846 (1975); Tucker v. State, 136 Ga. App. 456, 221 S.E.2d 664 (1975); Smith v.

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State, 235 Ga. 852, 221 S.E.2d 601 (1976); Tele-Spot v. Garden Cities Corp., 137 Ga. App. 238, 223 S.E.2d 273 (1976); Cowart v. Cowart, 236 Ga. 626, 225 S.E.2d 5 (1976); McGregor v. Town of Fort Oglethorpe, 236 Ga. 711, 225 S.E.2d 238 (1976); Daughtrey v. State, 138 Ga. App. 504, 226 S.E.2d 773 (1976); Stanley v. Stanley, 138 Ga. App. 560, 226 S.E.2d 800 (1976); Stephens v. State, 237 Ga. 259, 227 S.E.2d 261 (1976); Street v. State, 237 Ga. 307, 227 S.E.2d 750 (1976); Copeland v. State, 139 Ga. App. 55, 227 S.E.2d 850 (1976); Patterson v. Professional Resources, Inc., 140 Ga. App. 315, 231 S.E.2d 88 (1976); Wyche v. State, 140 Ga. App. 341, 231 S.E.2d 122 (1976); Walsey v. Lockhart, 140 Ga. App. 348, 231 S.E.2d 124 (1976); McClure v. Department of Transp., 140 Ga. App. 564, 231 S.E.2d 532 (1976); Chaplin v. State, 141 Ga. App. 788, 234 S.E.2d 330 (1977); Orr v. Woodruff-Robinson, Inc., 142 Ga. App. 861, 237 S.E.2d 463 (1977); Hunter v. State, 143 Ga. App. 541, 239 S.E.2d 212 (1977); Seymour v. State, 144 Ga. App. 32, 240 S.E.2d 305 (1977); Blue v. State, 144 Ga. App. 378, 241 S.E.2d 36 (1977); Whitehead v. Great Cent. Ins. Co., 144 Ga. App. 422, 241 S.E.2d 302 (1977); Burnett v. Doster, 144 Ga. App. 443, 241 S.E.2d 319 (1978); Adderholt v. Adderholt, 240 Ga. 626, 242 S.E.2d 11 (1978); Parker v. State, 145 Ga. App. 205, 243 S.E.2d 580 (1978); Lee v. Southeastern Plumbing Supply Co., 145 Ga. App. 465, 244 S.E.2d 33 (1978); Dozier v. Norris, 241 Ga. 230, 244 S.E.2d 853 (1978); Stevens v. State, 242 Ga. 34, 247 S.E.2d 838 (1978); Smart v. State, 147 Ga. App. 117, 248 S.E.2d 185 (1978); Lake v. Hicks, 147 Ga. App. 175, 248 S.E.2d 236 (1978); Cousins Mtg. & Equity v. Hamilton, 147 Ga. App. 210, 248 S.E.2d 516 (1978); Haga v. Holcombe, 147 Ga. App. 520, 249 S.E.2d 695 (1978); Ewing v. State, 147 Ga. App. 546, 249 S.E.2d 696 (1978); Montford v. State, 148 Ga. App. 335, 251 S.E.2d 125 (1978); Williamson v. Alderman, 148 Ga. App. 297, 251 S.E.2d 153 (1978); Bowen v. State, 151 Ga. App. 166, 259 S.E.2d 169 (1979); Moore v. State, 151 Ga. App. 413, 260 S.E.2d 350 (1979); Thomas v. State, 151 Ga. App. 562, 260 S.E.2d 556 (1979); Tucker v. State, 244 Ga. 721, 261 S.E.2d 635 (1979); McIntyre v. Gulf Oil Corp., 151 Ga. App. 855, 261 S.E.2d 766 (1979); Smith v. State Farm Mut. Auto. Ins. Co., 152 Ga. App. 825, 264 S.E.2d 296 (1979); Ross v. State, 245 Ga. 173, 263 S.E.2d 913 (1980); Hart v. State, 153 Ga. App. 53, 264 S.E.2d 542 (1980); Walker v. State, 153 Ga. App. 89, 264 S.E.2d 565 (1980); Duke v. State, 153 Ga. App. 129, 265 S.E.2d 73 (1980); Walker v. State, 153 Ga. App. 831, 266 S.E.2d 580 (1980); Rutledge v. State, 245 Ga. 768, 267 S.E.2d 199 (1980); Fair v. State, 245 Ga. 868, 268 S.E.2d 316 (1980); Taurus Prods., Inc. v. Maryland Sound Indus., Inc., 155 Ga. App. 147, 270 S.E.2d 337 (1980); State v. Graham, 246 Ga. 341, 271 S.E.2d 627 (1980); Rogers v. State, 155 Ga. App. 685, 272 S.E.2d 549 (1980); McCroy v. State, 155 Ga. App. 777, 272 S.E.2d 747 (1980); Bohin v. State, 156 Ga. App. 206, 274 S.E.2d 592 (1980); Hanna Creative Enters., Inc. v. Alterman Foods, Inc., 156 Ga. App. 376, 274 S.E.2d 761 (1980); Strickland v. Boswell, 156 Ga. App. 375, 274 S.E.2d 769 (1980); Whisenhunt v. State, 156 Ga. App. 583, 275 S.E.2d 82 (1980); Graham v. State, 156 Ga. App. 538, 275 S.E.2d 114 (1980); MacDonald v. MacDonald, 156 Ga. App. 565, 275 S.E.2d 142 (1980); American Vigorelli, Inc. v. Smith, Phillips & Dipietro, 157 Ga. App. 52, 276 S.E.2d 158 (1981); Bhatia v. West Cash & Carry Bldg. Materials of Savannah, Inc., 157 Ga. App. 145, 276 S.E.2d 656 (1981); Cole v. Jordan, 158 Ga. App. 200, 279 S.E.2d 497 (1981); Harkey v. State, 159 Ga. App. 112, 282 S.E.2d 648 (1981); McRae v. Smith, 159 Ga. App. 19, 282 S.E.2d 676 (1981); Foster v. Waverly Hall United Dev. Corp., 159 Ga. App. 710, 285 S.E.2d 35 (1981); Edwards v. Davis, 160 Ga. App. 122, 286 S.E.2d 301 (1981); Montgomery v. Tremblay, 249 Ga. 483, 292 S.E.2d 64 (1982); Godfrey v. Kirk, 161 Ga. App. 474, 288 S.E.2d 301 (1982); Neal v. State, 161 Ga. App. 77, 289 S.E.2d 293 (1982); Sams v. State, 162 Ga. App. 118, 290 S.E.2d 321 (1982); Brewer v. State, 162 Ga. App. 228, 291 S.E.2d 87 (1982); Cameron v. Cox, 162 Ga. App. 268, 291 S.E.2d 115 (1982); Walker v. State, 163 Ga. App. 684, 294 S.E.2d 717 (1982); Freeman v. Gold & White, Inc., 163 Ga. App. 467, 294 S.E.2d 718 (1982); Brannon v.

State, 163 Ga. App. 340, 295 S.E.2d 110 (1982); Cooper v. State, 163 Ga. App. 482, 295 S.E.2d 161 (1982); McKenney v. State, 163 Ga. App. 545, 295 S.E.2d 217 (1982); Gray v. Loper, 163 Ga. App. 552, 295 S.E.2d 229 (1982); Burleson v. Jordan, 163 Ga. App. 496, 295 S.E.2d 335 (1982); Readd v. State, 164 Ga. App. 97, 296 S.E.2d 402 (1982); Gilbert v. Colonial Stores Div., 164 Ga. App. 100, 296 S.E.2d 404 (1982); Scott v. Leder, 164 Ga. App. 334, 297 S.E.2d 103 (1982); Snider v. Lavender, 164 Ga. App. 591, 298 S.E.2d 582 (1982); Huttig Sash & Door Co. v. Controlled Bldg. Corp., 165 Ga. App. 99, 299 S.E.2d 411 (1983); High v. Zant, 250 Ga. 693, 300 S.E.2d 654 (1983); Roper v. State, 251 Ga. 95, 303 S.E.2d 103 (1983); In re T.E.D., 166 Ga. App. 322, 303 S.E.2d 777 (1983); In re S.D.S., 166 Ga. App. 344, 304 S.E.2d 85 (1983); Smith v. State, 251 Ga. 229, 304 S.E.2d 716 (1983); Edelberg v. Porterfield, 166 Ga. App. 383, 304 S.E.2d 739 (1983); Bray v. Carlyle, 167 Ga. App. 208, 306 S.E.2d 89 (1983); In re G.W.H., 168 Ga. App. 845, 310 S.E.2d 573 (1983); O'Neal v. State, 168 Ga. App. 869, 310 S.E.2d 751 (1983); Hill Aircraft & Leasing Corp. v. Planes, Inc., 169 Ga. App. 161, 312 S.E.2d 119 (1983); Thigpen v. Johnson, 169 Ga. App. 410, 313 S.E.2d 121 (1984); Branton v. Stone, 169 Ga. App. 737, 315 S.E.2d 24 (1984); Rosemond v. Prudential Property & Cas. Ins. Co., 170 Ga. App. 189, 316 S.E.2d 541 (1984); Global Assocs. v. Pan Am. Telecommunications, Inc., 170 Ga. App. 116, 316 S.E.2d 562 (1984); Butler v. State, 170 Ga. App. 257, 316 S.E.2d 841 (1984); Trammell v. F & M Bank, 170 Ga. App. 347, 317 S.E.2d 323 (1984); Gaye v. State, 170 Ga. App. 357, 317 S.E.2d 334 (1984); Watts v. State, 170 Ga. App. 614, 317 S.E.2d 654 (1984); New v. State, 171 Ga. App. 392, 319 S.E.2d 542 (1984); Chambers v. DOT, 172 Ga. App. 197, 322 S.E.2d 366 (1984); Davis v. State, 172 Ga. App. 710, 324 S.E.2d 559 (1984); Taylor v. State, 172 Ga. App. 827, 324 S.E.2d 788 (1984); Williams v. State, 173 Ga. App. 207, 325 S.E.2d 783 (1984); Vaughn v. State, 173 Ga. App. 716, 327 S.E.2d 747 (1985); Green v. Gaydon, 174 Ga. App. 796, 331 S.E.2d 106 (1985); Uren v. State, 174 Ga. App. 804, 331 S.E.2d 642 (1985); Bruce v. State, 175 Ga. App. 453, 333 S.E.2d 394 (1985); Dugger v. Danello, 175 Ga. App. 618, 334 S.E.2d 3 (1985); Kloszewski v. State, 177 Ga. App. 153, 338 S.E.2d 741 (1985); State v. Mitchell, 177 Ga. App. 333, 339 S.E.2d 384 (1985); Milford v. State, 178 Ga. App. 792, 344 S.E.2d 505 (1986); Campbell v. State, 181 Ga. App. 1, 351 S.E.2d 209 (1986); Smith v. State, 182 Ga. App. 58, 354 S.E.2d 681 (1987); Decatur Hous. Auth. v. Christian, 182 Ga. App. 270, 355 S.E.2d 764 (1987); Robinson v. State, 182 Ga. App. 423, 356 S.E.2d 55 (1987); Gentile v. Miller, Stevenson & Steinichen, Inc., 182 Ga. App. 690, 356 S.E.2d 666 (1987); Miller v. State, 183 Ga. App. 563, 359 S.E.2d 359 (1987); Wagner v. Howell, 257 Ga. 801, 363 S.E.2d 759 (1988); Mapp v. State, 258 Ga. 273, 368 S.E.2d 511 (1988); Jones v. State, 185 Ga. App. 595, 365 S.E.2d 153 (1988); In re C.C.B., 188 Ga. App. 46, 372 S.E.2d 6 (1988); Dean v. State, 188 Ga. App. 128, 372 S.E.2d 286 (1988); Whiteley v. State, 188 Ga. App. 129, 372 S.E.2d 296 (1988); In re Holly, 188 Ga. App. 202, 372 S.E.2d 479 (1988); Richmond Leasing Co. v. First Union Bank, 188 Ga. App. 843, 374 S.E.2d 746 (1988); Hunt v. Lee, 190 Ga. App. 403, 379 S.E.2d 215 (1989); Hout v. State, 190 Ga. App. 700, 380 S.E.2d 330 (1989); Brown v. Thomas, 191 Ga. App. 679, 382 S.E.2d 656 (1989); Coffee v. Silver, 195 Ga. App. 247, 393 S.E.2d 58 (1990); National Sur. Corp. v. O'Dell, 195 Ga. App. 374, 393 S.E.2d 504 (1990); Sizemore v. State, 195 Ga. App. 548, 395 S.E.2d 669 (1990); Odom v. State, 196 Ga. App. 293, 396 S.E.2d 27 (1990); Burns v. State, 196 Ga. App. 732, 397 S.E.2d 19 (1990); Thrasher v. State, 197 Ga. App. 593, 398 S.E.2d 850 (1990); Hamm v. Willis, 201 Ga. App. 723, 411 S.E.2d 771 (1991); Dover v. Master Lease Corp., 203 Ga. App. 526, 417 S.E.2d 368 (1992); Walls v. State, 204 Ga. App. 348, 419 S.E.2d 344 (1992); Robbins v. State, 207 Ga. App. 556, 428 S.E.2d 450 (1993); Walton v. State, 207 Ga. App. 787, 429 S.E.2d 158 (1993); Woods v. State, 208 Ga. App. 565, 431 S.E.2d 167 (1993); State v. Cobb, 208 Ga. App. 752, 432 S.E.2d 112 (1993); Alcovy Properties, Inc. v. MTW Inv. Co., 212 Ga. App. 102, 441 S.E.2d 288 (1994); Johnson v. Hardwick, 212 Ga. App. 44, 441 S.E.2d 450 (1994); Leavitt v. State, 264 Ga. 178, 442 S.E.2d 457 (1994);

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Asbury v. Georgia World Congress Ctr., 212 Ga. App. 628, 442 S.E.2d 822 (1994); Smith v. State, 213 Ga. App. 536, 445 S.E.2d 341 (1994); Effel v. Effel, 213 Ga. App. 623, 445 S.E.2d 373 (1994); Haygood v. State, 221 Ga. App. 477, 471 S.E.2d 552 (1996); Keegan v. State, 221 Ga. App. 487, 472 S.E.2d 107 (1996); Womack v. State, 223 Ga. App. 82, 476 S.E.2d 767 (1996); Hinely v. Hinely, 232 Ga. App. 211, 501 S.E.2d 20 (1998); Shelnutt v. State, 234 Ga. App. 655, 506 S.E.2d 643 (1998); Reid v. Royal Creek Apts. Ltd. Partnership, 239 Ga. App. 536, 521 S.E.2d 210 (1999); Crown Diamond Co. v. N.Y. Diamond Corp., 242 Ga. App. 674, 530 S.E.2d 800 (2000); Keller v. State, 242 Ga. App. 150, 529 S.E.2d 167 (2000); Baker v. State, 247 Ga. App. 25, 543 S.E.2d 70 (2000); Taylor v. Young, 253 Ga. App. 585, 560 S.E.2d 40 (2002); Strickland v. State, 257 Ga. App. 304, 570 S.E.2d 713 (2002); State v. Huckeba, 258 Ga. App. 627, 574 S.E.2d 856 (2002); In re Estate of Battle, 263 Ga. App. 73, 587 S.E.2d 140 (2003); Harden v. Young, 268 Ga. App. 619, 606 S.E.2d 6 (2004); Moss v. State, 278 Ga. App. 362, 629 S.E.2d 5 (2006); In re Otuonye, 279 Ga. App. 468, 631 S.E.2d 500 (2006); Monterey Cmty. Council v. DeKalb County Planning Comm'n, 281 Ga. App. 873, 637 S.E.2d 488 (2006); Johnson v. State, 283 Ga. App. 524, 642 S.E.2d 170 (2007); Thornton v. State, 288 Ga. App. 60, 653 S.E.2d 361 (2007); Andrus v. Andrus, 290 Ga. App. 394, 659 S.E.2d 793 (2008); Smith v. State, 294 Ga. App. 692, 670 S.E.2d 191 (2008); In the Interest of O.M.J., 297 Ga. App. 20, 676 S.E.2d 421 (2009); Scott v. State, 302 Ga. App. 111, 690 S.E.2d 242 (2010); Michel v. Michel, 286 Ga. 892, 692 S.E.2d 381 (2010); Bryant v. State, 309 Ga. App. 649, 710 S.E.2d 854 (2011); Fulton County Bd. of Tax Assessors v. Fast Evictions, LLC, 314 Ga. App. 178, 723 S.E.2d 461 (2012).

Constitutionality

Subsections (g) and (i) do not deny due process. — Provisions of subsections (g) and (i) of O.C.G.A. § 5-6-41, relating to preparation of a transcript of proceedings from recollection or by stipulation, do not deny due process of law. Wall v. Citizens & S. Bank, 247 Ga. 216, 274 S.E.2d 486 (1981).

Method of perfecting record under subsection (g) is not so inadequate as to deny meaningful appeal. Hunt v. State, 133 Ga. App. 548, 211 S.E.2d 601 (1974).

Standing to challenge. — Defendant who did not request that a transcript be made did not have standing to challenge the constitutionality of O.C.G.A. § 5-6-41 by alleging that the section denied the defendant equal protection of the law in that only a defendant who can afford to have the defendant's misdemeanor trial proceedings transcribed has a right to a transcript under subsection (j) of § 5-6-41 while an indigent defendant may have the defendant's misdemeanor trial proceedings transcribed only at the discretion of the trial court. Williams v. State, 254 Ga. 690, 333 S.E.2d 613 (1985).

Judicial Discretion

Reference in subsection (b) to discretion concerns terms judge may require for reporting and transcribing, but not to a party's mandatory right to have proceedings reported at own expense. Dumas v. State, 131 Ga. App. 79, 205 S.E.2d 119 (1974).

Provisions of subsection (c) are merely discretionary and not mandatory, and the trial judge is not obligated to have the case reported. Liberty Loan & Thrift Corp. v. Meeks, 115 Ga. App. 846, 156 S.E.2d 172 (1967); Gunter v. National City Bank, 239 Ga. 496, 238 S.E.2d 48 (1977).

Discretion granted the trial court by subsection (f) of O.C.G.A. § 5-6-41 vests the court with a necessary control over the designation and transmittal of both record and transcript. Washburn v. Sardi's Restaurants, 191 Ga. App. 307, 381 S.E.2d 750, cert. denied, 191 Ga. App. 923, 381 S.E.2d 750 (1989).

When a criminal defendant contended that the prosecutor's affidavit conflicted with the affidavits of the defendant's trial counsel, the trial court's adoption of the prosecutor's affidavit was dispositive, and was not subject to review. Smith v. State, 260 Ga. 274, 393 S.E.2d 229 (1990).

Recording of evidence at interlocutory hearing or subsequent contempt hearing. — It is not incumbent upon the trial judge to arrange for an official reporter to take down evidence at an interlocutory hearing or subsequent contempt hearing; the law does not mandate that every civil case be reported. Savage v. Savage, 234 Ga. 853, 218 S.E.2d 568 (1975).

Felony Cases

State must have transcript of evidence prepared in all felony cases. — Under Ga. L. 1965, p. 18, § 10 and § 17-8-5, it was the duty of the state in all felony cases to have a transcript of the evidence and proceedings reported and prepared and, after a guilty verdict had been returned, to file a transcript. Parrott v. State, 134 Ga. App. 160, 214 S.E.2d 3 (1975), overruled on other grounds, Mathis v. State, 147 Ga. App. 148, 248 S.E.2d 212 (1978).

State function to prepare transcript. — It is not the function of courts to prepare transcript of criminal trial; that is the function of the state, as required by subsection (a). Knowles v. State, 156 Ga. App. 389, 274 S.E.2d 590 (1980), rev'd on other grounds, 247 Ga. 218, 274 S.E.2d 468 (1981).

All testimony and proceedings except argument of counsel must be reported. Aiken v. State, 226 Ga. 840, 178 S.E.2d 202 (1970), cert. denied, 401 U.S. 982, 91 S. Ct. 1216, 28 L. Ed. 2d 334 (1971).

Construing Ga. L. 1965, p. 18, § 10 (see O.C.G.A. § 5-6-41) with former Code 1933, § 27-2401 (see O.C.G.A. § 17-8-5), it would appear that in a felony case all testimony and proceedings must be reported, except argument of counsel. Graham v. State, 153 Ga. App. 658, 266 S.E.2d 316, rev'd on other grounds, 246 Ga. 341, 271 S.E.2d 627 (1980).

When objection made to argument of state's counsel, upon motion of accused, transcript shall include argument. When an objection is made to argument of state's counsel, and upon motion of accused, the court shall require that the transcript of argument be made. Aiken v. State, 226 Ga. 840, 178 S.E.2d 202 (1970), cert. denied, 401 U.S. 982, 91 S. Ct. 1216, 28 L. Ed. 2d 334 (1971).

When trial transcript is not available to appellant, the appellant is effectively denied the appellant's right to appeal. Wade v. State, 231 Ga. 131, 200 S.E.2d 271 (1973).

State's failure to file correct transcript. — When the court reporter worked over 100 hours and was unable to decipher inaudible tapes, and the trial court and counsel were unable to reconstruct record, failure of state to file correct transcript, through no fault of the appellant, effectively deprives the defendant of the defendant's right of appeal. Knowles v. State, 156 Ga. App. 389, 274 S.E.2d 590 (1980), rev'd on other grounds, 247 Ga. 218, 274 S.E.2d 468 (1981).

Failure of state to file transcript, or correct transcript, even when caused, as here, by the state's inability to file it (and not by appellant's fault), effectively denies appellant the appellant's right to appeal because a complete and correct transcript of the appellant's trial is not available to the appellant. Parrott v. State, 134 Ga. App. 160, 214 S.E.2d 3 (1975).

Defendant failed to show prejudice. — Defendant failed to demonstrate that the loss of two videotapes had harmed the defendant or precluded the appellate court from reviewing any of the issues raised on appeal with regard to the defendant's convictions for multiple offenses relating to the sexual molestation and exploitation of two minors. Significantly, although the videotapes were missing, the parties had stipulated to the contents of the tapes at the bench trial and to the proffered testimony of the minor victims. Mitchell v. State, 289 Ga. App. 55, 656 S.E.2d 145 (2007), cert. dismissed, No. S08C0770, 2008 Ga. LEXIS 499 (Ga. 2008).

Misdemeanor Cases

Provisions of subsection (b) of O.C.G.A. § 5-6-41 are not mandatory and the trial court is not obligated to have a misdemeanor trial case reported. Frasier v. State, 160 Ga. App. 812, 287 S.E.2d 669 (1982).

Misdemeanor Cases (Cont'd)

Whether transcript shall be prepared in misdemeanor case initially lies within discretion of trial court. Williams v. State, 140 Ga. App. 87, 230 S.E.2d 94 (1976).

It lies within the discretion of the trial court to grant or deny an indigent the transcription of the trial of a misdemeanor. Hughes v. State, 168 Ga. App. 413, 309 S.E.2d 409 (1983).

In misdemeanor cases, it is discretionary with the trial court as to whether the proceedings are transcribed. Thus, absent a demand for a transcript, prepared at the request of the demanding party, the reporting of such a case is not required as a matter of law. Ward v. State, 188 Ga. App. 372, 373 S.E.2d 65 (1988).

Claim to a free transcript. — In misdemeanor cases, it is within the trial court's discretion to require the reporting and transcribing of the evidence and proceedings by a court reporter, but two factors need to be considered on the record in evaluating an indigent defendant's claim to a free transcript: (1) the transcript's value in connection with the defendant's trial or appeal; and (2) the accessibility of other means that would fulfill the same functions as a transcript. Failure to make that evaluation on the record is not a proper exercise of a trial court's discretion. Stanley v. State, 267 Ga. App. 379, 599 S.E.2d 331 (2004).

Reporting of misdemeanor not required absent demand by party willing to bear expense of preparation. Williams v. State, 140 Ga. App. 87, 230 S.E.2d 94 (1976).

Indigent defendant charged with misdemeanor may request transcription. — When a trial court, sua sponte, has not ordered such, an indigent defendant, on trial on a misdemeanor charge, must make a request or motion to the trial court that evidence and proceedings be reported and transcribed. Parker v. State, 154 Ga. App. 668, 269 S.E.2d 518 (1980).

Defendant in misdemeanor case is not denied transcript absent demand. — Absent demand by the defendant in a misdemeanor case for preparation of a transcript at the defendant's own expense under subsection (j), the defendant has not been denied a transcript of the defendant's misdemeanor conviction. Williams v. State, 140 Ga. App. 87, 230 S.E.2d 94 (1976).

In criminal misdemeanor proceedings, the trial court did not err in accepting the defendant's waiver of takedown; because the defendant did not elect to have the proceedings taken down, whether the proceedings were reported was a matter within the trial court's discretion under O.C.G.A. § 5-6-41(b), and the defendant failed to use the remedy provided under § 5-6-41(g), which provided a means of using the parties' recollection to reconstruct the proceedings. Johnson v. State, 280 Ga. App. 882, 635 S.E.2d 267 (2006).

Trial court did not err by failing to order transcription of a defendant's misdemeanor proceeding without ascertaining the defendant's indigence status or obtaining a waiver. Under O.C.G.A. § 5-6-41(b), the defendant had no right to a transcript in a misdemeanor case, and neither the defendant nor defense counsel requested transcription at defendant's own expense under § 5-6-41(j). Bagley v. State, 298 Ga. App. 513, 680 S.E.2d 565 (2009).

Judge may assign cost of transcript to defendant making request. — Determination that the defendant should pay the cost of reporting in misdemeanor cases when defense counsel requests proceedings to be recorded is within the sound discretion of the trial judge to prescribe terms by which misdemeanor cases are to be reported under subsection (b). Godwin v. State, 138 Ga. App. 131, 225 S.E.2d 723 (1976).

Court must make sure reporter is available. — When the defendant in a misdemeanor case asks that the case be recorded at the defendant's expense, the court must make sure that the court reporter is available to comply with the request. Thompson v. State, 240 Ga. 296, 240 S.E.2d 87 (1977).

Defendant in misdemeanor case need not make advance arrangements for court reporter if the defendant desires that the trial be recorded. Thompson v. State, 240 Ga. 296, 240 S.E.2d 87 (1977).

Defendant need not ensure prior to trial that reporter is in attendance. — Subsection (j) of Ga. L. 1965, p. 18, § 10 (see O.C.G.A. § 5-6-41) and former Code 1933, § 24-3102 (see O.C.G.A. § 15-14-3) did not put a duty upon a defendant who was charged with a misdemeanor to ensure prior to trial that the court reporter is complying with the reporter's statutory duty to attend court sessions. When a defendant was facing a potential criminal conviction with possible resulting fine or imprisonment, such a duty cannot be read into these statutes. Thompson v. State, 240 Ga. 296, 240 S.E.2d 87 (1977).

Absence of transcript of hearing in misdemeanor case is attributable to complaining party. Williams v. State, 140 Ga. App. 87, 230 S.E.2d 94 (1976).

Trial judge's decision not to prepare narrative not subject to review. — With regard to a defendant's attempt to appeal the sufficiency of the evidence with regard to the defendant's convictions for theft of services, a misdemeanor, and two counts of obstruction of a police officer, because the parties could not agree on a narrative, the trial judge's decision that no narrative would be created was final and not subject to review. Williams v. State, 287 Ga. App. 851, 652 S.E.2d 803 (2007).

Hearing on misdemeanor charge. — Defendant must request that a hearing on a misdemeanor charge be reported and transcribed, unless the trial court on the court's own motion orders that this be done. Gilbert v. City of Manchester, 204 Ga. App. 422, 419 S.E.2d 487, cert. denied, 204 Ga. App. 921, 419 S.E.2d 487 (1992).

Impact of transcript's absence in misdemeanor case. — Absence of transcript on appeal in misdemeanor case requires judgment below be affirmed. Williams v. State, 140 Ga. App. 87, 230 S.E.2d 94 (1976).

Reporting of Voir Dire

Defendant in felony case is entitled to have voir dire reported or transcribed and is harmed by failure to do so. Graham v. State, 153 Ga. App. 658, 266 S.E.2d 316 (1980).

Voir dire must be reported under subsection (d). — Any objection or motion in course of voir dire and court's ruling thereon must be reported under subsection (d), as once ruling of court is made, it would be a matter which may be raised on appeal. State v. Graham, 246 Ga. 341, 271 S.E.2d 627 (1980); Conley v. State, 157 Ga. App. 166, 276 S.E.2d 677 (1981).

Voir dire examination regarding jurors' feelings about death penalty. — Failure to record voir dire examination of prospective jurors as to the jurors' feelings about imposing the death penalty in a case in which the sentence of death is imposed, is reversible error. Owens v. State, 233 Ga. 869, 214 S.E.2d 173 (1975).

Entire voir dire is not required to be reported in all felony cases. Meier v. State, 190 Ga. App. 625, 379 S.E.2d 588 (1989).

When defendant did not cite any specific objection made during voir dire or claim any specific harm from the lack of transcription, an omission could not be reversible error. Meier v. State, 190 Ga. App. 625, 379 S.E.2d 588 (1989).

When defendant made a tactical decision not to object in open court during voir dire examinations, there was no requirement that the reporter record the voir dire examination. Russell v. State, 181 Ga. App. 624, 353 S.E.2d 820 (1987).

Unrecorded voir dire. — When voir dire is not recorded, the complaining party has the duty of complying with the procedure for reconstructing the record. Denny v. State, 226 Ga. App. 432, 486 S.E.2d 417 (1997).

Defendant's contention that possible error occurred during voir dire or that defense counsel may have been ineffective and that, because of the lack of a record, the defendant would never know if there was error was not a sufficient basis to require a new trial. Primas v. State, 231 Ga. App. 861, 501 S.E.2d 28 (1998).

Although the defendant asserted that because voir dire was not transcribed, it was impossible to determine whether any errors occurred therein, so the judgment should have been reversed or the case should have been remanded to the trial court pursuant to O.C.G.A. § 5-6-41(f), the appellate court found that the general unspecified hope of reversible error during voir dire did not win a new trial on the

Reporting of Voir Dire (Cont'd)

ground that a record should have been made so as to accommodate a search for error now buried in unrecorded history. Bynum v. State, 300 Ga. App. 163, 684 S.E.2d 330 (2009), cert. denied, No. S10C0225, 2010 Ga. LEXIS 300 (Ga. 2010).

Trial court did not abuse the court's discretion in denying the defendant's motion for a change of venue because although the court reporter transcribed the motion for change of venue and the trial court's ruling, the actual questions and answers of the prospective jurors were not reported, and defense counsel made no motion at that time to include the answers in the record or to have the answers reconstructed for the record; since voir dire was not transcribed, it was assumed that the jurors who were not excused for cause did not have such fixed opinions that the jurors could not be impartial judges of the defendant's guilt. Walden v. State, 289 Ga. 845, 717 S.E.2d 159 (2011).

Defendant was not entitled to a new trial due to the fact that voir dire was not recorded under O.C.G.A. § 5-6-41(a) because: (1) the defendant failed to request that voir dire be transcribed; (2) O.C.G.A. § 5-6-41(a) did not require that voir dire be reported in all felony cases; (3) while it was mandatory that voir dire be made part of the record in cases imposing the death penalty, the death penalty was not imposed; (4) a review of the existing trial transcript indicated that one of the sitting jurors was arrested on outstanding traffic-related charges, but that juror was replaced with one of the alternates prior to jury deliberations; and (5) merely asserting a general unspecified hope of reversible error during voir dire was insufficient to warrant a new trial on the ground that a transcript of the proceeding should have been made so as to accommodate a search for error now buried in unrecorded history. McFarlane v. State, 291 Ga. 345, 729 S.E.2d 349 (2012).

Content of Transcript

Differences from required content of transcript under prior law. — Under old law, transcript on appeal contained only evidence and did not contain any objections, colloquies, and various rulings of the court on matters arising during trial. The Appellate Practice Act changed this procedure to require that record be made of objections and rulings of court which may be raised on appeal. State v. Graham, 246 Ga. 341, 271 S.E.2d 627 (1980).

Transmittal of portion of record. — Appellant may choose to have only a portion of a record transmitted to the Court of Appeals, but this does not relieve the appellant from the obligation to demonstrate error by the record. Jordan v. Johnson, 223 Ga. App. 875, 479 S.E.2d 175 (1996).

Inclusion in transcript of all proceedings which may be questioned on appeal. — Subsection (d) contemplates that all proceedings on trial which may be called in question on appeal (including all colloquies, arguments to jury, objections and rulings of court) shall be included in a written transcript of proceedings in the trial court. Palmer v. Stevens, 115 Ga. App. 398, 154 S.E.2d 803 (1967).

Failure to designate sufficient portions of record for review. — Father failed to support his contentions that the trial court erred in awarding child support payments to the mother because he failed to designate sufficient portions of the record for the appellate court to review as required by O.C.G.A. § 5-6-41. Kennedy v. Kennedy, 309 Ga. App. 590, 711 S.E.2d 103 (2011).

Transcript record failed to include continuance request. — Because an appellant failed to include in the transcript record appellant's request for a continuance, as well as nothing regarding the nature of this request or the parameters of the trial court's denial of this request, the appellate court refused to hold that the trial court erred in declining to grant a continuance. Shamsai v. Coordinated Props., Inc., 259 Ga. App. 438, 576 S.E.2d 901 (2003).

Issues raised in brief but not incorporated in transcript. — Court of Appeals cannot consider questions with respect to proceedings on trial which are related in party's brief but are not incorporated in properly authenticated tran-

script as required by section. R. & S. Mgt. Co. v. Huntley, 119 Ga. App. 712, 168 S.E.2d 626 (1969).

When appellant failed to submit a proposed transcript to the trial judge for approval, and instead, sought to delegate the entire preparation of the transcript to the trial court, the trial court correctly denied the appellant's motion asking the court to reconstruct the transcript as the duty does not lie with the court in this respect. Machiz v. Machiz, 169 Ga. App. 91, 311 S.E.2d 538 (1983).

Incorrect or Incomplete Transcripts

Purpose of subsection (f). — Subsection (f) of O.C.G.A. § 5-6-41 is solely for the purpose of making the record speak the truth, not for adding evidence to the record or supplying fatal deficiencies after the fact. Wigley v. State, 194 Ga. App. 7, 389 S.E.2d 769 (1989).

Subsection (f) of O.C.G.A. § 5-6-41 is not an instrument for supplying fatal deficiencies after the fact. Nobles v. Prevost, 221 Ga. App. 594, 472 S.E.2d 134 (1996).

Official or adequately reconstructed transcript required. — Without access either to an official transcript or an adequately reconstructed transcript, a court cannot effect a proper disposition of the issues raised on appeal. Effel v. Effel, 207 Ga. App. 809, 428 S.E.2d 809 (1993).

When transcript or record is incomplete, burden is on complaining party to have record completed in trial court, and when this is not done, there is nothing for the appellate court to review. Zachary v. State, 245 Ga. 2, 262 S.E.2d 779 (1980); Smith v. State, 160 Ga. App. 26, 285 S.E.2d 749 (1981); Howe v. State, 250 Ga. 811, 301 S.E.2d 280 (1983); Ivory v. State, 199 Ga. App. 283, 405 S.E.2d 90, cert. denied, 199 Ga. App. 906, 405 S.E.2d 90 (1991) See Whitt v. State, 215 Ga. App. 704, 452 S.E.2d 125 (1994); Forehand v. State, 267 Ga. 254, 477 S.E.2d 560 (1996); Ney v. State, 227 Ga. App. 496, 489 S.E.2d 509 (1997); Floyd v. State, 227 Ga. App. 873, 490 S.E.2d 542 (1997); Pope v. State, 228 Ga. App. 897, 494 S.E.2d 345 (1998); Harris v. State, 230 Ga. App. 403, 496 S.E.2d 277 (1998); Eason v. State, 249 Ga. App. 738, 549 S.E.2d 532 (2001).

Burden is on complaining party to have record and transcript completed in trial court. State v. Everett, 155 Ga. App. 162, 270 S.E.2d 345 (1980).

When the transcript or record does not fully disclose what transpired at trial, the burden is on the complaining party to have the record completed in the trial court under the provisions of O.C.G.A. § 5-6-41. Page v. State, 159 Ga. App. 344, 283 S.E.2d 310 (1981).

When the defendant's opening statement was not recorded and the defendant admits the defendant's objection to the trial court's alleged limitation of the defendant's statement was not perfected, there is nothing for the Court of Appeals to review on appeal. The complaining party bears the burden of having the record completed in the court below. Williams v. State, 165 Ga. App. 553, 301 S.E.2d 908 (1983).

When there is nothing in the record or transcript to support the defendant's contention that a prior ruling of the trial court relieved the defendant of the duty of making a written request to charge on a lesser included offense in order to preserve the issue on appeal, there is nothing for the appellate court to review. Howe v. State, 250 Ga. 811, 301 S.E.2d 280 (1983).

When the transcript or record does not fully disclose what transpired at trial, the burden is on the complaining party to have the record completed in the trial court under the provisions of O.C.G.A. § 5-6-41. When this is not done, there is nothing for the appellate court to review. Campbell v. Crumpton, 173 Ga. App. 488, 326 S.E.2d 845 (1985).

When the defendant pled guilty to charges of driving with a suspended driver's license, possession of marijuana, giving a false name to a police officer, failing to maintain no-fault insurance, and displaying an improper license plate, for which the trial court sentenced the defendant to 12 months in prison, four months to be served, and fined the defendant $1,930, and the defendant filed a timely appeal from the trial court's judgment on the defendant's plea alleging that the trial court erred by accepting the defendant's plea and entering judgment thereon because the guilty plea was not an informed, knowledgeable, and voluntary decision

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and the defendant was not aware of the relevant circumstances and likely consequences of the defendant's decision, the entire record, as designated by the defendant to be included on appeal, fails to show that the defendant was cognizant of all the rights the defendant was waiving and the possible consequences of the defendant's plea, and since the state failed to take any action to correct the alleged omission or to fill a silent record by use of extrinsic evidence affirmatively showing the guilty plea was knowing and voluntary, the state failed to carry the state's burden, and the trial court erred by accepting the defendant's plea and entering judgment thereon. Agerton v. State, 191 Ga. App. 633, 382 S.E.2d 417 (1989).

Burden is on the complaining party to have the record completed in the trial court in accordance with provisions of subsection (f) of O.C.G.A. § 5-6-41. Massengale v. Moore, 194 Ga. App. 328, 390 S.E.2d 439 (1990).

When the transcript or record does not fully disclose what transpired at trial, the burden is on the complaining party to have the record completed in the trial court under the provisions of O.C.G.A. § 5-6-41 and when there was no amendment or supplement to the record to reflect the necessary facts pursuant to subsection (f) or (g) and since there was no stipulation in the record as to facts pursuant to subsection (i), the defendant did not carry the burden to show by the record the facts necessary to prove a claim of racial discrimination. Thomas v. State, 208 Ga. App. 367, 430 S.E.2d 768 (1993).

Court of appeals was barred from considering a letter allegedly constituting a request for a hearing on a summary judgment motion, as the letter, which was attached to the appellate brief, was not part of the record and, thus, was not properly before the court. Thomas v. Schouten, 210 Ga. App. 244, 435 S.E.2d 746 (1993).

Defendant's allegation that the state committed prosecutorial misconduct in the form of improper comments it made during closing argument could not be reviewed as the incomplete transcript did not allow the reviewing court to review the contention; thus, reversal of the defendant's conviction could not be ordered since the defendant had the obligation of providing a sufficient transcript for appellate review. McFarlin v. State, 259 Ga. App. 838, 578 S.E.2d 546 (2003).

Burden is on an appealing defendant to ensure that the record includes the issue upon which the defendant seeks review as well as the lower court's ruling on such issue, and when the proof necessary for determination of the issues on appeal is omitted from the record, the appellate court must assume that the judgment below was correct and affirm; thus, when the record in a case of child molestation and other crimes did not reveal a final ruling denying defendant's motion to admit evidence of the victims' prior molestation and the defendant alleged that the ruling was given in an unrecorded bench conference, the issue of whether the trial court erred in allegedly excluding such evidence could not be determined on appeal and the trial court's action was presumed correct. Pollard v. State, 260 Ga. App. 540, 580 S.E.2d 337 (2003).

Quality of a tape-recording of a termination-of-parental-rights hearing was so poor that the court reporter could not understand much of what was said; as it was the mother's burden to provide the transcript of the hearing, because the transcript was inadequate to address a claim of error, the appellate court assumed the trial court's ruling was correct. In the Interest of C.T.M., 278 Ga. App. 297, 628 S.E.2d 713 (2006).

Defendant did not complain of a missing transcript or refer to a hearing in a motion for new trial, thus, even though the state was not able to locate a transcript of the hearing, there was no basis to remand the case. Butts v. State, 279 Ga. App. 28, 630 S.E.2d 182 (2006).

Judgment in favor of the defendants in a medical malpractice suit was upheld on appeal because the plaintiffs failed to provide an adequate record on appeal so as to allow the appellate court to address the alleged errors committed by the trial court; as a result, the trial court's rulings were presumed correct. Steele v. Atlanta

Maternal-Fetal Med., P.C., 283 Ga. App. 274, 641 S.E.2d 257 (2007).

Domestic violence defendant's complaint that the grand jury was tainted by an outside influence that prejudiced the grand jury by giving the grand jurors a general presentation on domestic violence could not be reviewed because the defendant failed to include the transcript of the hearing on the defendant's motion to quash the indictment. Pierce v. State, 301 Ga. App. 167, 687 S.E.2d 185 (2009), cert. denied, No. S10C0549, 2010 Ga. LEXIS 244 (Ga. 2010).

Trial court did not err in ruling that the transcript of the hearing on a manufacturer's motion for summary judgment accurately portrayed what had occurred at the hearing because a driver had the burden to seek corrective action under O.C.G.A. § 5-6-41(f). Udoinyion v. Michelin N. Am., Inc., 313 Ga. App. 248, 721 S.E.2d 190 (2011).

In a criminal trial, the defendants failed in the defendants' claim that a recording of a witness interview was erroneously admitted due to a failure to lay a foundation for the admission of prior consistent or inconsistent statements because, inter alia, the defendants did not meet the defendants' burden, under O.C.G.A. § 5-6-41, to complete the record to show what part of the interview was played for the jury. White v. State, 315 Ga. App. 54, 726 S.E.2d 548 (2012).

Failure to provide transcript. — Judgment ordering a writ of possession and past rent due was presumed to be correct because a tenant did not file a transcript of the hearing or attempt to recreate the record. Hughley v. Habra, 277 Ga. App. 138, 625 S.E.2d 531 (2006).

Because no transcript of a lower court's proceedings was submitted on appeal and no attempt was made to recreate the record as provided for in O.C.G.A. § 5-6-41(g), (i), a tenant's appeal could not be considered. Creagh v. Federal Nat'l Mortg. Assoc., 277 Ga. App. 614, 627 S.E.2d 813 (2006).

Without a hearing transcript, the appeals court was unable to review an LLC's claim that the trial court erred by failing to give the court an opportunity to amend a defective answer, and whether it was error to deny the LLC an evidentiary hearing on the amount of damages owed, as the court could not verify the LLC's claim that the trial court did not admit evidence on the issue of damages. Sterling, Winchester & Long, LLC v. Loyd, 280 Ga. App. 416, 634 S.E.2d 188 (2006).

When a wife in a divorce case claimed that the trial court had improperly heard the case without a jury, but the wife had failed to provide a transcript under O.C.G.A. § 5-6-41, the court would presume that the trial court faithfully and lawfully performed the court's duties and would conclude that the case was properly heard without a jury. Fine v. Fine, 281 Ga. 850, 642 S.E.2d 698 (2007).

In the absence of a transcript in a divorce case, the court had to assume that the evidence adduced during the bench trial was sufficient to support the trial court's evidentiary rulings regarding the wife's enumerations of error. Fine v. Fine, 281 Ga. 850, 642 S.E.2d 698 (2007).

Contempt finding against a former spouse relating to a property distribution portion of a divorce decree had to be affirmed because the former spouse failed to secure the transmittal to the appellate court of a transcript of the contempt hearing as required by O.C.G.A. § 5-6-41(c). Morris v. Morris, 284 Ga. 748, 670 S.E.2d 84 (2008).

Evidence never actually admitted at trial cannot properly become part of the record on appeal pursuant to subsection (f) of O.C.G.A. § 5-6-41. Nixon v. Rosenthal, 214 Ga. App. 446, 448 S.E.2d 45 (1994).

Duty of defendant. — It is the duty of the defendant to include in the record those items which will enable the appellate court to perform an objective review of the evidence and proceedings, and when the transcript is necessary and the defendant omits the transcript from the record on appeal, the appellate court must assume that the judgment below was correct and affirm. Magnolia Court Apts., Inc. v. City of Atlanta, 249 Ga. App. 6, 545 S.E.2d 643 (2001).

When issue raised can be resolved without resort to omitted portion. — When issue raised in omitted portions of transcript can be resolved by looking to

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remaining portions of transcript, it cannot be said that anything material to the appellant has been omitted from the record on appeal. Zachary v. State, 245 Ga. 2, 262 S.E.2d 779 (1980).

Trial court has necessary control over designation and transmittal of both record and transcript. Smith v. Top Dollar Stores, Inc., 129 Ga. App. 60, 198 S.E.2d 690 (1973).

Subsection (f) allows trial court to retain some control over record on appeal in certain instances, such as when, in the court's opinion, the appellate court could not properly understand or pass on the court's rulings unless the appellate court had before it material omitted from the appeal in first instance but deemed necessary to a decision on points of error raised by the litigants. G.E.C. Corp. v. Southern Fabricators, Inc., 122 Ga. App. 452, 177 S.E.2d 497 (1970).

Defendant was not entitled to remand for a second hearing on reconstructing a transcript when procedures followed by the trial court at the first remand hearing complied with the provisions of subsection (f) of O.C.G.A. § 5-6-41. Carr v. State, 267 Ga. 547, 480 S.E.2d 583 (1997), cert. denied, 522 U.S. 921, 118 S. Ct. 313, 139 L. Ed. 2d 242 (1997).

Amendments to correct typographical errors authorized. — Trial court was authorized by subsection (f) of O.C.G.A. § 5-6-41 to accept amendments to the transcript in order to correct typographical errors. Bates v. State, 228 Ga. App. 140, 491 S.E.2d 200 (1997).

Remedy in trial court. — When the transcript or record does not truly or fully disclose what transpired in the trial court and the parties are unable to agree thereon, the defendant's remedy is in the trial court, not the appellate court. Epps v. State, 168 Ga. App. 79, 308 S.E.2d 234 (1983).

Procedure appropriate in felony case. — When a portion of the court reporter's tapes of a felony trial were deleted, the trial court did not err in following the prescribed procedure for supplementation of the trial transcript even though the defendant did not participate in the process. Stubbs v. State, 220 Ga. App. 106, 469 S.E.2d 229 (1996); Turner v. State, 226 Ga. App. 348, 486 S.E.2d 639 (1997).

Factual and legal findings included in record at trial judge's direction. — When trial judge directs that the clerk include findings of fact and conclusions of law in its correction of record, the appellate court may properly consider such corrections made by the trial court. Bradley v. Bradley, 233 Ga. 83, 210 S.E.2d 1 (1974).

Transcript omitting charge. — In civil case where appellant has not shown that exceptions were made to the charge, the appellant did not seek a hearing in the trial court to attempt to show that exceptions to charge were timely made, and all that is missing in transcript is charge of court and exceptions made thereto, the judgment will not be reversed because of deficiencies in the transcript. Albea v. Jackson, 236 Ga. 690, 225 S.E.2d 46 (1976).

Affidavit of party's counsel does not meet requirements of section regarding correcting record for appeal. Henderson v. Lewis, 128 Ga. App. 28, 195 S.E.2d 289 (1973).

Transcript omitting bench conferences. — When the defendant argued on appeal that the bench conferences at the defendant's criminal trial were not transcribed, but the defendant failed to follow the O.C.G.A. § 5-6-41 procedure for completing the transcript, the defendant was unable to show error or harm regarding the bench conferences. Morrison v. State, 256 Ga. App. 23, 567 S.E.2d 360 (2002).

One-paragraph statement in affidavit form by the prosecuting attorney was an insufficient substitute for a transcript or recording of an alleged in camera conference during trial. McGraw v. State, 199 Ga. App. 389, 405 S.E.2d 53, cert. denied, 199 Ga. App. 906, 405 S.E.2d 53 (1991).

Court assumes transcript correct. — When the record discloses no effort to have the transcript corrected, the appellate court will assume that the transcript is correct. Downside Risk, Inc. v. Metropolitan Atlanta Rapid Transit Auth., 168

Ga. App. 202, 308 S.E.2d 547 (1983).

Transcript correction not allowed. — Trial court properly dismissed the defendant's motion to correct the transcript of the defendant's trial for murder and aggravated assault, which alleged that the transcript was altered to suppress exculpatory evidence; other than the defendant's assertion that conflicting testimony evidenced a defective transcript, there was nothing to indicate that the detective's testimony was altered during transcription. Wright v. State, 275 Ga. 788, 573 S.E.2d 361 (2002).

Appellee's rights when appellant designates matter to be omitted. — Even if the appellant has designated a relevant portion of the record on appeal for omission, the appellee is entitled, under O.C.G.A. § 5-6-42, to file the appellee's own designation of record to correct the deficiency and, the appellee also has a remedy for correction of the record under subsection (f) of O.C.G.A. § 5-6-41, even after it has been transmitted to the Court of Appeals. In the absence of any attempt on the appellee's part to exercise these remedies, the Court of Appeals must assume that the record before the court is complete in all relevant respects. Boats for Sail v. Sears, 158 Ga. App. 74, 279 S.E.2d 314 (1981).

Transcript of district attorney's closing argument. — Court did not rule on the defendant's claim of error that no transcript was made of the district attorney's alleged prejudicial closing argument, since O.C.G.A. § 17-8-5 does not require that such a transcript be made and there was nothing in the record to show that the defendant requested that one be made. Ford v. State, 160 Ga. App. 707, 288 S.E.2d 39 (1981).

When closing arguments were not reported because the parties could not agree as to what had transpired, the court entered an order reciting the facts based on its recollection, which recitation was final. Bailey v. State, 200 Ga. App. 621, 409 S.E.2d 230 (1991).

Claim of improper closing argument by codefendant's counsel was deemed abandoned when the closing argument was not transcribed, and the defendant did not supplement the record with a stipulation pursuant to subsection (g) of O.C.G.A. § 5-6-41. Cox v. State, 242 Ga. App. 334, 528 S.E.2d 871 (2000).

Jury instruction corrected by a trial transcript amended to correct a typographical error gave an accurate statement of the applicable law and was not error. Clanton v. State, 208 Ga. App. 669, 431 S.E.2d 453 (1993).

Motion to perfect record not proper. — Defendant's filing of a "motion to perfect the record," offering the testimony of a witness as to what transpired during a portion of the trial, was not a proper vehicle for perfecting the record pursuant to O.C.G.A. § 5-6-41. Whitt v. State, 215 Ga. App. 704, 452 S.E.2d 125 (1994).

Supplementation of record after appellate court renders decision. — Once the appellate court renders a decision, O.C.G.A. § 5-6-48, under which the action originates in the appellate court, becomes the exclusive method for supplementing the record. Therefore, the appellate court's refusal to entertain, on motion for rehearing under subsection (f) of O.C.G.A. § 5-6-41, under which the action originates in the trial court, the supplementation of the record was not error. However, in holding that what the defendant wore at trial, not shown in the record other than a reference to "prison garb," was new evidence and not subject to subsection (f), the appellate court erred. State v. Pike, 253 Ga. 304, 320 S.E.2d 355 (1984).

Subsection (f) iof O.C.G.A. § 5-6-41 s not to be used after rendition of an appellate court's decision as a vehicle to secure the grant of a motion for reconsideration or application for certiorari. Once the appellate court renders a decision, O.C.G.A. § 5-6-48 becomes the exclusive method for supplementing the record. Hirsch v. Joint City County Bd. of Tax Assessors, 218 Ga. App. 881, 463 S.E.2d 703 (1995).

Written motion to supplement not required. — By participating in the state's attempt to supplement the record during a hearing on a motion for new trial, a defendant acquiesced in the state's presentation of the state's theory that the trial court's admonition to the defendant of the right to testify was missing from the

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record, and it was not necessary that the state file a written motion under O.C.G.A. § 5-6-41(f) to supplement the record. State v. Nejad, 286 Ga. 695, 690 S.E.2d 846 (2010).

Ordering trial clerk to submit omitted requests to charge. — Requests to charge are of such importance in an appeal when the trial court's giving of a charge is cited as error that the appellate court will order the clerk of the trial court to submit that portion of the trial record to the appellate court pursuant to subsection (f) of O.C.G.A. § 5-6-41, and a motion to strike the state's supplementation of the record to include the requests on the ground that it is tardily filed will be denied. Vick v. State, 166 Ga. App. 572, 305 S.E.2d 17 (1983).

Indigent appellant must take steps to provide transcript. — Although the trial court declared the appellant indigent, and directed the state to provide the appellant with a trial transcript, the appellant apparently took no steps, by making timely request or otherwise, to insure that the pretrial hearing regarding the appellant's motion in limine was duly recorded, nor did the appellant request that the trial court reconstruct this hearing. In the absence of this transcript, the appellate court could not consider the appellant's enumerated error as to the denial of the appellant's motion. Jones v. State, 187 Ga. App. 25, 369 S.E.2d 314 (1988).

Improper supplementation. — Supplementation of the record by both the defendant and the state by appending attachments to their respective briefs was not an authorized method; the appellate court cannot consider the factual assertions of the parties appearing in briefs when the evidence does not appear on the record. Leatherwood v. State, 212 Ga. App. 342, 441 S.E.2d 813 (1994).

Lost transcripts. — Plaintiff's motion for a new trial because transcripts and exhibits were lost or destroyed by the court reporter was properly denied when the trial court followed the proper procedure in recreating a narrative transcript, and evidence in the available transcript and the narrative transcript supported the jury's verdict. Xiong v. Landford, 226 Ga. App. 126, 485 S.E.2d 534 (1997).

Defendants failed to meet defendants' burden to affirmatively show error by the record when the defendants failed to include in the record those items that would enable the court to perform an objective review of the evidence and proceedings, pursuant to subsection (c) of O.C.G.A. § 5-6-41, by not including a transcript or a statutorily authorized substitute. City of Byron v. Betancourt, 242 Ga. App. 71, 528 S.E.2d 841 (2000).

Entirety of record required. — Trial court's denial of defendant's motion to vacate a sentence was affirmed because the defendant did not request that the entire record be transmitted to the appellate court, and, therefore, the appellate court was required to assume that the trial court ruled correctly. Arnold v. State, 276 Ga. App. 680, 624 S.E.2d 258 (2005).

Failure to correct inaccurate transcript. — Inmate's habeas petition alleging a defective plea was properly denied because, although the inmate pled at a group hearing, the transcript showed that the defendants stated that the defendants knew the rights the defendants were giving up; among other things, the inmate did not pursue any remedy in the trial court to correct an inaccurate transcript pursuant to O.C.G.A. § 5-6-41(f). Bullard v. Thomas, 285 Ga. 545, 678 S.E.2d 897 (2009).

Stipulated Transcripts

Submission of transcript prepared by recollection. — Subsections (c), (d) and (g) authorize submission of transcript prepared from recollection only when trial has not been reported or when, for some other reason, actual transcript is not obtainable. Harrison v. Piedmont Hosp., 156 Ga. App. 150, 274 S.E.2d 72 (1980).

State's motion to dismiss a defendant's appeal was denied; a transcript prepared by recollection was properly before the appellate court, because according to O.C.G.A. § 5-6-41(d), (f) and (g), a transcript prepared from recollection did not need judicial approval or intervention unless the parties could not agree on what transpired, and here, the defendant and

the state agreed on the transcript prepared by recollection and both parties signed the agreement, and according to O.C.G.A. § 5-6-41(g), the agreement of the parties thereto or their counsel entitled such transcript to be filed as a part of the record in the same manner and with the same binding effect as a transcript filed by the court reporter. Branton v. State, 258 Ga. App. 221, 573 S.E.2d 475 (2002).

Defendant wishing to establish that record is in error. — If the defendant in misdemeanor case wishes to establish that record as the record appears was in error, the defendant should have availed oneself of right of construction of record from recollection under subsection (g). Williams v. State, 140 Ga. App. 87, 230 S.E.2d 94 (1976).

When transcript is unavailable, agreed upon statement of facts in brief may suffice. — In instances when transcript is unavailable and such facts as are necessary for disposition are stated in brief, and the state concedes such statement is substantially correct, the appellate court may reach a decision on agreed upon facts. Holzmeister v. State, 156 Ga. App. 94, 274 S.E.2d 109 (1980).

Judicial approval required. — When a stipulation approved by both counsel does not have attached thereto approval by the trial judge, which is clearly required by subsection (i) of O.C.G.A. § 5-6-41, the appellate court has no authority to consider the enumerations of error as having been raised in the trial court in accordance with the statements contained in the stipulation if the appellate court must review the evidence submitted at trial. Under the circumstances, the appellate court must affirm the judgment. Elliott v. Georgia Baptist Convention, 165 Ga. App. 800, 302 S.E.2d 714 (1983).

Appellate court affirmed the trial court's award of summary judgment, as there was no transcript of the hearing on the motion, and the plaintiff had presented evidence at the hearing; furthermore, no narrative transcript was available under O.C.G.A. § 5-6-41(g), as the trial judge made clear that the trial judge could not recall what transpired at the hearing. Tanks v. Greens Owners Ass'n, 281 Ga. App. 277, 635 S.E.2d 872 (2006).

Submission requirements. — There is no authority for counsel to file such stipulation in appellate court, and effort of counsel to do so is a nullity. Martin v. Department of Pub. Safety, 226 Ga. 723, 177 S.E.2d 243 (1970); Freeman v. State, 215 Ga. App. 341, 450 S.E.2d 346 (1994).

Stipulated transcript is subject to same requirements regarding time of filing as transcript by court reporter, that is, that it be filed with clerk of lower court within 30 days of filing of notice of appeal in absence of order of lower court extending time for such filing. Ponce De Leon Properties, Inc. v. Fulton Cotton Mills, 116 Ga. App. 205, 156 S.E.2d 487 (1967).

Trial court's certificate is a final determination of what took place on trial of case. Park v. State, 225 Ga. 618, 170 S.E.2d 687 (1969).

Trial court is final arbiter of any differences in preparation of record. Miller v. State, 150 Ga. App. 597, 258 S.E.2d 279 (1979); Pelletier v. Schultz, 157 Ga. App. 64, 276 S.E.2d 118 (1981); Pahnke v. State, 203 Ga. App. 88, 416 S.E.2d 324 (1992), cert. denied, 203 Ga. App. 907, 416 S.E.2d 324, 506 U.S. 895, 113 S. Ct. 273, 121 L. Ed. 2d 201 (1992); Whitt v. State, 215 Ga. App. 704, 452 S.E.2d 125 (1994).

Any issue as to correctness of the record is to be resolved by the trial court for that court retains jurisdiction even after the case is docketed in the appellate court to add additional record. Pelletier v. Schultz, 157 Ga. App. 64, 276 S.E.2d 118 (1981).

Trial court controls determination of final record and may supplement record. — Subsection (f) makes clear that the trial court controls determination of final record on appeal, and may even supplement record designated by parties on the party's own motion. Jones v. Spindel, 239 Ga. 68, 235 S.E.2d 486 (1977).

When parties disagree regarding omissions from transcript. — When parties are unable to agree on stipulation as to that which was omitted from transcript, the appellate court is restricted to consider only facts stated in trial judge's certificate. Firestone v. Walker, 116 Ga.

Stipulated Transcripts (Cont'd)

App. 316, 157 S.E.2d 509 (1967); Elliott v. Flewellyn, 174 Ga. App. 486, 330 S.E.2d 185 (1985).

Judicial approval required. — When the trial court did not approve the plaintiff's motion to certify a transcript which the plaintiff prepared from memory and which the defendants contested, the decision was final and nonreviewable. Saleem v. Snow, 217 Ga. App. 883, 460 S.E.2d 104 (1995).

Trial court's disapproval of transcript prepared by appellant bars transcript's use. — When proposed transcript prepared by appellant is disapproved by the trial court, this is sufficient to bar the transcript without necessity of showing that appellee formally objected to the proposed transcript. Burns v. Barnes, 154 Ga. App. 802, 270 S.E.2d 57 (1980); Welch v. Mercer, 165 Ga. App. 776, 302 S.E.2d 629 (1983).

Statement of testimony approved by neither opposing counsel nor trial court. — Statement of testimony at trial submitted by defense counsel and approved by neither opposing counsel nor trial court may not be considered by appellate court. Parker v. State, 154 Ga. App. 668, 269 S.E.2d 518 (1980).

When the state refused to stipulate to the defendant's transcript because the witnesses were unable to remember their testimony and the trial judge indicated on the front of the proposed stipulation that the trial judge did not remember what transpired at the trial, the appellate court could not consider the defendant's challenge to the sufficiency of the evidence. Wright v. State, 215 Ga. App. 569, 452 S.E.2d 118 (1994).

Amendment of brief prepared by appellee's counsel and assented to by appellant's counsel. — When evidence was not reported at trial, but appellee's counsel prepares a brief of evidence, which was assented to by counsel for appellant, there is no error in court allowing and approving amendment to brief over objection of counsel for appellant. Kenner v. Whitehead, 115 Ga. App. 760, 156 S.E.2d 136 (1967).

Trial court's recreating of court's own transcript is not subject to review so long as the transcript satisfies requirements of section of being a transcript of evidence (as opposed to conclusions of fact). Griggs v. Griggs, 234 Ga. 451, 216 S.E.2d 311 (1975).

Options of judge in recreating transcript. — When trial judge acts under this section to recreate transcript, the jduge may do so by comparing submissions of parties, or by approving (with changes in accord with court's recollection) submission of one party or the other, or the judge may recreate a transcript by the judge's own composition. Griggs v. Griggs, 234 Ga. 451, 216 S.E.2d 311 (1975).

Judge's certification of party's summary. — In absence of agreement by parties, trial court is under no obligation to certify either party's summary of testimony unless it be in accord with the party's own recollection of the evidence. Griggs v. Griggs, 234 Ga. 451, 216 S.E.2d 311 (1975).

Videotape. — Under O.C.G.A. § 5-6-41(f), the appellate court could consider alleged error regarding the trial court's failure to redact portions of a videotape used at trial even though the videotape was not part of the record on appeal when the parties stipulated to the contents of the disputed portion of the videotape. Priebe v. State, 250 Ga. App. 725, 553 S.E.2d 5 (2001).

Record insufficient to permit appellate review. — Defendant's Batson challenge failed because the defendant did not satisfy the defendant's burden under O.C.G.A. § 5-6-41 to have the record completed; the recollections of the defendant and the state about what happened in jury selection did not provide a basis for appellate review as colloquies between court and counsel and argument of counsel were not competent evidence of the facts observed therein and did not suffice to make a proper record of facts required to establish a prima facie case of discrimination. Acey v. State, 281 Ga. App. 197, 635 S.E.2d 814 (2006).

Action did not comply with the procedures governing the preparation of the record for appeal, O.C.G.A. § 5-6-41(g), because although an insured did not object to the introduction of the affidavit of a

driver's lawyer attesting to the trial court's voir dire procedures, the methods of preparing a transcript by recollection as set out in O.C.G.A. § 5-6-41 were not followed; the court of appeals could not consider the lawyer's unilateral attempt to provide a potentially biased account of what transpired in the trial court. Sibley v. Dial, 315 Ga. App. 457, 723 S.E.2d 689 (2012).

Expenses of Recordation and Transcription

Any party has absolute right to have case reported at own expense in all cases. Dumas v. State, 131 Ga. App. 79, 205 S.E.2d 119 (1974).

Court not required to record proceedings. — While any party may, as a matter of right, have a case reported at that party's expense, O.C.G.A. § 5-6-41 does not require a trial court in a civil action to have the proceedings and evidence reported by a court reporter. Finch v. Brown, 216 Ga. App. 451, 454 S.E.2d 807 (1995).

Notice of right to have case reported. — Trial judge is not obligated to inform parties of their right to have case reported at their own expense under subsection (j). Liberty Loan & Thrift Corp. v. Meeks, 115 Ga. App. 846, 156 S.E.2d 172 (1967); Gunter v. National City Bank, 239 Ga. 496, 238 S.E.2d 48 (1977).

Parties must bear transcription costs in civil cases and a trial court did not err in denying a request for public funds to cover transcription costs of a summary judgment hearing. Saleem v. Snow, 217 Ga. App. 883, 460 S.E.2d 104 (1995).

When the defendant does not offer to pay for recordation, subsection (j) is not applicable. Newell v. State, 237 Ga. 488, 228 S.E.2d 873 (1976).

Nonindigent appellant failing to have trial reported at own expense under subsection (j) must accept consequences, including possibility that record adequate for appeal cannot be prepared by one of the alternate methods provided by section. Walker v. State, 153 Ga. App. 89, 264 S.E.2d 565 (1980).

Cost of obtaining transcript falls on party desiring that the transcript be transmitted to the appellate court. Stone Mt. Mem. Ass'n v. Stone Mt. Scenic R.R., Inc., 232 Ga. 92, 205 S.E.2d 293 (1974).

While costs of having transcript prepared by court reporter are an expense of appeal, they are not costs of appeal which are recoverable from appellee when the appellant is successful in obtaining a reversal in the appellate court. Stone Mt. Mem. Ass'n v. Stone Mt. Scenic R.R., Inc., 232 Ga. 92, 205 S.E.2d 293 (1974).

Allocation of costs of supplementing record. — If trial court finds that additional portions designated by appellee are necessary to complete record on appeal, costs must be paid by the appellant; only if considered unnecessary on appeal, should costs be taxed against the appellee. Trial court's decision will not be reversed absent manifest abuse of discretion. Jones v. Spindel, 239 Ga. 68, 235 S.E.2d 486 (1977).

Motion to tape record proceedings. — Party has a right to choose not to go to the expense of hiring a court reporter, and may instead make a reasonable request by written motion at the outset of trial to personally tape record the proceedings for aid in the event of a retrial or appeal. King v. State, 176 Ga. App. 137, 335 S.E.2d 439 (1985), overruled on other grounds, Copeland v. White, 178 Ga. App. 644, 344 S.E.2d 436 (1986).

Court's arbitrary denial of a properly made motion to tape record the trial proceedings does not constitute reversible error unless actual harm to the requesting party is demonstrated. King v. State, 176 Ga. App. 137, 335 S.E.2d 439 (1985), overruled on other grounds, Copeland v. White, 178 Ga. App. 644, 344 S.E.2d 436 (1986).

Indigent appellant. — Provision to indigent appellant of transcript of continuance hearing was unnecessary for appeal from denial of motion for continuance when no testimony had been given at hearing. Miller v. State, 165 Ga. App. 487, 299 S.E.2d 174 (1983).

No right to reporter services in civil appeal. — Indigent does not have the right to free court reporter services in an appellate, civil proceeding. Quarterman v. Edwards, 169 Ga. App. 300, 312 S.E.2d 643 (1983).

Expenses of Recordation and Transcription (Cont'd)

Presumption of propriety of judgment when appellant fails to pay for record preparation. — When the plaintiff failed to pay necessary costs for preparation of a record so that no record was filed on appeal, the trial court's granting of a summary judgment in quia timet action was presumed to be supported by sufficient evidence and the judgment was affirmed. Vaughan v. Buice, 253 Ga. 540, 322 S.E.2d 282 (1984).

No express refusal to pay obtained. — Trial court erred in a civil suit by denying an appealing plaintiff's motions for a trial transcript and for a new trial based on not having a transcript as a pretrial order did not qualify as an express ruling that the plaintiff expressly refused to pay for the costs of the transcript. Further, the pretrial order in no way qualified as a ruling invoked at the commencement of the proceedings. Moore v. Ctr. Court Sports & Fitness, LLC, 289 Ga. App. 596, 657 S.E.2d 548 (2008), cert. denied, 2008 Ga. LEXIS 463 (Ga. 2008).

Application

Supreme Court of Georgia declined to address the defendant's enumeration challenging the trial court's ruling on the supplemental issue raised at a hearing to reconstruct the evidence, as the filing of a notice of appeal divested the trial court of jurisdiction to consider that issue. Moreover, while O.C.G.A. § 5-6-41(f) allowed the trial courts to retain some control over the record on appeal in certain instances, the statute's purpose was solely to make the record speak the truth, not for adding evidence to the record or supplying fatal deficiencies after the fact. Ruffin v. State, 283 Ga. 87, 656 S.E.2d 140 (2008).

Enumeration of error regarding prosecutor's argument. — When the prosecutor's argument was not transcribed and counsel for the plaintiff had made no effort to correct or complete the record as provided in the section, enumeration of the error dealing with an alleged improper argument by the prosecutor cannot be reviewed. Carter v. State, 137 Ga. App. 824, 225 S.E.2d 73 (1976).

When closing arguments of the attorneys are not reported, and where the defendant does not supplement the record by any of the approved methods, an enumeration dealing with improper closing argument by the district attorney is deemed abandoned. Ledesma v. State, 251 Ga. 487, 306 S.E.2d 629 (1983), cert. denied, 464 U.S. 1069, 104 S. Ct. 975, 79 L. Ed. 2d 213 (1984).

With neither an original transcript of the offending portions of the assistant district attorney's argument nor a transcript prepared from recollection, the appellate court had to presume that the trial court acted correctly. Houck v. State, 173 Ga. App. 388, 326 S.E.2d 567 (1985).

Litigant's failure to arrange for court reporter. — Trial court did not err in denying a bank customer's motion to record all proceedings in a bank's action against the customer. The customer had notice of the hearing and could have arranged for a court reporter to be present, and the trial court advised the customer that a court reporter was available. Vadde v. Bank of Am., 301 Ga. App. 475, 687 S.E.2d 880 (2009), cert. denied, No. S10C0624, 2010 Ga. LEXIS 338 (Ga. 2010); cert. denied, 131 S. Ct. 298, 178 L. Ed. 2d 143 (2010).

Failure to transcribe certain proceedings. — Trial court did not err in failing to take down certain bench conferences, objections to closing arguments, questions from the jury, and the court's responses to jury questions because the defendant could not show prejudice from this purported nonfeasance and no attempt was made to amend or to supplement the record. Boone v. State, 250 Ga. App. 133, 549 S.E.2d 713 (2001).

Failure to record telephonic hearing. — Driver's claim that the trial court erred in denying the driver's motion for continuance based on the driver's expert's unavailability during the week of trial was not preserved for review because the driver did not have the telephonic hearing of the motion transcribed or otherwise complete the record under O.C.G.A. § 5-6-41(f). Pointer v. Roberts, 288 Ga. 150, 702 S.E.2d 130 (2010).

Failure to order reconstruction. — Because the defendant did not have the record completed by reconstruction, the appellate court could not determine that any harm was done by the failure to record bench conferences. Atkins v. State, 253 Ga. App. 169, 558 S.E.2d 755 (2002).

Motion to establish transcript properly denied. — In a case involving a dispute over an estate, the trial court did not err by denying an administrator's motion for a transcript of the bench trial as the record indicated that the administrator, and the opposing side, wanted to proceed with the trial without a court reporter as neither wanted to incur the cost and, therefore, waived the right to have one reconstructed. Barker v. Elrod, 291 Ga. App. 871, 663 S.E.2d 289 (2008).

Failure to record evidence produced when tape was played. — Defendant was not prejudiced below or on appeal by the failure of the court reporter to record evidence produced when a tape was played, when each member of the jury, and the defendant's counsel, had a copy of a transcript of the tape, and the transcript was admitted in evidence without objection. Royal v. State, 189 Ga. App. 756, 377 S.E.2d 526 (1989).

Failure to have record completed. — Defendant waived any error in the admission of photographs, admitted over defendant's objection, as defendant failed to place the basis for the objection on the record or to have the record completed under O.C.G.A. § 5-6-41(f). Young v. State, 280 Ga. 65, 623 S.E.2d 491 (2005).

While the trial judge might require the parties to have the proceedings reported, even if such was done, it remained the appellant's duty to have the transcript prepared for purposes of an appeal; hence, a claim that the probate court erred in not ordering that a record be made of the hearings lacked merit. LaFavor v. LaFavor, 282 Ga. App. 753, 639 S.E.2d 633 (2006).

Supreme court could not review the defendant's claim that the trial court set pretrial bond in an excessive and unreasonable amount because the defendant failed to have the record completed pursuant to O.C.G.A. § 5-6-41; testimony at the hearing on the motion for new trial was not a sufficient substitute for a transcript, and without a transcript of the bond hearing or a statutorily authorized substitute, the supreme court had to assume that the trial court's judgment was correct. Glass v. State, 289 Ga. 542, 712 S.E.2d 851 (2011).

Section precludes use of § 9-11-43(b) to cure absence of transcript. — Because of O.C.G.A. § 5-6-41, affidavit, deposition, and oral testimony provisions of O.C.G.A. § 9-11-43(b), pertaining to hearing of motions based on facts not appearing of record, cannot be used to cure absence of transcript of proceedings for post-trial motions or for appellate review. Wall v. Citizens & S. Bank, 274 Ga. 216, 274 S.E.2d 486 (1981).

Amendment of judgment is not a means of bringing evidence to appellate court. — Although amendment to judgment of court, sitting without jury, adding thereto certain statements, findings of fact and conclusions of law, is authorized by Ga. L. 1970, p. 170, § § 9-11-52, an amendment is not an authorized means of bringing evidence to an appellate court on appeal under this Ga. L. 1965, p. 18, § 10. Chapman v. Connor, 138 Ga. App. 518, 226 S.E.2d 625 (1976).

Duty of appellant who states in notice of appeal that transcript will be transmitted. — Appellant who states in notice of appeal that transcript is to be transmitted as part of appellate record is statutorily mandated to cause court reporter to prepare and file an original and one copy of transcript with clerk of trial court together with court reporter's certificate attesting to correctness thereof within 30 days after filing of notice of appeal unless time is extended as provided in Ga. L. 1965, p. 18, § 6 (see O.C.G.A. § 5-6-39). State v. Hart, 246 Ga. 212, 271 S.E.2d 133 (1980).

Brief cannot serve as record or transcript for demonstrating error or for supporting claim of error. Holzmeister v. State, 156 Ga. App. 94, 274 S.E.2d 109 (1980).

Plaintiff's attempt to supplement the record with affidavits from plaintiff's attorneys stating that an oral request for qualification of prospective jurors was made prior to jury voir dire did not comply with the dictates of subsection

Application (Cont'd)

(f) of O.C.G.A. § 5-6-41, and thus created no record evidence for purposes of appeal. Hardy v. Tanner Medical Ctr., Inc., 231 Ga. App. 268, 499 S.E.2d 121 (1998).

Addendum to a court order containing findings of fact in a child custody proceeding could not substitute as a trial transcript because the addendum was not prepared in accordance with O.C.G.A. § 5-6-41. Burger v. Krueger, 224 Ga. App. 179, 480 S.E.2d 230 (1996).

Litigant cannot obtain recordings from reporter and employ a typist to transcribe recordings. — There is no duty on litigant to take recordings of evidence from reporter and have the recordings transcribed by typists employed by a litigant. In fact, such a practice cannot be allowed. The reporter has a duty to give a correct report of proceedings on the trial, and must certify to the correctness of such transcript under subsection (e) of this section. Diamond v. Liberty Nat'l Bank & Trust Co., 228 Ga. 533, 186 S.E.2d 741 (1972).

Delivery by designated agent. — Under subsection (e), required delivery of transcript to clerk may be by designated agent. Shield Ins. Co. v. Kemp, 117 Ga. App. 538, 160 S.E.2d 915 (1968).

Last minute request for reporter. — Motion for continuance should be granted when request for court reporter was made one day in advance but none was available on day of trial. Massey v. State, 127 Ga. App. 638, 194 S.E.2d 582 (1972).

When reporter's hearing disability causes transcription errors. — When the defendant satisfactorily shows that due to reporter's hearing disability, the corrected transcript is not true, complete, and correct, the trial court errs in not granting motions to have another court reporter transcribe tapes. Wilson v. State, 246 Ga. 672, 273 S.E.2d 9 (1980).

When failure to record motion for new trial and ruling thereon is harmless error. — In absence of allegation that transcript is inaccurate or that a dispute exists as to the court's ruling, failure of the court reporter to record a motion for a new trial and ruling is harmless error. Zachary v. State, 150 Ga. App. 388, 258 S.E.2d 158 (1979), aff'd, 245 Ga. 2, 262 S.E.2d 779 (1980).

No requirement that trial judge order transcription of all habeas hearings. — Former Code 1933, § 50-124 (see O.C.G.A. § 9-14-20) had reference to pleadings and orders in habeas corpus cases and did not require that the trial judge order all habeas hearings to be reported and transcribed. Hilliard v. Hilliard, 243 Ga. 424, 254 S.E.2d 372 (1979).

Failure to order transcription of habeas proceeding to regain child custody. — When, in habeas corpus proceeding, divorced father sought to regain custody of son, the trial court did not err in failing to order hearing transcribed. Hilliard v. Hilliard, 243 Ga. 424, 254 S.E.2d 372 (1979).

Defense counsel may refuse court's offer to have evidence and proceedings transcribed. — Defense counsel does not jeopardize the defendant's right to appeal and thereby ineffectively assist the client when, in misdemeanor trial, counsel refuses the court's offer to have evidence and proceedings transcribed. Hunt v. State, 133 Ga. App. 548, 211 S.E.2d 601 (1974).

Presumption that trial court acted correctly when no transcript prepared. — Defendant's assertion that the trial court erred in denying the defendant's motion for a mistrial made following the prosecutor's closing argument failed, when the defendant contended that the prosecutor improperly commented on the defendant's failure to testify, yet the prosecutor's closing argument was not transcribed nor was a substitute included in the record. With neither an original transcript of the offending portions of the prosecutor's argument nor a transcript prepared from recollection, the court must presume that the trial court acted correctly. Peterson v. State, 204 Ga. App. 532, 419 S.E.2d 757 (1992).

When the defendants argued that the trial court erred in denying the defendants' motions for retrial, and the defendants failed to provide a complete appellate record containing the defendants' motions for retrial or the trial court's rulings, the defendants did not satisfy the

defendants' burden under O.C.G.A. § 5-6-41, and the appellate court could not review the issue. Bollinger v. State, 259 Ga. App. 102, 576 S.E.2d 80 (2003).

Sheriff's claim that a corporation failed to prove that a defendant in fieri facias transferred its rights to the excess funds generated in a tax sale was rejected as the sheriff failed to file a transcript or a stipulation of evidence in lieu of a transcript pursuant to O.C.G.A. § 5-6-41(i); the trial court proceedings were entitled to a presumption of regularity and the appellate court had to assume that the trial court's findings were supported by sufficient competent evidence. Barrett v. Marathon Inv. Corp., 268 Ga. App. 196, 601 S.E.2d 516 (2004).

Bank's writ of possession for a foreclosed property was affirmed as a tenant in sufferance failed to file a transcript or a statutorily-authorized substitute; the evidence was assumed to support the grant of the writ of possession. Wimbley v. Washington Mut. Bank, 271 Ga. App. 477, 610 S.E.2d 124 (2005).

Trial court's grant of a writ of possession to a lessor was presumed to be correct as the lessee's claims that the lessor waived the parking provision and that the default notice was improperly sent, required a review of the evidence submitted at trial; the lessee failed to file a transcript and did not attempt to reconstruct the transcript as allowed by O.C.G.A. § 5-6-41(g) and (i). Great Lake Enters. v. AJK Group, Inc., 272 Ga. App. 439, 612 S.E.2d 606 (2005).

Trial court's finding that an injured party did not dismiss a suit before the party was found in contempt of the trial court's order awarding a company an attorney fee for the injured party's discovery violations was presumed to be supported by the evidence as the injured party failed to include a transcript or a legally acceptable substitute in the record on appeal. Collier v. D & N Trucking Co., 273 Ga. App. 271, 614 S.E.2d 801 (2005).

As a condominium unit owner's appeal from a contempt order of the trial court did not include a transcript of the trial court proceedings or a recreation of the record as provided for in O.C.G.A. § 5-6-41(g) and (i), the owner failed in the burden of proof and the appellate court presumed that the evidence supported the trial court's judgment. Schroder v. Murphy, 282 Ga. App. 701, 639 S.E.2d 485 (2006), cert. denied, 2007 Ga. LEXIS 220 (Ga. 2007).

On appeal from a stalking conviction, because the record failed to show that the oath was not administered to the jury, no reversible error existed, and the appeals court had to presume that the jury was sworn. Benton v. State, 286 Ga. App. 736, 649 S.E.2d 793 (2007), cert. denied, 2007 Ga. LEXIS 753 (Ga. 2007).

Because a commercial tenant, appealing pro se, had not requested a transcript or submitted authorized substitute under O.C.G.A. § 5-6-41, and had expressly noted in notice of appeal that none would be submitted, the court had to presume that the judgment granting a writ of possession to the landlord was correct. Keita v. K & S Trading, 292 Ga. App. 116, 663 S.E.2d 362 (2008).

Although a tenant appealing a writ of possession in favor of a landlord made various arguments based on factual issues that required consideration of the evidence presented to the trial court, the tenant failed to file a transcript of the proceedings and failed to reconstruct the proceedings in accordance with O.C.G.A. § 5-6-41(g) and (i); the tenant had the burden to show error by the record, but failed to provide any evidence to support the allegations. It was thus presumed that the trial court's order was correct. Siratu v. Diane Inv. Group, 298 Ga. App. 127, 679 S.E.2d 359 (2009).

Although a hearing was held at which the defendant's counsel attempted to perfect the record pursuant to O.C.G.A. § 5-6-41(g), no evidence of what was presented at trial was put on, and the parties did not reach an agreement as to what had transpired at the trial. There being no transcript of the trial, the court was bound to assume that the defendant's convictions were supported by sufficient evidence. Ford v. State, 306 Ga. App. 606, 703 S.E.2d 71 (2010).

When a wife appealed a trial court's decision to enforce the parties' postnuptial agreement but she failed to provide a transcript under O.C.G.A. § 5-6-41, it was assumed that findings that there was full

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and fair disclosure of the husband's financial condition prior to execution of the agreement were supported by sufficient competent evidence. Spurlin v. Spurlin, 289 Ga. 818, 716 S.E.2d 209 (2011).

Imposition of a penalty for a frivolous appeal was warranted when the appellant failed to include the hearing transcript or an authorized substitute in the record and could have no reasonable belief that the court would reverse the judgment of the trial court. Trevino v. Flanders, 231 Ga. App. 782, 501 S.E.2d 13 (1998).

When the closing arguments of the parties were not recorded but, in an attempt to supplement the record, the defendant's attorney filed an affidavit stating that during the state's closing argument, the assistant district attorney and court reporter were permitted, over the defendant's objection, to reenact the shooting of the victim, the issues raised were "deemed abandoned" by the defendant's failure to supplement the record by any of the methods approved under subsection (f) of O.C.G.A. § 5-6-41. Patterson v. State, 256 Ga. 740, 353 S.E.2d 338 (1987).

Court correctly provided transcript not including complete voir dire and argument of counsel; provision of those portions of the voir dire in which objections were made or rulings were made by the trial court was a sufficient compliance with the requirements of O.C.G.A. § 17-8-5, as was limiting transcription of counsel's argument to those matters to which objection was made. Gardner v. State, 172 Ga. App. 677, 324 S.E.2d 535 (1984).

Depositions sent by supplemental record. — There was no reversible error and the depositions were considered part of the record when the court relinquished the depositions to defendants' attorney with the understanding that the depositions were to be filed in the clerk's office and transmitted to the appellate court, when counsel failed to do that, the court ordered that the depositions be sent by supplemental record. Custom Lighting & Decorating, Ltd. v. Hampshire Co., 204 Ga. App. 293, 418 S.E.2d 811 (1992).

Certification of reconstructed transcript. — When the defendant challenged the sufficiency of the evidence at the defendant's trial, defendant's simply pointing out the absence of a ruling in the record on the defendant's motion to certify a reconstructed transcript did not carry the burden of showing that the trial court refused to rule on a reconstructed transcript, and since there was no transcript of the trial, the appellate court was bound to assume that the defendant's conviction was supported by evidence. Goodwin v. State, 251 Ga. App. 549, 554 S.E.2d 317 (2001).

Failure to timely file transcript. — Trial court properly dismissed the debtors' appeal as a transcript was not filed until over two months after the statutory due date, and the debtors did not request an extension of time to file the transcript; any delay in completing the record past the 30 days granted by statute was presumptively unreasonable and inexcusable. Dye v. U.S. Bank Nat'l Ass'n, 273 Ga. App. 652, 616 S.E.2d 476 (2005).

Trial court did not abuse the court's discretion in ruling that an appellant had not satisfied O.C.G.A. §§ 5-6-42 and 5-6-48, that the appellant's delay in filing a transcript was unreasonable and inexcusable, and that the delay in the appeal process was the appellant's fault because the case was remanded to the trial court for the purpose of supplementing or reconstructing the transcript, and at the hearing more than a year later, the appellant offered no evidence as to efforts taken by the appellant to obtain the transcript or, if necessary, to file the appropriate motions to extend the time to file the transcript or to have the transcript reconstructed; at no time did the appellant file a motion to reconstruct the record, pursuant to O.C.G.A. § 5-6-41(g), or to extend the time to file the transcript, pursuant to O.C.G.A. § 5-6-39, after the case was remanded to the trial court. Lavalle v. Jarrett, 306 Ga. App. 260, 701 S.E.2d 886 (2010).

Trial court did not abuse the court's discretion in dismissing the parents' appeal under O.C.G.A. § 5-6-48(c) on the ground that the parent's delay in the filing

of the transcript was unreasonable, inexcusable, and caused by the parents because the parents took no steps whatsoever to have the transcript prepared until almost ten months after the parents filed their notice of appeal, over seven months after the court reporter informed the parents of the necessary deposit, and almost five months after the trial court informed the parents that the parents would be responsible for bearing the full costs of having the transcript prepared; by waiting to pay the deposit and order the transcript, the parents prevented the case from being docketed and heard in the earliest possible appellate term of court. Bush v. Reed, 311 Ga. App. 328, 715 S.E.2d 747 (2011).

Trial court did not abuse the court's discretion, pursuant to O.C.G.A. § 5-6-48(c), in granting the appellee's motion to dismiss with regard to the transcript on appeal because the appellants' delay in filing the transcript, pursuant to O.C.G.A. §§ 5-6-41(c) and 5-6-42, was unreasonable, inexcusable, and caused by the appellants. Pistacchio v. Frasso, 314 Ga. App. 119, 723 S.E.2d 322 (2012).

Restatement of judge's comments into record. — When, after a lunch break during the guilt phase of the trial, the trial court made a few remarks to the jury while awaiting the return of the defendant, and the trial judge later restated the judge's comments, as well as the judge could remember the comments, into the record, relating that the judge had told the jury that the trial would be slightly delayed because the defendant had eaten late, and had congratulated one of the jurors for having been elected to the board of education, there was no violation of O.C.G.A. § 5-6-41 or O.C.G.A. § 17-8-5, and any possible constitutional error relating to a defendant's right to be present during all stages of a defendant's trial was clearly harmless beyond a reasonable doubt. Westbrook v. State, 256 Ga. 776, 353 S.E.2d 504 (1987).

Recollected testimony of witnesses. — When during a defendant's bench trial, the evidence was not recorded, the defendant did not request or otherwise arrange for recording and, afterwards, the state and the defendant were unable to agree on what transpired during trial, the defendant was afforded the next best thing to a transcript, i.e., the recollected testimony of all witnesses in the criminal trial plus the testimony of persons who observed it. What was recalled was sufficient to conclude that the denial of the defendant's motion for a new trial was proper. King v. State, 195 Ga. App. 353, 393 S.E.2d 709 (1990).

Police officer's testimony. — In the absence of a transcript for review, the appellate court could assume as a matter of law that a police officer's testimony was sufficient to support a conviction. Jones v. State, 226 Ga. App. 608, 487 S.E.2d 89 (1997).

Burden of proving bias in jury selection. — Defendant did not meet the burden to complete the record to establish a prima facie case that the state improperly used its peremptory strikes to exclude blacks from the jury when the defendant did not amend or supplement the record to reflect the necessary facts pursuant to subsection (f) of O.C.G.A. § 5-6-41, nor was there any stipulation in the record as to the facts pursuant to subsection (i) of § 5-6-41. Coker v. State, 207 Ga. App. 482, 428 S.E.2d 578 (1993).

Failure to swear jury in criminal trial. — If the trial court failed to swear the jury in a criminal case, the defendant's remedy was to have the record corrected pursuant to the provisions of O.C.G.A. § 5-6-41(f). Keller v. State, 261 Ga. App. 769, 583 S.E.2d 591 (2003).

Trial court properly concluded that the O.C.G.A. § 5-6-41(f) hearing was held and that the O.C.G.A. § 15-12-139 oath was properly administered when: (1) the defendant did not move to correct the record; (2) unless otherwise shown, the trial court was presumed to have followed the law; (3) although the defendant initially made that objection at the hearing on the motion for new trial, the defendant subsequently acquiesced in the trial court's hearing of the issue at that time, and was granted the opportunity for a second hearing, at which the defendant presented an additional witness; and (4) the trial court credited the prosecutor's distinct memory that the trial court did, in fact, swear the jury. Hill v. State, 291 Ga. 160, 728 S.E.2d 225 (2012).

OPINIONS OF THE ATTORNEY GENERAL

Law does not require that verbatim transcripts be prepared and filed in misdemeanor cases; the holding in Griffin v. Illinois, 351 U.S. 12, 76 S. Ct. 585, 100 L. Ed. 89 (1956) does not require a contrary ruling since the lack of a transcript in Griffin blocked the appeal, a circumstance which would not apply in a Georgia misdemeanor case. 1970 Op. Att'y Gen. No. U70-69.

RESEARCH REFERENCES

Am. Jur. 2d. — 5 Am. Jur. 2d, Appellate Review, § 449 et seq.

C.J.S. — 4 C.J.S., Appeal and Error, § 554 et seq.

ALR. — Will questions which might have been, but were not, raised on prior appeal or error, be considered on subsequent appeal or error, 1 ALR 725.

Review on appeal of evidence as to genuineness of disputed documents, 12 ALR 212; 27 ALR 319.

Use in state court by counsel or party of tape recorder or other electronic device to make transcript of criminal trial proceedings, 67 ALR3d 1013.

Court reporter's death or disability prior to transcribing notes as grounds for reversal or new trial, 57 ALR4th 1049.

Failure or refusal of state court judge to have record made of bench conference with counsel in criminal proceeding, 31 ALR5th 704.

5-6-42. Procedure for preparation and filing of transcript of evidence and proceedings where appellant designates matter to be omitted from record on appeal; extensions of time for completion of transcript.

If the appellant designates any matter to be omitted from the record on appeal as provided in Code Section 5-6-37, the appellee may, within 15 days of serving of the notice of appeal by appellant, file a designation of record designating that all or part of the omitted matters be included in the record on appeal. A copy of the designation shall be served on all other parties in the manner prescribed by Code Section 5-6-32. Where there is a transcript of evidence and proceedings to be included in the record on appeal, the appellant shall cause the transcript to be prepared and filed as provided by Code Section 5-6-41; but, when the appellant has designated that the transcript not be made a part of the record on appeal and its inclusion is by reason of a designation thereof by appellee, the appellee shall cause the transcript to be prepared and filed as referred to in Code Section 5-6-41 at his expense. The party having the responsibility of filing the transcript shall cause it to be filed within 30 days after filing of the notice of appeal or designation by appellee, as the case may be, unless the time is extended as provided in Code Section 5-6-39. In all cases, it shall be the duty of the trial judge to grant such extensions of time as may be necessary to enable the court reporter to complete his transcript of evidence and proceedings. (Ga. L. 1965, p. 18, § 11.)

Cross references. — Filings in clerk's office, Rules of the Supreme Court of the State of Georgia, Rule 1. Certification and transmittal of transcript and record, Rules of the Supreme Court of the State of Georgia, Rule 15. Contents, form, and certification of transcript, Rules of the Supreme Court of the State of Georgia, Rule 18. Objection to failure to comply with Appellate Practice Act, Rules of the Supreme Court of the State of Georgia, Rule 20. Preparation of records and transcripts, Rules of the Court of Appeals of the State of Georgia, Rule 42. Transmission of transcript, Rules of the Court of Appeals of the State of Georgia, Rule 44. Objections to records or transcripts, Rules of the Court of Appeals of the State of Georgia, Rule 47.

Law reviews. — For article, "Synopses of 1968 Amendments Appellate Procedure Act and Georgia Civil Practice Act," see 4 Ga. St. B.J. 503 (1968). For survey article on appellate practice and procedure, see 59 Mercer L. Rev. 21 (2007). For survey article on appellate practice and procedure, see 60 Mercer L. Rev. 21 (2008).

For comment on Davis v. Davis, 222 Ga. 579, 151 S.E.2d 123 (1966), see 4 Ga. St. B.J. 259 (1967).

JUDICIAL DECISIONS

Analysis

General Consideration
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General Consideration

Designation as to precisely which portions of record to be omitted. — Burden is on appellant in first instance to bring up all record and evidence introduced under it bearing on review of the appellant's enumerations of error, and in particular it is the appellant's duty, if the appellant wishes something omitted, to state it with precision in the appellant's notice of appeal pursuant to this section. Ayers Enters., Ltd. v. Adams, 131 Ga. App. 12, 205 S.E.2d 16 (1974).

Questions regarding trial proceedings related in brief but not in transcript. — Court of Appeals cannot consider questions regarding proceedings on trial which are related in party's brief but are not incorporated in properly authenticated transcript. Turner v. Watson, 139 Ga. App. 648, 229 S.E.2d 126 (1976).

Party having responsibility of preparing and filing transcript refers to either appellant or appellee, and when the appellant states in notice of appeal that the transcript is to be transmitted as part of the appellate record, the party having responsibility of preparing and filing transcript refers to appellant. State v. Hart, 246 Ga. 212, 271 S.E.2d 133 (1980).

Party having the responsibility of preparing and filing the transcript refers to either the appellant or the appellee. Long v. City of Midway, 165 Ga. App. 602, 302 S.E.2d 372, rev'd on other grounds, 251 Ga. 364, 306 S.E.2d 639 (1983).

Appellant must prepare and file transcript. — Under Ga. L. 1965, p. 18, § 11 (see O.C.G.A. § 5-6-42), the appellant has the responsibility for causing a transcript to be prepared and filed as provided by Ga. L. 1965, p. 18, § 10 (see O.C.G.A. § 5-6-41) unless the appellant has designated that the transcript not be included in the record. Walker v. State, 153 Ga. App. 89, 264 S.E.2d 565 (1980).

Supreme court could not review the defendant's claim that the trial court set pretrial bond in an excessive and unreasonable amount because the defendant failed to have the record completed pursuant to O.C.G.A. § 5-6-41; testimony at the hearing on the motion for new trial was not a sufficient substitute for a transcript, and without a transcript of the bond hearing or a statutorily authorized substitute, the supreme court had to assume that the trial court's judgment was correct. Glass v. State, 289 Ga. 542, 712 S.E.2d 851 (2011).

Duty of appellant who states in notice of appeal that transcript shall be transmitted. — When notice of appeal recites that transcript will be filed for

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inclusion in the record, the transcript must be filed within 30 days after filing of a notice of appeal unless within such time a time extension is applied for and allowed, and failure to timely file a transcript or to timely obtain an extension of time for so doing requires dismissal of the appeal. O'Kelley v. McLain, 123 Ga. App. 669, 182 S.E.2d 189 (1971).

Appellant who states in the notice of appeal that the transcript is to be transmitted as part of the appellate record is statutorily mandated to cause the court reporter to prepare and file an original and one copy of the transcript with the clerk of trial court together with a court reporter's certificate attesting to correctness thereof within 30 days after filing of notice of appeal unless time is extended as provided in Ga. L. 1965, p. 18, § 6 (see O.C.G.A. § 5-6-39). State v. Hart, 246 Ga. 212, 271 S.E.2d 133 (1980).

When the notice of appeal states that a transcript of evidence and proceedings will be filed for inclusion in the record on appeal, the appellant is the party ultimately responsible for filing the transcript. Curtis v. State, 168 Ga. App. 235, 308 S.E.2d 599 (1983).

Duty to request transcription from court reporter. — Appellant who appeals felony conviction and states in notice of appeal that transcript is to be transmitted as part of appellate record has continuing duty under section to request, at same time that the appellant files a notice of appeal, the court reporter to transcribe the reported testimony. State v. Hart, 246 Ga. 212, 271 S.E.2d 133 (1980).

Appellee's right where appellant designates portion to be omitted. — Even if the appellant has designated a relevant portion of the record on appeal for omission, the appellee is entitled, under this section, to file the appellee's own designation of record to correct the deficiency and, the appellee also has a remedy for correction of the record under O.C.G.A. § 5-6-41(f), even after it has been transmitted to the Court of Appeals; in the absence of any attempt on the appellee's part to exercise these remedies, the Court of Appeals must assume that the record before it is complete in all relevant respects. Boats for Sail v. Sears, 158 Ga. App. 74, 279 S.E.2d 314 (1981).

Appellant not obligated to prepare record. — Obligation of the appellant relates to the transcript, and the obligation for the preparation of the record rests with the clerk. After the appellant has filed a notice of appeal, the appellant's duty as to the record is limited to the payment of costs. When the clerk fails to transmit the record, but there is no indication that this failure is occasioned by the failure of a party to pay costs, the trial court has no discretion to dismiss the appeal. Long v. City of Midway, 251 Ga. 364, 306 S.E.2d 639 (1983).

Appellant had no obligation to file transcript until the appellant's motion for new trial was disposed of, and the failure to do so or the failure to pay for and file the transcript as soon as it is ready has no controlling bearing on the question of unreasonable delay in filing the transcript after notice of appeal as required by O.C.G.A. § 5-6-42. Galletta v. Hillcrest Abbey W., Inc., 185 Ga. App. 20, 363 S.E.2d 265 (1987), cert. denied, 185 Ga. App. 910, 363 S.E.2d 265 (1988).

Appellate court will order trial clerk to submit omitted requests. — Requests to charge are of such importance in an appeal when the trial court's giving of a charge is cited as error that the appellate court will order the clerk of the trial court to submit that portion of the trial record to the appellate court pursuant to O.C.G.A. § 5-6-41(f), and a motion to strike the state's supplementation of the record to include the requests on the ground that it is tardily filed will be denied. Vick v. State, 166 Ga. App. 572, 305 S.E.2d 17 (1983).

State's violation of duty does not excuse defendant's noncompliance. — It is duty of state to request court reporter to transcribe reported testimony and then file transcript after guilty verdict had been returned in a felony case. However, the state's duty to request court reporter to transcribe reported testimony in felony conviction had no time limit and thus cannot relieve the appellant in felony conviction of duty the court reporter to

request court reporter to transcribe reported testimony at same time that the court reporter files a notice of appeal. State v. Hart, 246 Ga. 212, 271 S.E.2d 133 (1980).

When defendant ineffectively represented at trial. — Section inapplicable to appeal involving criminal defendant who was ineffectively represented by counsel at trial. Ingram v. State, 134 Ga. App. 935, 216 S.E.2d 608 (1975).

Transcript of hearing on motion for summary judgment. — Trial court did not err in ruling that the transcript of the hearing on a manufacturer's motion for summary judgment accurately portrayed what had occurred at the hearing because the certification of the transcript met the requirements of O.C.G.A. § 15-14-5, and a driver had the burden to seek corrective action under O.C.G.A. § 5-6-41(f). Udoinyion v. Michelin N. Am., Inc., 313 Ga. App. 248, 721 S.E.2d 190 (2011).

Cited in Harper v. Green, 113 Ga. App. 557, 149 S.E.2d 163 (1966); Davis v. Davis, 222 Ga. 579, 151 S.E.2d 123 (1966); Oglethorpe Co. v. Carmack, 223 Ga. 128, 153 S.E.2d 541 (1967); Benecke v. Boyer, 115 Ga. App. 99, 153 S.E.2d 668 (1967); Fleming v. Sanders, 223 Ga. 172, 154 S.E.2d 14 (1967); Herrington v. Leathers, 115 Ga. App. 282, 154 S.E.2d 621 (1967); Byars v. Metropolitan Life Ins. Co., 115 Ga. App. 368, 154 S.E.2d 719 (1967); Walker v. State Hwy. Dep't, 115 Ga. App. 461, 154 S.E.2d 768 (1967); Joiner v. State, 223 Ga. 367, 155 S.E.2d 8 (1967); Teper v. Weiss, 115 Ga. App. 621, 155 S.E.2d 730 (1967); Wilcox v. Wilcox, 223 Ga. 396, 156 S.E.2d 84 (1967); Puckett v. Edmonds, 115 Ga. App. 776, 156 S.E.2d 151 (1967); Elliott v. Leathers, 223 Ga. 497, 156 S.E.2d 440 (1967); Poss v. State, 116 Ga. App. 264, 157 S.E.2d 33 (1967); Strickland v. Staten, 223 Ga. 726, 157 S.E.2d 740 (1967); Kacoonis v. City of Mountain View, 224 Ga. 151, 160 S.E.2d 364 (1968); Shield Ins. Co. v. Kemp, 117 Ga. App. 538, 160 S.E.2d 915 (1968); D.G. Mach. & Gage Co. v. Hardy, 118 Ga. App. 45, 162 S.E.2d 852 (1968); Hardy v. D.G. Mach. & Gage Co., 224 Ga. 818, 165 S.E.2d 127 (1968); Martin Theaters of Ga., Inc. v. Lloyd, 118 Ga. App. 835, 165 S.E.2d 909 (1968); Calloway v. State, 119 Ga. App. 194, 166 S.E.2d 613 (1969); Addis v. First Kingston Corp., 225 Ga. 231, 167 S.E.2d 656 (1969); Hernandez v. Hernandez, 225 Ga. 789, 171 S.E.2d 520 (1969); O'Quinn v. State, 121 Ga. App. 231, 173 S.E.2d 409 (1970); Richardson v. Nu-Way Cleaners & Laundry, 121 Ga. App. 425, 174 S.E.2d 202 (1970); Stevens v. Clayton County, 226 Ga. 528, 175 S.E.2d 831 (1970); Baxter v. Long, 122 Ga. App. 500, 177 S.E.2d 712 (1970); Johnson v. State, 122 Ga. App. 785, 178 S.E.2d 743 (1970); Howard v. Smith, 227 Ga. 427, 181 S.E.2d 47 (1971); Massey v. State, 227 Ga. 257, 181 S.E.2d 71 (1971); Hardwick v. State, 227 Ga. 467, 181 S.E.2d 376 (1971); Lowe v. Lowe, 123 Ga. App. 525, 181 S.E.2d 715 (1971); Bramlett v. Smith, 227 Ga. 523, 181 S.E.2d 849 (1971); Whiteway Laundry & Dry Cleaners, Inc. v. Childs, 126 Ga. App. 617, 191 S.E.2d 454 (1972); Smith v. Top Dollar Stores, Inc., 129 Ga. App. 60, 198 S.E.2d 690 (1973); Irby v. Christian, 130 Ga. App. 375, 203 S.E.2d 284 (1973); Price v. Cheek, 130 Ga. App. 506, 203 S.E.2d 751 (1973); Jackson v. State, 130 Ga. App. 581, 203 S.E.2d 923 (1974); Blackstone v. State, 131 Ga. App. 666, 206 S.E.2d 553 (1974); Mingo v. State, 133 Ga. App. 385, 210 S.E.2d 835 (1974); Gilbert v. Reynolds, 233 Ga. 488, 212 S.E.2d 332 (1975); Interstate Fin. Corp. v. Appel, 233 Ga. 649, 212 S.E.2d 821 (1975); Coop Mtg. Invs. Assocs. v. Pendley, 134 Ga. App. 236, 214 S.E.2d 572 (1975); Taylor v. Whitmire, 234 Ga. 449, 216 S.E.2d 310 (1975); Johnson v. Clements, 135 Ga. App. 495, 218 S.E.2d 109 (1975); Anderson v. Anderson, 235 Ga. 115, 218 S.E.2d 846 (1975); State v. Weeks, 136 Ga. App. 637, 222 S.E.2d 117 (1975); Canon v. Canon, 236 Ga. 99, 222 S.E.2d 381 (1976); Almond v. Robertson, 138 Ga. App. 22, 225 S.E.2d 486 (1976); Reid v. State, 237 Ga. 106, 227 S.E.2d 24 (1976); DuBois v. DuBois, 240 Ga. 314, 240 S.E.2d 706 (1977); Strother v. C. & S. Nat'l Bank, 147 Ga. App. 140, 248 S.E.2d 204 (1978); McAllister v. City of Jonesboro, 242 Ga. 95, 249 S.E.2d 565 (1978); Reed v. Arrington-Blount Ford, Inc., 148 Ga. App. 595, 252 S.E.2d 13 (1979); Middleton v. Continental Dev. Corp., 153 Ga. App. 144, 264 S.E.2d 689 (1980); Dampier v. First Bank & Trust Co., 153 Ga. App. 756, 266 S.E.2d 539 (1980);

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Brown v. Frachiseur, 247 Ga. 463, 277 S.E.2d 16 (1981); Harris v. Clark, 157 Ga. App. 549, 278 S.E.2d 132 (1981); Edwards v. Davis, 160 Ga. App. 122, 286 S.E.2d 301 (1981); Perry v. Freeman, 163 Ga. App. 186, 293 S.E.2d 381 (1982); Huttig Sash & Door Co. v. Controlled Bldg. Corp., 165 Ga. App. 99, 299 S.E.2d 411 (1983); Ray v. Standard Fire Ins. Co., 168 Ga. App. 116, 308 S.E.2d 221 (1983); Brown v. Commercial Credit Equip. Corp., 172 Ga. App. 568, 323 S.E.2d 822 (1984); Moon v. DeKalb County Personnel Review Panel, 173 Ga. App. 486, 326 S.E.2d 844 (1985); Siler v. Johns, 173 Ga. App. 692, 327 S.E.2d 810 (1985); Whitton v. State, 174 Ga. App. 634, 331 S.E.2d 10 (1985); Neese v. Long, 178 Ga. App. 105, 341 S.E.2d 861 (1986); Baker v. Southern Ry., 192 Ga. App. 444, 385 S.E.2d 125 (1989); Baker v. Southern Ry., 260 Ga. 115, 390 S.E.2d 576 (1990); Department of Human Resources v. Patillo, 196 Ga. App. 778, 397 S.E.2d 47 (1990); Hall v. Bussey, 200 Ga. App. 311, 408 S.E.2d 430 (1991); Sellers v. Nodvin, 262 Ga. 205, 415 S.E.2d 908 (1992); McLelland v. State, 203 Ga. App. 93, 416 S.E.2d 340 (1992); Beavers v. Gilstrap, 210 Ga. App. 46, 435 S.E.2d 267 (1993); Johnson v. Hardwick, 212 Ga. App. 44, 441 S.E.2d 450 (1994); Jackson v. Beech Aircraft Corp., 217 Ga. App. 498, 458 S.E.2d 377 (1995); Plumides v. American Engines & Transmissions, Inc., 227 Ga. App. 885, 490 S.E.2d 552 (1997); Hameed v. Hall, 234 Ga. App. 890, 508 S.E.2d 680 (1998); Durden v. Griffin, 270 Ga. 293, 509 S.E.2d 54 (1998); Bass v. Mercer, 240 Ga. App. 545, 524 S.E.2d 260 (1999); Crown Diamond Co. v. N.Y. Diamond Corp., 242 Ga. App. 674, 530 S.E.2d 800 (2000); Holy Fellowship Church of God in Christ v. First Community Bank, 242 Ga. App. 400, 530 S.E.2d 24 (2000); Ball v. Fulton-DeKalb Hosp. Auth., 258 Ga. App. 899, 576 S.E.2d 1 (2002).

Timely Filing of Transcript

Purpose of time requirements. — Time requirements of O.C.G.A. § 5-6-42 for filing a transcript are not jurisdictional, but are merely a means of avoiding delay so a case can be presented on the earliest possible calendar in the appellate courts. Galletta v. Hillcrest Abbey W., Inc., 185 Ga. App. 20, 363 S.E.2d 265 (1987), cert. denied, 185 Ga. App. 910, 363 S.E.2d 265 (1988).

Appellant bears burden of timely filing transcript or obtaining extension. — Burden is on appellant to file transcript of evidence within 30 days of filing of notice of appeal, or if transcript cannot be obtained within that time the appellant must obtain an extension of time to file a transcript. Failure to timely file a transcript makes it affirmatively appear that the failure was caused by the appellant. Fahrig v. Garrett, 224 Ga. 817, 165 S.E.2d 126 (1968); Dowling v. State, 120 Ga. App. 810, 172 S.E.2d 190 (1969).

When the minor failed to file the transcript within 30 days of the time the minor filed the notice of appeal as required by O.C.G.A. § 5-6-42, or did not offer assurances of when the transcript might have been filed, the juvenile court did not abuse the court's discretion in dismissing the minor's appeal and finding the delay unreasonable. In re C.F., 255 Ga. App. 93, 564 S.E.2d 524 (2002).

Appellant's inaction results in dismissal. — Dismissal was proper when the appellant's inaction caused a delay of nine months between the notice of appeal and delivery of the transcript. In re D.M.C., 232 Ga. App. 466, 501 S.E.2d 305 (1998).

Statutory law placed burden not only of paying for transcript, but making sure it was filed, on the party taking the appeal, and since the patient had that burden and shirked that responsibility, resulting in a greater than three-year delay that prejudiced the surgical business and doctor, the trial court was entitled to involuntarily dismiss the patient's appeal. Atlanta Orthopedic Surgeons v. Adams, 254 Ga. App. 532, 562 S.E.2d 818 (2002).

Since a construction company bringing an appeal of a jury verdict in favor of homeowners never sought an extension of time to file the transcript from the post-trial hearing on the company's motions for new trial and judgment notwithstanding the verdict, nor communicated with the court reporter during the nine-month period after the hearing, the record did not support the trial court's

finding that the delay in filing that transcript caused by the construction company was excusable and the trial court's denial of the homeowners' motion to dismiss the appeal was error; the record showed that the construction company's actions delayed a just disposition of the case by delaying the docketing of the appeal and hearing of the case by the appellate court, and, consequently, the homeowners were forced to wait for a final disposition on the construction company's appeal of the verdict against the company. Coptic Constr. Co. v. Rolle, 279 Ga. App. 454, 631 S.E.2d 475 (2006).

Court has broad discretion in granting extensions of time. Brookshire v. J.P. Stevens Co., 133 Ga. App. 97, 210 S.E.2d 46 (1974).

Effect of failure to timely file transcript. — Failure to file transcript in accordance with O.C.G.A. § 5-6-42 is not jurisdictional, and is not ground for dismissal unless accompanied by finding of unreasonableness and lack of excuse, as required by O.C.G.A. § 5-6-48(c). Young v. Jones, 147 Ga. App. 65, 248 S.E.2d 49 (1978); Llano v. DeKalb County, 174 Ga. App. 693, 331 S.E.2d 36 (1985); Galletta v. Hillcrest Abbey W., Inc., 185 Ga. App. 20, 363 S.E.2d 265 (1987), cert. denied, 185 Ga. App. 910, 363 S.E.2d 265 (1988); Burns v. Howard, 239 Ga. App. 315, 520 S.E.2d 491 (1999).

Failure of the appellant to request an extension for the filing of the transcript is not in itself a ground for dismissal of the appeal absent a judicial determination that the resulting delay was both unreasonable and inexcusable. McGuirt v. Lawrence, 193 Ga. App. 611, 389 S.E.2d 2 (1989); Barmore v. Himebaugh, 205 Ga. App. 381, 422 S.E.2d 255 (1992); Dalton v. Thanh Tam Vo, 224 Ga. App. 382, 480 S.E.2d 377 (1997).

Trial court properly dismissed the debtors' appeal as a transcript was not filed until over two months after the statutory due date, and the debtors did not request an extension of time to file the transcript; any delay in completing the record past the 30 days granted by statute was presumptively unreasonable and inexcusable. Dye v. U.S. Bank Nat'l Ass'n, 273 Ga. App. 652, 616 S.E.2d 476 (2005).

Trial court did not err in dismissing the litigant's appeal when the litigant had not filed the transcript 110 days after the notice of appeal was filed; the litigant's claim of poverty was contradicted by the litigant's trip to India during the time the appeal was pending. Roy v. Shetty, 274 Ga. App. 8, 616 S.E.2d 208 (2005).

Appeal was properly dismissed for failure to timely file a transcript under O.C.G.A. § 5-6-42 since the 150 day delay in filing the transcript was unreasonable under O.C.G.A. § 5-6-48, in that it resulted in a delay of the consideration of the appeal for another term and affected the appellee's ability to administer the estate in question; the delay was inexcusable since the record indicated that the attorney had the transcript when the attorney filed the notice of appeal. Adams v. Hebert, 279 Ga. App. 158, 630 S.E.2d 652 (2006).

Trial court did not abuse the court's discretion by dismissing a security corporation's appeal of a civil judgment against the corporation as a result of having failed to have filed a transcript within 30 days as required by O.C.G.A. § 5-6-42. Since no transcript existed, the appellate court was unable to determine whether the security corporation had rebutted the presumption that the filing of the transcript 49 days after the 30-day statutory deadline for filing transcripts was unreasonable and no extension was requested. Pioneer Sec. & Investigations, Inc. v. Hyatt Corp., 295 Ga. App. 261, 671 S.E.2d 266 (2008).

Party not responsible when not cause of delay. — Trial court has discretion to dismiss an appeal for failure to timely file a transcript only if: (1) the delay in filing was unreasonable; and (2) the failure to timely file was inexcusable in that the delay was caused by some act of the party responsible for filing the transcript. Boulden v. Fowler, 202 Ga. App. 237, 414 S.E.2d 263 (1991), cert. denied, 202 Ga. App. 905, 414 S.E.2d 263 (1992).

Failure to get extension. — Failure to get an extension is not, standing alone, a sufficient basis for dismissal. Boulden v. Fowler, 202 Ga. App. 237, 414 S.E.2d 263 (1991), cert. denied, 202 Ga. App. 905, 414 S.E.2d 263 (1992).

Dismissal proper where transcript not timely filed nor extension applied

Timely Filing of Transcript (Cont'd)

for. When no application was made to the trial judge for an extension of time for filing of transcript of evidence and no extension was granted, appellee's motion to dismiss an appeal because the transcript was not filed within 30 days after the notice of appeal was filed must be granted. Culver v. Sisk, 223 Ga. 519, 156 S.E.2d 352 (1967); Cole v. Cole, 228 Ga. 9, 183 S.E.2d 743 (1971); Thomas v. Satterfield, 169 Ga. App. 432, 313 S.E.2d 134 (1984).

Trial court did not abuse the court's discretion in finding that the delay in timely filing a transcript was caused by plaintiffs and was inexcusable, given the plaintiffs undisputed failure to seek another extension of the deadline and the trial court's authorization to conclude that the plaintiffs had failed even to order the additional portions of transcript until the deadline had passed. Van Diviere v. Delta Airlines, 204 Ga. App. 573, 420 S.E.2d 27, cert. denied, 204 Ga. App. 922, 420 S.E.2d 27 (1992).

Dismissal was supported by a finding that the delay was unreasonable and inexcusable, given a four-month delay in filing the transcript and the defendant's apparent lack of diligence in discovering that the transcript would be delayed. Langston v. State, 206 Ga. App. 874, 426 S.E.2d 609 (1992).

Delay of 112 days between the filing of the notice of appeal and completion of the transcript warranted dismissal of the appeal. Smith v. Simpson, 231 Ga. App. 109, 497 S.E.2d 663 (1998).

Trial court did not abuse the court's discretion in ruling that an appellant had not satisfied O.C.G.A. §§ 5-6-42 and 5-6-48 and that the delay in the appeal process was the appellant's fault because the case was remanded to the trial court for the purpose of supplementing or reconstructing the transcript, but at the hearing more than a year later, the appellant offered no evidence as to efforts taken by the appellant to obtain the transcript or, if necessary, to file the appropriate motions to extend the time to file the transcript or to have the transcript reconstructed; at no time did the appellant file a motion to reconstruct the record, pursuant to O.C.G.A. § 5-6-41(g), or to extend the time to file the transcript, pursuant to O.C.G.A. § 5-6-39, after the case was remanded to the trial court. Lavalle v. Jarrett, 306 Ga. App. 260, 701 S.E.2d 886 (2010).

Trial court did not abuse the court's discretion in dismissing the parents' appeal under O.C.G.A. § 5-6-48(c) on the ground that the parents delay in the filing of the transcript was unreasonable, inexcusable, and caused by the parents because the parents took no steps whatsoever to have the transcript prepared until almost ten months after the parents filed the parents notice of appeal, over seven months after the court reporter informed the parents of the necessary deposit, and almost five months after the trial court informed the parents that the parents would be responsible for bearing the full costs of having the transcript prepared; by waiting to pay the deposit and order the transcript, the parents prevented the case from being docketed and heard in the earliest possible appellate term of court. Bush v. Reed, 311 Ga. App. 328, 715 S.E.2d 747 (2011).

Trial court did not abuse the court's discretion in finding that a mother's failure to timely pursue the filing of the transcript from the mother's parental rights termination hearing or seek an extension of time for almost one year was unreasonable and inexcusable and in dismissing the appeal under O.C.G.A. § 5-6-48(a). In the Interest of T.H., 311 Ga. App. 641, 716 S.E.2d 724 (2011).

Trial court did not abuse the court's discretion, pursuant to O.C.G.A. § 5-6-48(c), in granting the appellee's motion to dismiss with regard to the transcript on appeal because the appellants' delay in filing the transcript, pursuant to O.C.G.A. §§ 5-6-41(c) and 5-6-42, was unreasonable, inexcusable, and caused by the appellants. Pistacchio v. Frasso, 314 Ga. App. 119, 723 S.E.2d 322 (2012).

Delay in filing of transcript is not necessarily cause for dismissal. — Because there was no evidence that an 11-day delay in the filing of a transcript for transmission as part of the appellate record discernibly delayed the docketing

of the record in the appellate court, the trial court abused the court's discretion by concluding that the delay was unreasonable, and erred by dismissing an appeal. Fulton County Bd. of Tax Assessors v. Love, 289 Ga. App. 252, 656 S.E.2d 576 (2008).

Filing of transcript in lower court before filing of notice of appeal complies with section. Logan v. Logan, 223 Ga. 574, 156 S.E.2d 913 (1967).

Appellant responsible for unreasonable delay. — Fact that an unreasonable delay in the preparation of the transcript is not the fault of the appellant does not excuse a filing delay, in the absence of a proper request by the appellant for an extension of time. This being so, the trial court is authorized to dismiss the appeal. In re G.W.H., 168 Ga. App. 845, 310 S.E.2d 573 (1983).

Remand for requisite finding. — Order dismissing appeal, which simply recited that the transcript had not been timely filed but did not include the requisite finding that the resulting delay was both unreasonable and inexcusable, was reversed and remanded for the requisite finding. Speir v. Nicholson, 193 Ga. App. 444, 388 S.E.2d 42 (1989).

Although unreasonable delay occurred in ordering a transcript, remand was necessary for the trial court to make affirmative rulings on the record whether the delay was excusable or who was the cause of the delay. Jackson v. Beech Aircraft Corp., 213 Ga. App. 172, 444 S.E.2d 359 (1994).

Trial court did not abuse the court's discretion in granting a dismissal of the plaintiff's appeal, pursuant to O.C.G.A. § 5-6-42, because the plaintiff failed to file a transcript for the plaintiff's appeal for more than 17 months after the plaintiff filed the notice of appeal, the plaintiff never sought an extension of time under O.C.G.A. § 5-6-39, and the court held that the plaintiff's action was unreasonable, inexcusable, and caused by the plaintiff's own conduct; there was no requirement that a hearing be held on the motion to dismiss, pursuant to O.C.G.A. § 5-6-48(c), as the plaintiff was only entitled to an opportunity to be heard, which the plaintiff received. Lemmons v. Newton, 269 Ga. App. 880, 605 S.E.2d 626 (2004).

Cost of Transcript

Cost of transcript falls on party desiring its transmittal. — Cost of obtaining from court reporter a transcript of evidence falls on party desiring that the transcript be transmitted to appellate court. Stone Mt. Mem. Ass'n v. Stone Mt. Scenic R.R., Inc., 232 Ga. 92, 205 S.E.2d 293 (1974).

Expense where supplementation necessary. — Expense of entire record falls on appellant who includes only parts of the record when trial court approves additional designations by appellee. Jones v. Spindel, 239 Ga. 68, 235 S.E.2d 486 (1977).

When appellant designates portion of transcript, and then appellee designates entire transcript of evidence to be material to appeal, and trial judge approves such additional designation, expense of procuring and filing entire transcript of evidence must be borne by the appellant. Brand v. Montega Corp., 233 Ga. 35, 209 S.E.2d 583 (1974).

Costs of preparing transcript are not recoverable. — While costs of having transcript prepared by court reporter are an expense of appeal, they are not costs of appeal which are recoverable from appellee when the appellant is successful in obtaining a reversal in the appellate court. Stone Mt. Mem. Ass'n v. Stone Mt. Scenic R.R., Inc., 232 Ga. 92, 205 S.E.2d 293 (1974).

When the defendant in the court below and on appeal only briefly asserted that those items included in the record were unnecessary to the appeal, without explaining or arguing the issue in any detail, the trial court had ample grounds to find that the defendant failed in the burden to show that costs should be apportioned. Jacques v. Murray, 290 Ga. App. 334, 659 S.E.2d 643 (2008).

Delay in paying costs. — Delay of slightly more than 30 days in paying the bill of costs because of the appellant's medical condition was properly found to be neither unreasonable nor inexcusable. Poythress v. Savannah Airport Comm'n, 229 Ga. App. 303, 494 S.E.2d 76 (1997).

5-6-43. Preparation and transmittal of record on appeal by court clerk; retention of copy by clerk; furnishing at no cost to Attorney General in capital cases; notification where defendant confined to jail.

(a) Within five days after the date of filing of the transcript of evidence and proceedings by the appellant or appellee, as the case may be, it shall be the duty of the clerk of the trial court to prepare a complete copy of the entire record of the case, omitting only those things designated for omission by the appellant and which were not designated for inclusion by the appellee, together with a copy of the notice of appeal and copy of any notice of cross appeal, with date of filing thereon, and transmit the same, together with the transcript of evidence and proceedings, to the appellate court, together with his certificate as to the correctness of the record. Where no transcript of evidence and proceedings is to be sent up, the clerk shall prepare and transmit the record within 20 days after the date of filing of the notice of appeal. If for any reason the clerk is unable to transmit the record and transcript within the time required in this subsection or when an extension of time was obtained under Code Section 5-6-39, he shall state in his certificate the cause of the delay and the appeal shall not be dismissed. The clerk need not recopy the transcript of evidence and proceedings to be sent up on appeal but shall send up the reporter's original and retain the copy, as referred to in Code Section 5-6-41; and it shall not be necessary that the transcript be renumbered as a part of the record on appeal. The clerk shall retain an exact duplicate copy of all records and the transcript sent up, with the same pagination, in his office as a permanent record.

(b) Where the accused in a criminal case was convicted of a capital felony, the clerk shall likewise furnish, at no cost, the Attorney General with an exact copy of the record on appeal.

(c) Where a defendant in a criminal case is confined in jail pending appeal, it shall be the duty of the clerk to state that fact in his certificate; and it shall be the duty of the appellate court to expedite disposition of the case.

(d) Where a transcript of evidence and proceedings is already on file at the time the notice of appeal is filed, as where the transcript was previously filed in connection with a motion for new trial or for judgment notwithstanding the verdict, the clerk shall cause the record and transcript (where specified for inclusion) to be transmitted as provided in subsection (a) of this Code section within 20 days after the filing of the notice of appeal. (Ga. L. 1965, p. 18, § 12; Ga. L. 1966, p. 493, § 5; Ga. L. 1968, p. 1072, § 6; Ga. L. 1981, p. 1396, § 15; Ga. L. 1992, p. 6, § 5; Ga. L. 2011, p. 24, § 1/HB 41.)

The 2011 amendment, effective March 16, 2011, in subsection (b), inserted ", at no cost," and deleted ", for which the clerk shall receive a fee as required by paragraph (6) of subsection (h) of Code Section 15-6-77, to be paid out of funds appropriated to the Department of Law" following "record on appeal". See editor's note for applicability.

Cross references. — Payment by appellant of costs of transcript preparation prior to transmittal of transcript to appellate court, § 15-6-80. Certification and transmittal of transcript and record, Rules of the Supreme Court of the State of Georgia, Rule 15. Objection to failure to comply with Appellate Practice Act, Rules of the Supreme Court of the State of Georgia, Rule 20. Duty of trial court clerks as to records and transcripts, Rules of the Court of Appeals of the State of Georgia, Rule 41. Preparation of records and transcripts, Rules of the Court of Appeals of the State of Georgia, Rule 42. Objections to records or transcripts, Rules of the Court of Appeals of the State of Georgia, Rule 47.

Editor's notes. — Ga. L. 2011, p. 24, § 4/HB 41, not codified by the General Assembly, provides that the amendment by that Act shall apply retroactively to all cases for which fees have not been assessed.

Law reviews. — For article, "Setting the Record Straight: A Proposal to Save Time and Trees," see 14 Ga. St. B.J. 14 (2008).

JUDICIAL DECISIONS

One purpose of the requirement of filing transcript under Ga. L. 1965, p. 18, § 10 and Ga. L. 1968, p. 1072, § 6 (see O.C.G.A. §§ 5-6-41 5-6-43) is to afford local counsel in county when the case was tried convenient access to exact duplicate copy of record so as to enable counsel to easily ascertain proper references to be included in brief and written argument. Law v. Smith, 226 Ga. 298, 174 S.E.2d 893 (1970).

Constitutionality. — This section follows the Constitution by stating that cause shall not be dismissed if clerk is unable to transmit record within time required by statute, or when judge grants extension of time, and the judge shall attach the judge's certificate attesting to cause of delay. George v. American Credit Control, Inc., 222 Ga. 512, 150 S.E.2d 683 (1966).

Appellant responsible for contents of record. — It is appellant's burden to designate what shall be included in the record on appeal; failing which the Court of Appeals is not authorized to go outside the record and accept assertions of fact in briefs which are not supported by the record, nor accept as fact what is asserted by way of argument in a transcript. Doe v. State, 205 Ga. App. 322, 422 S.E.2d 558 (1992).

Late filing of transcript is no longer ground for dismissal of appeals by appellate courts. Smith v. Smith, 128 Ga. App. 29, 195 S.E.2d 269 (1973).

Appellant's failure to state whether transcript will be filed. — Failure of the appellant to state whether or not the transcript will be filed for inclusion in record on appeal is not cause for dismissal of appeal when action of the appellant does not result in delay of transmission of appeal. Kennedy v. Savannah News-Press, Inc., 122 Ga. App. 175, 176 S.E.2d 540 (1970).

Inexcusable delay in failing to file transcript. — In an attorney lien case, the trial court did not abuse the court's discretion by dismissing the former client's appeal for a delay in transmitting the record appendix because the delay of 55 days was inexcusable and caused by the former client, who had elected to take responsibility for transmitting the record by stating in the notice of appeal that the client would file a record appendix and never amended the client's notice of appeal to provide that the clerk would be responsible for transmission of the record. McAlister v. Abam-Samson, 318 Ga. App. 1, 733 S.E.2d 58 (2012).

Delay in transmittal which has no prejudicial effect. — When the plaintiff's delay in transmitting record is not prejudicial to the defendant in causing delay in hearing or decision of appeal, and

the defendant does not show any change in the defendant's position or inequity resulting from delay in transmittal of record, motion to dismiss is denied. Brawner v. Martin & Jones Produce Co., 116 Ga. App. 324, 157 S.E.2d 514 (1967).

Delay caused by appellant's designation that nonexistent transcript be included. — Delay in transmission of appeal to Court of Appeals caused by the appellant's designation of transcript to be included when such transcript was nonexistent requires dismissal of appeal. Kennedy v. Savannah News-Press, Inc., 122 Ga. App. 175, 176 S.E.2d 540 (1970).

Appellant not obligated to prepare record. — Obligation of the appellant relates to the transcript, and the obligation for the preparation of the record rests with the clerk. After the appellant has filed a notice of appeal, the appellant's duty as to the record is limited to the payment of costs. When the clerk fails to transmit the record, but there is no indication that this failure is occasioned by the failure of a party to pay costs, the trial court has no discretion to dismiss the appeal. Long v. City of Midway, 251 Ga. 364, 306 S.E.2d 639 (1983); Holy Fellowship Church of God in Christ v. First Community Bank, 242 Ga. App. 400, 530 S.E.2d 24 (2000).

Policy to require appellants to pay before copying material. — Court found nothing unduly burdensome, unreasonable, or unfair regarding the policy of the DeKalb County State Court to request payment of costs prior to photocopying the record because the court had lost "a couple of thousand dollars" when the appellants failed to pay costs after the record was photocopied. CRA Transp., Inc. v. Rolls Royce Motors, Inc., 204 Ga. App. 825, 420 S.E.2d 757, cert. denied, 204 Ga. App. 921, 420 S.E.2d 757 (1992).

Consideration of clerk's certificate. — Although a court clerk's certificate under O.C.G.A. § 5-6-43 that was attached to a record on appeal indicated that the delay in the transmission of the record was not due to any fault by the insurer that had appealed as the certificate was dated months after the trial court dismissed an earlier appeal under O.C.G.A. § 5-6-48(c), it was clearly not considered by the trial court in the court's dismissal decision and, accordingly, it was not considered by the appellate court on appeal from the dismissal. ACCC Ins. Co. v. Pizza Hut of Am., Inc., 314 Ga. App. 655, 725 S.E.2d 767 (2012).

Clerk of court liable for attorney's fees to litigant for failure to prepare and transmit record. — Clerk of court was liable to a litigant for attorney's fees under O.C.G.A. § 9-15-14 based on the clerk's failure to prepare and transmit the record in the litigant's case to the appellate court as required by O.C.G.A. § 5-6-43 until six months after the record should have been prepared, and then only when the litigant filed a petition for mandamus, to which the clerk interposed meritless defenses. Robinson v. Glass, 302 Ga. App. 742, 691 S.E.2d 620 (2010).

Cited in Davis v. Davis, 222 Ga. 579, 151 S.E.2d 123 (1966); Vezzani v. Vezzani, 222 Ga. 853, 153 S.E.2d 161 (1967); DeFee v. I.S. Berlin Press, Inc., 115 Ga. App. 206, 154 S.E.2d 452 (1967); Hornsby v. Rodriguez, 116 Ga. App. 234, 156 S.E.2d 830 (1967); Employers' Fire Ins. Co. v. Pennsylvania Millers Mut. Ins. Co., 116 Ga. App. 433, 157 S.E.2d 807 (1967); Kilgo v. Cochran, 225 Ga. 477, 169 S.E.2d 818 (1969); Jacobs v. Shiver, 226 Ga. 284, 174 S.E.2d 415 (1970); Satcher v. James H. Drew Shows, Inc., 122 Ga. App. 548, 177 S.E.2d 846 (1970); Zeeman Mfg. Co. v. L.R. Sams Co., 123 Ga. App. 99, 179 S.E.2d 552 (1970); Crump v. State, 124 Ga. App. 502, 184 S.E.2d 367 (1971); Abel v. J.H. Harvey Co., 126 Ga. App. 115, 190 S.E.2d 87 (1972); Nevels v. City of Sale City, 128 Ga. App. 65, 195 S.E.2d 658 (1973); Key Life Ins. Co. v. Mitchell, 129 Ga. App. 192, 198 S.E.2d 919 (1973); Stone Mt. Mem. Ass'n v. Stone Mt. Scenic R.R., Inc., 232 Ga. 92, 205 S.E.2d 293 (1974); Summit Ins. Co. v. Mulherin, 233 Ga. 606, 212 S.E.2d 788 (1975); Herring v. Herring, 134 Ga. App. 766, 216 S.E.2d 642 (1975); Barnett v. Mobley, 236 Ga. 565, 224 S.E.2d 406 (1976); Young v. Climatrol S.E. Distrib. Corp., 237 Ga. 53, 226 S.E.2d 737 (1976); Hogan v. City-County Hosp., 138 Ga. App. 906, 227 S.E.2d 796 (1976); Pickett v. Paine, 139 Ga. App. 508, 229 S.E.2d 90 (1976); Little v. Thompson Co., 140 Ga. App. 238, 230 S.E.2d 316 (1976); McKissic

v. Kresge, 141 Ga. App. 604, 234 S.E.2d 96 (1977); Karlsberg v. Hoover, 142 Ga. App. 590, 236 S.E.2d 520 (1977); Malloy v. Aetna Cas. & Sur. Co., 143 Ga. App. 212, 237 S.E.2d 692 (1977); Craig Mtg. Co. v. Lanier Hosp., 144 Ga. App. 147, 240 S.E.2d 324 (1977); Ray v. Williams, 144 Ga. App. 155, 240 S.E.2d 577 (1977); Whitehead v. Great Cent. Ins. Co., 144 Ga. App. 422, 241 S.E.2d 302 (1977); ITT Indus. Credit Co. v. Burnham, 152 Ga. App. 641, 263 S.E.2d 482 (1979); City of Atlanta v. Barton, 153 Ga. App. 426, 265 S.E.2d 345 (1980); Neese v. Long, 178 Ga. App. 105, 341 S.E.2d 861 (1986); Battallia v. City of Columbus, 199 Ga. App. 897, 406 S.E.2d 290 (1991); Rewis v. Shaw, 208 Ga. App. 876, 432 S.E.2d 617 (1993); Crown Diamond Co. v. N.Y. Diamond Corp., 242 Ga. App. 674, 530 S.E.2d 800 (2000); Wilbanks v. State, 251 Ga. App. 248, 554 S.E.2d 248 (2001); Carter v. State, 267 Ga. App. 520, 600 S.E.2d 637 (2004); Purvis v. State, 288 Ga. 865, 708 S.E.2d 283 (2011); Pistacchio v. Frasso, 314 Ga. App. 119, 723 S.E.2d 322 (2012).

5-6-44. Authorization and procedure generally for filing of joint appeals, motions for new trial, and other motions; division of costs between parties.

(a) Whenever two or more persons are defendants or plaintiffs in an action, and a judgment, verdict, or decree has been rendered against each of them, jointly or severally, or where two or more cases are tried together, the plaintiffs or defendants, as the case may be, shall be entitled, but not required, to file joint appeals, motions for new trial, motions in arrest, motions to set aside, and motions for judgment notwithstanding the verdict, without regard to whether the parties have a joint interest, or whether the cases were merely consolidated for purposes of trial, or whether the cases were simply tried together without an order of consolidation.

(b) Where joint appeals are filed, the appealing parties may nevertheless be entitled, but not required, to file separate enumerations of error in the appellate court.

(c) When separate appeals, motions for new trial, or motions for judgment notwithstanding the verdict are filed, only one transcript of evidence and proceedings (where required) and only one record need be prepared, filed, or transmitted to the appellate court (as the case may be).

(d) In such cases, the court shall by order specify the division of costs between the parties.

(e) This Code section shall apply to both civil and criminal cases. (Ga. L. 1965, p. 18, § 15; Ga. L. 1968, p. 1072, § 4.)

JUDICIAL DECISIONS

Intent of section is to allow joint motions for new trial when two cases are consolidated for purposes of trial. Fair v. State, 220 Ga. 750, 141 S.E.2d 431 (1965).

Consolidation of cases for trial does not merge cases into one; thus, consent by nonresident plaintiff to consolidation of suits with several plaintiffs does not con-

stitute waiver of venue so that the defendant can bring a nonresident plaintiff into one of the separate actions as a third-party defendant. Louisville & N.R.R. v. Bush, 131 Ga. App. 405, 206 S.E.2d 58 (1974).

Cited in Moore v. State Hwy. Dep't, 117 Ga. App. 15, 159 S.E.2d 428 (1967); Daniel v. Yow, 226 Ga. 544, 176 S.E.2d 67 (1970); Marietta Broadcasting Co. v. Advance Mktg. Research, Inc., 231 Ga. 13, 200 S.E.2d 134 (1973); Security Mgt. Co. v. King, 132 Ga. App. 618, 208 S.E.2d 576 (1974); Colley v. Dillon, 158 Ga. App. 416, 280 S.E.2d 425 (1981).

RESEARCH REFERENCES

Am. Jur. 2d. — 5 Am. Jur. 2d, Appellate Review, §§ 231 et seq., 849 et seq

C.J.S. — 4 C.J.S., Appeal and Error, §§ 8, 237 et seq., 278, 325 et seq.

ALR. — Right to appellate review, on single appellate proceeding, of separate actions consolidated for trial together in lower court, 36 ALR2d 823.

5-6-45. Operation of notice of appeal as supersedeas in criminal cases; bond; review.

(a) In all criminal cases, the notice of appeal filed as provided in Code Sections 5-6-37 and 5-6-38 shall serve as supersedeas in all cases where a sentence of death has been imposed or where the defendant is admitted to bail. If the sentence is bailable, the defendant may give bond in an amount prescribed by the presiding judge, with security approved by the clerk, conditioned upon the defendant's personal appearance to abide the final judgment or sentence of the court. If the judgment or sentence is or includes a fine which is unconditionally required to be paid, and is not required to be paid over a period of probation, nor as a condition of a suspended or probated sentence, nor as an alternative sentence, the bond may also be conditioned upon payment of the fine at the time the defendant appears to abide the final judgment or sentence.

(b) If the defendant is a corporation which has been convicted as provided in Code Section 17-7-92, the presiding judge, on the motion of the defendant, prosecuting attorney, or on its own motion, may order that supersedeas be conditioned upon the posting of a supersedeas bond. Said order may be entered either before or after the filing of a motion for a new trial or notice of appeal. The bond shall be in an amount prescribed by the presiding judge, with security approved by the clerk, conditioned upon the defendant's appearance, by and through a corporate officer, agent, or attorney at law, to satisfy the judgment, together with all costs and interest. If the corporation fails to make the bond as ordered, the prosecuting attorney or other proper officer may use any and all lawful process and procedures available to enforce and collect the judgment. Should final judgment be entered in favor of the defendant, the presiding judge shall order a refund of all amounts collected in satisfaction of the judgment. The State of Georgia, and its political subdivisions, district attorney, solicitor-general, sheriff, mar-

shal, all other proper officers, and all agents and employees of the aforementioned persons shall be immune from all civil liability for acts and attempts to enforce and collect a judgment under this subsection.

(c) Any supersedeas bond may be reviewed by the presiding judge on the motion of defendant, prosecuting attorney, or on its own motion, and the court may require new or additional security, or order the bond strengthened, increased, reduced, or otherwise amended as justice may reasonably require. (Laws 1845, Cobb's 1851 Digest, pp. 449, 453; Code 1863, § 4171; Code 1868, § 4203; Code 1873, § 4263; Code 1882, § 4263; Penal Code 1895, § 1077; Penal Code 1910, § 1104; Code 1933, § 6-1005; Ga. L. 1965, p. 18, § 7; Ga. L. 1984, p. 413, § 1; Ga. L. 1992, p. 6, § 5; Ga. L. 1996, p. 748, § 9.)

Cross references. — Termination of appeal bonds in criminal cases, § 17-6-1. Review of death sentences by Supreme Court, § 17-10-35 et seq. Supersedeas, Rules of the Supreme Court of the State of Georgia, Rule 12. Filing notice of appeal and cross appeal, Rules of the Supreme Court of the State of Georgia, Rule 38. Supersedeas, Rules of the Court of Appeals of the State of Georgia, Rule 50.

Editor's notes. — Ga. L. 1996, p. 748, § 27, not codified by the General Assembly, provides: "Notwithstanding any other provision of law, an Act approved February 11, 1854 (Ga. L. 1854, p. 281), which abolished the office of solicitor of the City Court of Savannah, now the State Court of Chatham County, and transferred responsibility for the prosecution of criminal cases in said court to the solicitor general (now the district attorney) for the Eastern Judicial Circuit is confirmed. It shall be the duty of said district attorney to prosecute all criminal actions in said state court until otherwise specifically provided by law."

Ga. L. 1996, p. 748, § 28, not codified by the General Assembly, provides: "The provisions of this Act shall not affect the powers, duties, or responsibilities of the district attorney as successor to the office of solicitor general under the constitution, statutes, and common law of this state as provided by Code Section 15-18-1."

Ga. L. 1996, p. 748, § 29, not codified by the General Assembly, provides: "Except as otherwise authorized in this Act, on and after July 1, 1996, any reference in general law or in any local Act to the solicitor of a state court shall mean and shall be deemed to mean the solicitor-general of such state court."

Ga. L. 1996, p. 748, § 30, not codified by the General Assembly, provides: "(a) Except as provided in subsection (b) of this section, this Act shall become effective on July 1, 1996.

"(b) The provisions of paragraph (3) of Code Section 15-18-62, relating to the qualifications for the office of solicitor-general of a state court, shall apply to any person elected or appointed to such office after July 1, 1996. Any person holding such office on July 1, 1996, may continue to hold such office for the remainder of the term to which such person was elected or appointed notwithstanding the fact that such person has not been a member of the State Bar of Georgia for three years if such person is otherwise qualified to hold the office of solicitor-general."

Law reviews. — For article, "The Appellate Procedure Act of 1965," see 1 Ga. St. B.J. 451 (1965). For article, "1966 Amendments to the Appellate Procedure Act of 1965," see 2 Ga. St. B.J. 433 (1966).

JUDICIAL DECISIONS

Analysis

General Consideration
Revocation of Bail Bond
Forfeiture of Bond

General Consideration

Trial judge may use discretion in determining if bail should be granted. Sellers v. Georgia, 374 F.2d 84 (5th Cir. 1967).

Granting or refusing of bail in felony cases after indictment and conviction is a matter within sound discretion of trial court, and Supreme Court on appeal will not control that discretion unless that discretion has been flagrantly abused. Watts v. Grimes, 224 Ga. 227, 161 S.E.2d 286 (1968).

"If sentence is bailable," means when it is bailable in sound discretion of trial judge. Sellers v. State, 112 Ga. App. 607, 145 S.E.2d 827 (1965); Watts v. Grimes, 224 Ga. 227, 161 S.E.2d 286 (1968); Holcomb v. State, 129 Ga. App. 86, 198 S.E.2d 876 (1973).

Continuation of bond until appeal is finally decided. — It would be unrealistic to limit bond to single, specified date and not to require that bond be continued in effect until appeal is finally decided. State v. Slaughter, 246 Ga. 174, 269 S.E.2d 446 (1980).

Criminal bonds construed with reasonable strictness. — Criminal bond should be construed with reasonable strictness and surety should not be required to fulfill any conditions the surety did not covenant to perform, but intention as expressed by parties should be enforced. Coweta Bonding Co. v. Carter, 230 Ga. 585, 198 S.E.2d 281 (1973).

Defendant has no right to suspend order revoking probationary sentence by giving of bond, since final judgment of conviction terminates any right to supersedeas. Morrison v. State, 126 Ga. App. 565, 191 S.E.2d 449 (1972).

Power to grant nolle prosequi. — In enacting O.C.G.A. § 5-6-45, the legislature did not intend to deprive the trial court of the court's power to grant a nolle prosequi of a subsequent indictment after the filing of a notice of appeal from an order denying a plea of former jeopardy. Waters v. State, 174 Ga. App. 438, 330 S.E.2d 177 (1985).

Power of supersedeas. — Notice of appeal did not serve as a supersedeas and generally divested the trial court of jurisdiction to alter or execute a judgment of conviction since the defendant had not been found guilty of theft by receiving, and thus there was no judgment of conviction to appeal. Reedman v. State, 265 Ga. App. 162, 593 S.E.2d 46 (2003).

Considerations for bond. — Release on bond should not be granted unless the court finds that there is no substantial risk the defendant will not appear to answer the judgment following conclusion of the appellate proceedings and that the defendant is not likely to commit a serious crime, intimidate witnesses or otherwise interfere with the administration of justice, and that the appeal is not frivolous or taken for delay. Johnson v. State, 176 Ga. App. 620, 337 S.E.2d 42 (1985).

Jurisdiction to reconsider order to return property. — Trial court's jurisdiction to reconsider the court's order to return property, which was removed when the state filed the state's notice of appeal, is not retroactively supplied by the fact that the appeal was later dismissed by order of the supreme court for lack of a right of appeal in the state. King v. State, 208 Ga. App. 623, 432 S.E.2d 109 (1993), aff'd, 264 Ga. 282, 443 S.E.2d 844 (1994).

Jurisdiction of trial court. — Pendency of an appeal in the Supreme Court of Georgia did not deprive the trial court of jurisdiction to issue an order granting the defendant an out-of-time appeal. Porter v. State, 308 Ga. App. 121, 706 S.E.2d 620 (2011).

Appellate court lacked jurisdiction over bail conditions. — Appellate court was without jurisdiction to consider the defendant's arguments regarding bail conditions because under O.C.G.A.

§ 5-6-45(c), such conditions were reviewable by the trial court. Barnett v. State, 275 Ga. App. 464, 620 S.E.2d 663 (2005).

Cited in State v. Gilmer, 154 Ga. App. 673, 270 S.E.2d 25 (1980); Cowan v. State, 156 Ga. App. 650, 275 S.E.2d 665 (1980); Sharp v. State, 183 Ga. App. 641, 360 S.E.2d 50 (1987); Serpentfoot v. State, 241 Ga. App. 35, 524 S.E.2d 516 (1999).

Revocation of Bail Bond

Power of trial judge to revoke bail bond pending appeal. — Intent of legislature in passing section was not that supersedeas deprive trial judge of power to revoke bail bond pending appeal. It merely deprived the judge of the judge's power to execute sentence. Riggins v. State, 134 Ga. App. 941, 216 S.E.2d 723 (1975).

While trial judge may not execute sentence under supersedeas, the judge may nevertheless revoke bail bond to make the defendant amenable to execution when and if that time should come. Riggins v. State, 134 Ga. App. 941, 216 S.E.2d 723 (1975).

Notice and hearing required upon decision to revoke appeal bail bond. — Due process requirements of Fifth and Fourteenth Amendments mandate notice and an evidentiary hearing upon trial court's decision to revoke appeal bail bond. Riggins v. State, 134 Ga. App. 941, 216 S.E.2d 723 (1975).

Forfeiture of Bond

Forfeiture. — Forfeiture of appeal or supersedeas bond granted under former Code 1933, § 6-1005 (see O.C.G.A. § 5-6-45) was is accomplished pursuant to former Code 1933, § 27-906 (see O.C.G.A. § 17-6-7) by issuing rule nisi and writ of scire facias. State v. Slaughter, 246 Ga. 174, 269 S.E.2d 446 (1980).

Whether the defendant was admitted to bail under former Code 1933, § 70-308 (see O.C.G.A. § 5-5-46), pending decision on the defendant's motion for new trial, or under former Code 1933, § 6-1005 (see O.C.G.A. § 5-6-45), pending decision on his appeal, forfeiture procedures of former Code 1933, § 27-906 (see O.C.G.A. § 17-6-71) applied to bond. Under either section, the trial judge would exercise the judge's discretion in permitting release on bail. State v. Slaughter, 246 Ga. 174, 269 S.E.2d 446 (1980).

OPINIONS OF THE ATTORNEY GENERAL

Suspension of execution of sentences in criminal cases. — Execution of sentence imposed in criminal case is suspended when notice of appeal is filed. 1975 Op. Att'y Gen. No. 75-30.

Execution of probated sentence involving payment of fines and restitution is suspended pending appeal. 1975 Op. Att'y Gen. No. 75-30.

RESEARCH REFERENCES

Am. Jur. 2d. — 5 Am. Jur. 2d, Appellate Review, § 201 et seq.

Am. Jur. Pleading and Practice Forms. — 2 Am. Jur. Pleading and Practice Forms, Appeal and Error, § 702.

C.J.S. — 4 C.J.S., Appeal and Error, § 477 et seq., 531 et seq.

ALR. — Bail pending appeal from conviction, 45 ALR 458.

Constitutional right to bail pending appeal from conviction, 77 ALR 1235.

When appeal is or is not deemed to have been prosecuted "with effect" or "to effect" within condition of supersedeas bond, 163 ALR 410.

Review for excessiveness of sentence in narcotics case, 55 ALR3d 812.

5-6-46. Operation of notice of appeal as supersedeas in civil cases; requirement of supersedeas bond or other security; fixing of amount; procedure upon no or insufficient filing; effect of bond as to liability of surety; punitive damages.

(a) In civil cases, the notice of appeal filed as provided in Code Sections 5-6-37 and 5-6-38 shall serve as supersedeas upon payment of all costs in the trial court by the appellant and it shall not be necessary that a supersedeas bond or other form of security be filed; provided, however, that upon motion by the appellee, made in the trial court before or after the appeal is docketed in the appellate court, the trial court shall require that supersedeas bond or other form of security be given with such surety and in such amount as the court may require, conditioned for the satisfaction of the judgment in full, together with costs, interest, and damages for delay if the appeal is found to be frivolous. When the judgment is for the recovery of money not otherwise secured, the amount of the bond or other form of security shall be fixed at such sum as will cover the whole amount of the judgment remaining unsatisfied, costs on the appeal, interest, and damages for delay, unless the court after notice and hearing and for good cause shown fixes a lesser amount. When the judgment determines the disposition of the property in controversy as in real actions, trover, and actions to foreclose mortgages and other security instruments, or when such property is in the custody of the sheriff or other levying officer, or when the proceeds of such property or a bond for its value are in the custody or control of the court, the amount of the supersedeas bond or other form of security shall be fixed at such sum only as will secure the amount recovered for the use and detention of the property, the costs of the action, costs on appeal, interest, and damages for delay.

(b) Notwithstanding subsection (a) of this Code section, in any civil case under any legal theory, including cases involving individual, aggregated, class-action, or otherwise joined claims, the amount of supersedeas bond or other form of security to be furnished during the pendency of all appeals or discretionary reviews of any judgment granting legal, equitable, or any other form of relief or damages, including compensatory, special, punitive, exemplary, or other damages, in order to stay execution of the judgment during the entire course of appellate review by any court shall be set in accordance with applicable laws or court rules, but the total supersedeas bond or other form of security that is required of all appellants collectively shall not exceed $25 million regardless of the value of the judgment.

(c) If supersedeas bond or other form of security is not filed within the time specified by the judge, or if the bond or other form of security filed is found insufficient, a bond or other form of security may be filed at such time as may be fixed by the trial court.

(d) By entering into an appeal or supersedeas bond or other form of security given pursuant to this Code section, the surety submits himself or herself to the jurisdiction of the court and irrevocably appoints the clerk of the court as the surety's agent upon whom any papers affecting the surety's liability on the bond may be served. The surety's liability may be enforced on motion without the necessity of notice or an independent action.

(e) Nothing in this Code section shall deprive the superior courts of their separate power to grant supersedeas under paragraph (1) of Code Section 15-6-9 nor deprive the appellate courts of the power to grant supersedeas in such manner as they may determine to meet the ends of justice.

(f) If an appellee proves by a preponderance of the evidence that a party bringing an appeal, for whom the supersedeas bond or other form of security has been limited pursuant to subsection (b) of this Code section, is dissipating or secreting its assets, or diverting assets outside the ordinary course of business to avoid payment of a judgment, a court may require the appellant to post a bond or other form of security in an amount not to exceed the total amount of the judgment. (Laws 1845, Cobb's 1851 Digest, pp. 449, 453; Code 1863, § 4171; Code 1868, § 4203; Ga. L. 1870, p. 416, § 1; Code 1873, § 4263; Ga. L. 1880-81, p. 120, § 1; Code 1882, § 4263; Civil Code 1895, § 5552; Civil Code 1910, § 6165; Ga. L. 1917, p. 63, § 1; Code 1933, § 6-1002; Ga. L. 1965, p. 18, § 8; Ga. L. 1994, p. 346, § 1; Ga. L. 2000, p. 228, § 2; Ga. L. 2001, p. 4, § 5; Ga. L. 2004, p. 980, § 1; Ga. L. 2005, p. 60, § 5/HB 95.)

Cross references. — Supersedeas, Rules of the Supreme Court of the State of Georgia, Rule 12. Filing notice of appeal and cross appeal, Rules of the Supreme Court of the State of Georgia, Rule 38. Supersedeas, Rules of the Court of Appeals of the State of Georgia, Rule 50.

Editor's notes. — Ga. L. 2000, p. 228, § 1, not codified by the General Assembly, provides: "The Act shall be known and may be cited as the 'Civil Litigation Improvement Act of 2000.'"

Ga. L. 2004, p. 980, § 4, not codified by the General Assembly, provides that the amendment by that Act shall apply to cases pending on or filed on or after May 17, 2004.

Law reviews. — For article, "The Appellate Procedure Act of 1965," see 1 Ga. St. B.J. 451 (1965). For article, "1966 Amendments to the Appellate Procedure Act of 1965," see 2 Ga. St. B.J. 433 (1966). For article surveying appellate practice and procedure, see 34 Mercer L. Rev. 3 (1982). For annual survey of appellate practice and procedure, see 40 Mercer L. Rev. 51 (1988).

For note on 2000 amendment of this Code section, see 17 Ga. St. U.L. Rev. 37 (2000).

JUDICIAL DECISIONS

Analysis

General Consideration
Applicability of Automatic Supersedeas Provision
Effect of Supersedeas
Supersedeas Bond

General Consideration

Payment of costs in trial court is prerequisite. — In civil action, filing of notice of appeal does not serve as supersedeas until all costs in the trial court have been paid. Chappelaer v. General G.M.C. Trucks, Inc., 130 Ga. App. 664, 204 S.E.2d 326 (1974); Penny Profit Foods, Inc. v. McMullen, 214 Ga. App. 740, 448 S.E.2d 787 (1994).

In a civil action, the filing of a notice of appeal does not serve as a supersedeas until all costs in the trial have been paid; when all costs are paid, the trial court loses jurisdiction over the case while the appeal is pending. Duncan v. Ball, 172 Ga. App. 750, 324 S.E.2d 477 (1984); Rockdale Awning & Iron Co. v. Kerbow, 210 Ga. App. 119, 435 S.E.2d 619 (1993).

Filing of notice of appeal did not serve as a supersedeas because the appellant failed to pay all costs in the trial court and all costs in the appeals preparation. Lott v. Arrington & Hollowell, P.C., 258 Ga. App. 51, 572 S.E.2d 664 (2002).

Notice of appeal did not serve as a supersedeas when all costs had not been paid, and although the appellate courts do not condone a party's failure to respond to the motion to dismiss in the first instance, the trial court was not deprived of jurisdiction to consider and rule on that party's motion to set aside the dismissal. Lunsford v. DeKalb Med. Ctr., Inc., 263 Ga. App. 394, 587 S.E.2d 859 (2003).

Pursuant to O.C.G.A. § 5-6-46, a notice of appeal, with payment of costs, serves as a supersedeas of the judgment appealed and deprives the trial court of jurisdiction over matters affecting such judgment. In the Interest of W.P.B., 269 Ga. App. 101, 603 S.E.2d 454 (2004).

Construction with O.C.G.A. §§ 5-6-34 and 5-6-35. — While O.C.G.A. § 5-6-35(h) provides that the filing of an application for appeal shall act as a supersedeas to the extent that a notice of appeal acts as a supersedeas, that section applies only to discretionary appeals. O.C.G.A. § 5-6-34(b), which applies to interlocutory appeals, does not so provide, but states that if the appellate court issues an order granting an appeal, the applicant may then timely file a notice of appeal and the notice of appeal shall act as a supersedeas, as provided in O.C.G.A. § 5-6-46. Nelson v. Haugabrook, 282 Ga. App. 399, 638 S.E.2d 840 (2006).

Hearing not required. — Trial court was not required to conduct an oral hearing before granting a motion to require a supersedeas bond under the statute. Rapps v. Cooke, 234 Ga. App. 131, 505 S.E.2d 566 (1998).

Appellant's right to initiate posting of bond. — Subsection (a) of O.C.G.A. § 5-6-46 provides that the appellee shall be entitled to the posting of a supersedeas bond upon the appellee's motion. The statute is silent as to whether the appellant can initiate the posting of bond, but no impediment appears which would legally prevent the appellant from doing so if the appellant wishes. Bank S. v. Roswell Jeep Eagle, Inc., 200 Ga. App. 489, 408 S.E.2d 503 (1991).

Judgment determining disposition of property. — In an action by mortgagors against mortgagee and foreclosure sale purchaser to challenge the lawfulness of a nonjudicial foreclosure sale, a supersedeas bond was authorized even though no money judgment was entered against the mortgagors. Cloud v. Georgia Cent. Credit Union, 214 Ga. App. 594, 448 S.E.2d 913 (1994).

Borrower failed to show that the trial court abused the court's discretion in setting a $300,000 supersedeas bond because the case fell within the disposition-of-property provision of O.C.G.A. § 5-6-46(a); the bank argued that interest continued to accrue on the note securing the loan pending appeal, that taxes on the property were coming due, and that the appeal delayed the bank from pursuing the bank's foreclosure, confirmation, and action for deficiency judgment. Duke Galish, LLC v. SouthCrest Bank, 314 Ga. App. 801, 726 S.E.2d 54 (2012).

Appellant proceeding in forma pauperis to be reimbursed for costs. — In the absence of a traverse to the appellant's affidavit, it is error to deny the appellant's motion to proceed in forma pauperis. When such a denial does occur, the appellant must be reimbursed for all costs actually paid by the appellant because of the requirements of subsection

(a) of O.C.G.A. § 5-6-43. However, the appellant is not entitled to be reimbursed for attorney's fees incurred during the appellant's appeal. Heath v. McGuire, 167 Ga. App. 489, 306 S.E.2d 741 (1983) (decided prior to 1982 amendment of § 9-15-2).

Uniform Superior Court Rule 6.2 does not apply to motions for supersedeas bonds. Cloud v. Georgia Cent. Credit Union, 214 Ga. App. 594, 448 S.E.2d 913 (1994); Rapps v. Cooke, 234 Ga. App. 131, 505 S.E.2d 566 (1998).

No jurisdiction to order interim special master fees. — Trial court erred in ordering a property owner to immediately pay the special master fees in a quiet title action as the ultimate responsibility for the fees of the special master was directly related to the resolution of the quiet title action; the trial court lacked jurisdiction to order payment of interim fees to the special master. Davis v. Harpagon Co., LLC, 281 Ga. 250, 637 S.E.2d 1 (2006).

No jurisdiction to vacate default judgment. — In an unpaid wages case, a trial court lacked jurisdiction under O.C.G.A. § 5-6-46 to grant a former employer's second motion to vacate a default judgment as the employer's petition for certiorari as to the denial of the first motion to set aside was still pending when the order granting the second motion was entered. Guthrie v. Wickes, 295 Ga. App. 892, 673 S.E.2d 523 (2009).

Defendants in a RICO action failed to exercise the defendants' right to open a prematurely entered default judgment as a matter of right by filing an answer and costs within the 15-day period provided in O.C.G.A. § 9-11-55(a); instead, the defendants filed an appeal. Although the trial court was thereby divested of jurisdiction to alter or amend the judgment, the defendants still could have opened the default as a matter of right by filing an answer and paying costs. Florez v. State, 311 Ga. App. 378, 715 S.E.2d 782 (2011), cert. dismissed, 2012 Ga. LEXIS 64 (Ga. 2012).

No jurisdiction after appeal filed. — Because a neighbor filed a notice of appeal, the trial court lacked jurisdiction under O.C.G.A. § 5-6-46(a) to supplement, amend, alter, or modify an order purporting to dismiss two of the neighbor's complaints with prejudice. McLeod v. Clements, 310 Ga. App. 235, 712 S.E.2d 627 (2011).

Pursuant to O.C.G.A. § 5-6-46(a), the trial court was without jurisdiction to enter final judgment orders in favor of a bank because the orders were entered after notices of appeal as the summary judgment orders had already been filed. Shropshire v. Alostar Bank of Commerce, 314 Ga. App. 310, 724 S.E.2d 33 (2012).

Child custody proceedings. — Trial court did not exceed the court's authority in denying a former husband's motion for supersedeas to enforce an emergency order limiting a former wife's visitation and requiring the visitation to be supervised pending appeal because in the court's order resolving the supersedeas issue the trial court expressly excepted the custody and visitation provisions of the court's prior order from any supersedeas effect; the trial court found that the allegations upon which the emergency order was based were not supported by any credible evidence. Blackmore v. Blackmore, 311 Ga. App. 885, 717 S.E.2d 504 (2011).

Cited in Swindle v. Swindle, 221 Ga. 760, 147 S.E.2d 307 (1966); Hartman v. Brady, 117 Ga. App. 828, 162 S.E.2d 246 (1968); Spell v. State, 225 Ga. 705, 171 S.E.2d 285 (1969); Jones v. Sheffield, 122 Ga. App. 574, 178 S.E.2d 299 (1970); Taylor v. Kohlmeyer & Co., 123 Ga. App. 493, 181 S.E.2d 496 (1971); Leonard Bros. Trucking Co. v. Crymes Transps., Inc., 124 Ga. App. 341, 183 S.E.2d 773 (1971); Byers v. Lieberman, 126 Ga. App. 582, 191 S.E.2d 470 (1972); Carter v. Burson, 229 Ga. 748, 194 S.E.2d 472 (1972); Allied Prods., Inc. v. Peterson, 233 Ga. 266, 211 S.E.2d 123 (1974); Turner v. Harper, 233 Ga. 483, 211 S.E.2d 742 (1975); McClure v. Hopper, 234 Ga. 45, 214 S.E.2d 503 (1975); Lenny v. Lenny, 235 Ga. 358, 220 S.E.2d 1 (1975); North Peachtree I-285 Properties, Ltd. v. Hicks, 136 Ga. App. 426, 221 S.E.2d 607 (1975); Pilgrim v. Brookfield West, Inc., 136 Ga. App. 619, 222 S.E.2d 137 (1975); Samples v. Greene, 138 Ga. App. 823, 227 S.E.2d 456 (1976); Roper v. Motors Ins. Corp., 139 Ga. App. 788, 229 S.E.2d 481 (1976); Billas v. Dwyer, 140 Ga. App. 774, 232 S.E.2d 102

General Consideration (Cont'd)

(1976); Anthony v. Anthony, 240 Ga. 155, 240 S.E.2d 45 (1977); Crymes v. Crymes, 240 Ga. 721, 242 S.E.2d 30 (1978); Mitchell v. Excelsior Sales & Imports, Inc., 243 Ga. 813, 256 S.E.2d 785 (1979); Salim v. Salim, 244 Ga. 513, 260 S.E.2d 894 (1979); Yield, Inc. v. City of Atlanta, 152 Ga. App. 174, 262 S.E.2d 483 (1979); Hawn v. Chastain, 154 Ga. App. 609, 269 S.E.2d 50 (1980); State v. Slaughter, 246 Ga. 174, 269 S.E.2d 446 (1980); White v. Phillips, 88 F.R.D. 263 (N.D. Ga. 1980); Bhatia v. West Cash & Carry Bldg. Materials of Savannah, Inc., 157 Ga. App. 145, 276 S.E.2d 656 (1981); Henson & Henson, P.C. v. Myszka, 160 Ga. App. 135, 286 S.E.2d 456 (1981); Landmark First Nat'l Bank v. Schwall & Heuett, 161 Ga. App. 356, 288 S.E.2d 331 (1982); Tidwell Homes, Inc. v. Sharif, 164 Ga. App. 284, 297 S.E.2d 67 (1982); Georgia Farm Bldgs., Inc. v. Willard, 165 Ga. App. 325, 299 S.E.2d 181 (1983); J.M. Clayton Co. v. Martin, 177 Ga. App. 228, 339 S.E.2d 280 (1985); Mijajlovic v. State, 179 Ga. App. 506, 347 S.E.2d 325 (1986); Davis v. Glaze, 182 Ga. App. 18, 354 S.E.2d 845 (1987); State v. Vurgess, 182 Ga. App. 544, 356 S.E.2d 273 (1987); Williams v. Natalie Townhouses of Inman Park Condominium Ass'n, 182 Ga. App. 815, 357 S.E.2d 156 (1987); Wehunt v. ITT Bus. Communications Corp., 183 Ga. App. 560, 359 S.E.2d 383 (1987); Bullard v. Carreras, 183 Ga. App. 539, 359 S.E.2d 429 (1987); Atlanta Propeller Serv., Inc. v. Hoffman GMBH & Co., 191 Ga. App. 529, 382 S.E.2d 109 (1989); Abrahamsen v. McDonald's Corp., 197 Ga. App. 624, 398 S.E.2d 861 (1990); Spicewood, Inc. v. Dykes Paving & Constr. Co., 199 Ga. App. 165, 404 S.E.2d 305 (1991); Fulton Paper Co. v. Reeves, 212 Ga. App. 341, 441 S.E.2d 881 (1994); Nest Inv., Inc. v. Tzavaras, 221 Ga. App. 282, 471 S.E.2d 223 (1996); Rolleston v. Cherry, 237 Ga. App. 733, 521 S.E.2d 1 (1999); ARA Health Servs. v. Stitt, 250 Ga. App. 420, 551 S.E.2d 793 (2001); Loiten v. Loiten, 288 Ga. App. 638, 655 S.E.2d 265 (2007); Robinson v. Robinson, 287 Ga. 842, 700 S.E.2d 548 (2010); Avren v. Garten, 289 Ga. 186, 710 S.E.2d 130 (2011); McRae v. Hogan, 317 Ga. App. 813, 732 S.E.2d 853 (2012).

Applicability of Automatic Supersedeas Provision

Filing of notice of appeal acts as supersedeas even in interlocutory appeal. Lawrence v. Whittle, 146 Ga. App. 686, 247 S.E.2d 212 (1978).

Automatic supersedeas provision applies to order to vacate judgment consented to by the plaintiff. Phillips Broadcast Equip. Corp. v. Production 70'S, Inc., 133 Ga. App. 765, 213 S.E.2d 35 (1975).

Appeal to Supreme Court of contempt order issued by trial court acts as supersedeas pending appeal of order, and for trial court to hold appellant in contempt of the contempt order is error. Berman v. Berman, 231 Ga. 727, 204 S.E.2d 125 (1974).

Upon filing notice of appeal, supersedeas is automatic in all civil cases, except injunction cases. Simpson v. Simpson, 233 Ga. 17, 209 S.E.2d 611 (1974).

Filing of notice of appeal in injunction cases does not serve as supersedeas. Citizens to Save Paulding County v. City of Atlanta, 236 Ga. 125, 223 S.E.2d 101 (1976).

Injunction cases are exempt from automatic supersedeas. — It was the intention of the legislature in enacting Ga. L. 1972, p. 689, § 9 (see O.C.G.A. § § 9-11-62) to exempt injunction cases from automatic supersedeas provisions of former Code 1933, § 6-1002 (see O.C.G.A. § 5-6-46). Howard v. Smith, 226 Ga. 850, 178 S.E.2d 159 (1970); Davis v. Creative Land Dev. Corp., 230 Ga. 47, 195 S.E.2d 411 (1973).

Trial court had authority to hold a property owner in contempt for failure to comply with a court order that imposed a permanent restraining order in favor of the owner's neighbors, even though the order was on appeal, as there was no order by the court that stayed the judgment pending appeal, pursuant to O.C.G.A. § 9-11-62(a), which was an exception to the automatic supersedeas provisions of O.C.G.A. § 5-6-46. Knapp v. Cross, 279 Ga. App. 632, 632 S.E.2d 157 (2006).

Appeal from denial of injunction should not establish injunction independently. — No appeal from order de-

nying injunction should have effect of establishing an injunction independently of an order of court entered pursuant to provisions of Ga. L. 1967, p. 226, § 28 (see O.C.G.A. § 9-11-62(c)). Howard v. Smith, 226 Ga. 850, 178 S.E.2d 159 (1970).

Appeal did not supersede court's authority to issue order. — Bank's notice of appeal from denial of summary judgment in the bank's equitable action to reform a mortgage note did not supersede the trial court's authority to enter an order requiring mortgagors to pay mortgage payments into the court registry. Decatur Fed. Savs. & Loan v. Gibson, 268 Ga. 362, 489 S.E.2d 820 (1997).

Dismissal of an appeal in a probate matter was proper because the VA guardian's filing of a notice of appeal relating to the probate court's order dismissing the notice of appeal, did not divest the probate court of jurisdiction to complete the hearing and issue an order compelling the guardian to pay the value of the estate to the administrator of the estate; the record showed that the guardian did not pay the court costs associated with the dismissal order appeal until after the court entered the order that the guardian pay over the value of the estate. In re Estate of Robertson, 271 Ga. App. 785, 611 S.E.2d 680 (2005).

Probate court's order granting an executor's motion for payment of expenses of probate pursuant to O.C.G.A. § 53-5-26 was not prohibited by the supersedeas imposed by the filing of the initial notice of appeal because the order permitted the executor to have the estate pay expenses, including reasonable attorney's fees, incurred by the executor in the probate of the will and while acting in good faith, and it was neither based upon nor related to the carrying into effect the judgment on appeal. Simmons v. Harms, 287 Ga. 176, 695 S.E.2d 38 (2010).

Effect of Supersedeas

General rule is that supersedeas suspends all further proceedings in the suit in which the judgment superseded is rendered, such as are based upon and relate to the carrying into effect of that judgment. Under this rule the supersedeas, during its pendency, prevents any steps to enforce or carry into effect the judgment, such as issuing an execution based thereon. International Images, Inc. v. Smith, 181 Ga. App. 543, 352 S.E.2d 846 (1987).

Notice of appeal serves as supersedeas from time of filing and does not act retroactively. Vowell v. Carmichael, 235 Ga. 387, 219 S.E.2d 732 (1975).

Effect of appeal on enforcement of judgment superseded. — Notice of appeal deprives trial court of jurisdiction to proceed towards enforcement of judgment superseded. Tyree v. Jackson, 226 Ga. 642, 177 S.E.2d 159 (1970); Walker v. Walker, 239 Ga. 175, 236 S.E.2d 263 (1977).

When there is an appeal from a final judgment, such appeal deprives the trial court of jurisdiction to take further proceedings toward the enforcement of the judgment on appeal because subsection (a) of O.C.G.A. § 5-6-46 provides that in civil cases a notice of appeal from such final judgment serves as a supersedeas. Cohran v. Carlin, 160 Ga. App. 762, 288 S.E.2d 81 (1981), aff'd, 249 Ga. 510, 291 S.E.2d 538 (1982); Smiway, Inc. v. DOT, 178 Ga. App. 414, 343 S.E.2d 497 (1986).

Appeal in a separate action involving the tenant only did not affect the tenant's guarantors, nor a judgment entered solely against the guarantors. Winzer v. EHCA Dunwoody, LLC, 277 Ga. App. 710, 627 S.E.2d 426 (2006).

Modification of judgment. — Supersedeas prevents trial judge from modifying judgment while the judgment is on appeal. Jackson v. Martin, 225 Ga. 170, 167 S.E.2d 135 (1969).

Automatic supersedeas deprives trial court of jurisdiction to modify or alter judgment pending appeal. Turner v. Harper, 233 Ga. 483, 211 S.E.2d 742 (1975).

Notice of appeal, with payment of costs, serves as supersedeas of judgment (unless supersedeas bond be required) and while on appeal, the trial court is without authority to modify such judgment. Cohran v. Carlin, 249 Ga. 510, 291 S.E.2d 538 (1982); Bank S. v. Roswell Jeep Eagle, Inc., 200 Ga. App. 489, 408 S.E.2d 503 (1991).

Trial court erred in vacating an order

Effect of Supersedeas (Cont'd)

which removed an executor as the executor of an estate and in entering a second order which again removed the executor; O.C.G.A. § 5-6-46(a) provided that the filing of a notice of appeal served as supersedeas when all costs in the trial court are paid, and this automatic supersedeas deprived the trial court of jurisdiction to modify or alter the judgment in the case pending the appeal, and because an appeal of the first order was pending when the second order was entered, any subsequent proceedings purporting to supplement, amend, alter or modify the judgment, whether pursuant to statutory or inherent power, was without effect. In re Estate of Zeigler, 259 Ga. App. 807, 578 S.E.2d 519 (2003).

Trial court correcting mistakes in judgment. — While as a general proposition trial court has power to correct mistakes in judgments, notice of appeal operates as supersedeas and deprives the trial court of the power to affect judgment appeal, so that subsequent proceedings purporting to supplement, amend, alter, or modify the judgment, whether pursuant to statutory or inherent power, are without effect. Brown v. Wilson Chevrolet-Olds, Inc., 150 Ga. App. 525, 258 S.E.2d 139 (1979); Screven v. Drs. Gruskin & Lucas, 227 Ga. App. 756, 490 S.E.2d 422 (1997).

Trial court's modification of orders and jury trial were nullity. — In a title insurance case, the trial court erred in modifying the court's summary judgment orders and proceeding to trial after the insurer filed a notice of appeal from the original summary judgment order. Under O.C.G.A. § 5-6-46(a), the insurer's notice of appeal deprived the trial court of jurisdiction, and the subsequent orders, trial, and jury verdict were a nullity. Lawyers Title Ins. Corp. v. Griffin, 302 Ga. App. 726, 691 S.E.2d 633 (2010).

Jurisdiction concerning temporary alimony and attorney fees. — When former husband appeals divorce and alimony judgment and former wife petitions trial court for additional attorney fees prior to entry of remittitur, the trial court has authority to award attorney fees for the wife's defense of husband's appeal. By filing notice of appeal, the husband suspends final judgment and reinvests trial court with jurisdiction as to temporary alimony, including attorney fees even without reservation of jurisdiction. Staten v. Staten, 242 Ga. 399, 249 S.E.2d 81 (1978).

Discovery may continue as to matters pending in trial courts notwithstanding grant and appeal of summary judgments as to counterclaims, cross-claims and third party complaints or grant and appeal of partial summary judgments. Cohran v. Carlin, 249 Ga. 510, 291 S.E.2d 538 (1982).

Trial court may try case. — It is not error for trial court to try case while overruling of the defendants' motions to dismiss is on appeal. Cohran v. Carlin, 249 Ga. 510, 291 S.E.2d 538 (1982).

While trial judge, after certifying bill of exceptions, loses jurisdiction of every issue presented therein, the case is still pending in the trial court, and the judge may conduct interlocutory matters, allow pleadings, and proceed with trial of case, subject to peril that any decision reached which conflicts with decision of appellate court when rendered will thereby be made nugatory. Cohran v. Carlin, 249 Ga. 510, 291 S.E.2d 538 (1982).

Plaintiff's supersedeas protection divested allowing jurisdiction in trial court. — Although the filing of a mortgagor's notice of appeal from an order granting a writ of possession over foreclosed property to the mortgagee should have operated as a supersedeas, pursuant to O.C.G.A. § 5-6-46, upon either the payment of all costs in the trial court or an affidavit of indigency, when the mortgagor failed to pay the costs and the mortgagor's affidavit of indigency was found to be either frivolous or a fabrication, the mortgagor's supersedeas protection was divested; accordingly, the trial court still retained jurisdiction over the matter. Hurt v. Norwest Mortg., Inc., 260 Ga. App. 651, 580 S.E.2d 580 (2003).

Supersedeas Bond

Supersedeas bond is permissible as means of assuring compliance with

order of court. Bull v. Bull, 243 Ga. 72, 252 S.E.2d 494 (1979).

Authority to require bond. — Trial court did not err in requiring a supersedeas bond because O.C.G.A. § 5-6-46(a) authorizes a court to rule on such motions, even though filed after the notice of appeal is filed and after the appeal is docketed in the appellate court. Ruffin v. Banks, 249 Ga. App. 297, 548 S.E.2d 61 (2001), overruled on other grounds, Kent v. Kent, 289 Ga. 821, 716 S.E.2d 212 (2011).

Trial court has no discretion under O.C.G.A. § 5-6-46 to refuse to require a supersedeas bond posted for the benefit of an appellee who seeks security for a money judgment, nor to do so without a hearing. Barngrover v. Hins, 289 Ga. App. 410, 657 S.E.2d 14 (2008).

Taxpayer's action challenging the validity and implementation of a special purpose local option sales tax (SPLOST) resolution passed by a county was a public lawsuit and was not meritorious; therefore, the trial court did not err in requiring the taxpayer to post a $2.1 million appeal bond under O.C.G.A. § 50-15-2. Mattox v. Franklin County, 316 Ga. App. 181, 728 S.E.2d 813 (2012).

Order requiring supersedeas bond does not operate as condition precedent to transmittal of appeal. — Requiring supersedeas bond on motion of appellee to trial court is intended to prevent notice of appeal from serving as supersedeas, and does not operate as a condition precedent to the appellant's right to have the appeal transmitted to the appellate court for review. In absence of such bond as may be required by appropriate court, appellee is free to enforce judgment at the appellee's peril pending decision on appeal. DeFee v. Williams, 114 Ga. App. 571, 151 S.E.2d 923 (1966).

Orders requiring supersedeas bonds not final. — Since there were matters still pending the cases, orders requiring supersedeas bonds were not final and thus, not subject to direct appeal. Pruett v. Commercial Bank, 211 Ga. App. 692, 440 S.E.2d 85 (1994).

When final judgment was entered against the issuer based on a supersedeas bond, and the judgment was not challenged or otherwise modified, vacated, or set aside, the issuer could not go behind the judgment, as a defendant in fieri facias, and attack the validity of the bond. Riverdale Collision, Inc. v. Osborne Bonding & Sur. Co., 220 Ga. App. 611, 469 S.E.2d 823 (1996).

Timely motion and order thereon give trial court jurisdiction of subject matter of supersedeas bonds. Hughes v. Star Bonding Co., 137 Ga. App. 661, 224 S.E.2d 863 (1976).

Effect of noncompliance with order to post supersedeas bond. — Failure to comply with order to post supersedeas bond has sole effect of removing any supersedeas features of appeal, and leaves appellee at liberty, if the appellee chooses to do so, to make whatever levy of execution or other action may be available to collect the appellee's debt, always remembering that the appellee does so at the appellee's peril if judgment is reversed on appeal. Hubbard v. Farmers Bank, 153 Ga. App. 497, 265 S.E.2d 845 (1980).

Failure of appealing party to file supersedeas bond simply means that judgment of trial court may be enforced and is no ground for dismissing appeal. Hawn v. Chastain, 246 Ga. 723, 273 S.E.2d 135 (1980).

Failure to post bond by time set may be corrected. — It may happen that an appellant fails to post proper bond by time set in order, but the appellant may correct this default as a matter of right provided case has not been docketed in appellate court. Hughes v. Star Bonding Co., 137 Ga. App. 661, 224 S.E.2d 863 (1976).

Construciton of subsection (c). — First sentence of subsection (b) (now subsection (c)) means that when proper motion for supersedeas is filed in the trial court, prior to docketing of case in the appellate court, the trial court may properly set time for appellant to present proper supersedeas bond, and bond so filed is adequate. Further, if the bond is not filed or is inadequately filed within time specified, the appellant is not entirely cut off from right to file it but the appellant still may file proper bond as a matter of right if case has not yet been docketed on appeal. Hughes v. Star Bond-

Supersedeas Bond (Cont'd)

ing Co., 137 Ga. App. 661, 224 S.E.2d 863 (1976).

Court's judgment as to party's ability to pay costs or post bond is final. Hyman v. Leathers, 168 Ga. App. 112, 308 S.E.2d 388 (1983).

Trial court erred by denying the plaintiff's motion for a supersedeas bond after the plaintiff successfully obtained a jury verdict against the defendants; the plaintiff exercised the statutory right to move the trial court for a supersedeas bond and was under no obligation either to ask for a hearing or to show that the defendants were incapable of satisfying the judgment against the defendants. The trial court was obligated to require the defendants to post a supersedeas bond in the full amount of the judgment, including costs, interest, and damages, unless, after notice and hearing, the court found good cause for fixing a lesser amount. Barngrover v. Hins, 289 Ga. App. 410, 657 S.E.2d 14 (2008).

Trial court erred in denying a broker's motion for a supersedeas bond because having received a judgment for the recovery of money against the sellers, the broker exercised the broker's statutory right to move for a supersedeas bond, and under O.C.G.A. § 5-6-46(a), the trial court was obligated to require the sellers to post a supersedeas bond in the full amount of the judgment including costs, interest, and damages, unless, after notice and hearing, the court found good cause for fixing a lesser amount. Cochran v. Kennelly, 306 Ga. App. 838, 703 S.E.2d 411 (2010).

No abuse of discretion found as to amount of bond. — O.C.G.A. § 5-6-46 vests the trial court with authority to order a supersedeas bond "in such amount as the court may require." Thus, there was nothing in the record to indicate that the trial court abused the court's discretion in ordering a $100,000 supersedeas bond. Phillips v. Connecticut Nat'l Bank, 196 Ga. App. 477, 396 S.E.2d 538 (1990).

Considering the amount of debt secured by property foreclosed upon and the defendant's actions in delaying the foreclosure sale by repeated bankruptcy filings as well as the filing of appeals, the trial court did not abuse the court's discretion by requiring a supersedeas bond in the amount of $340,000. Cloud v. Georgia Cent. Credit Union, 214 Ga. App. 594, 448 S.E.2d 913 (1994).

In a probate proceedings in which the executrix was dismissed as executrix after failing to gain control of the assets of the estate, including a diamond ring and the decedent's van, and the executrix sold the decedent's home without obtaining an appraisal and without attempting to realize the best price on the open market, the trial court did not abuse the court's discretion under O.C.G.A. § 5-6-46 in requiring the executrix to post a supersedeas bond in the amount of $95,500; the contested values of the decedent's home, the amount of the executor's fees, and the lack of any valuation as to the household furnishings, the diamond ring, and the van justified the amount of the bond. In re Estate of Zeigler, 273 Ga. App. 269, 614 S.E.2d 799 (2005).

Order to post bond upheld. — When a case presented mixed questions of equity and law, and the trial court's final order enforced a contract, the trial court did not err when the court required the posting of a supersedeas bond. Ruskin v. AAF-McQuay, Inc., 284 Ga. App. 49, 643 S.E.2d 333 (2007).

Read together, O.C.G.A. §§ 5-6-13(a) and 5-6-46(a) required the trial court to grant the husband a supersedeas when the husband filed a "Notice of Intent to Appeal" and to grant the wife's motion to require the husband to post a supersedeas bond. Horn v. Shepherd, 292 Ga. 14, 732 S.E.2d 427 (2012).

Supersedeas does not apply to foreclosure confirmation proceeding. — O.C.G.A. § 5-6-46(a) provides, in part, that in civil cases, the notice of appeal filed shall serve as supersedeas and it shall not be necessary that a supersedeas bond or other form of security be filed; thus, by the statute's express terms, that statute applies only to civil cases, not foreclosure confirmation proceedings under O.C.G.A. § 44-14-161(a). Summit Inv. Mgmt. Acquisitions I, LLC v. Greg A. Becker Enters., Ltd., 317 Ga. App. 608, 732 S.E.2d 286 (2012).

RESEARCH REFERENCES

Am. Jur. 2d. — 5 Am. Jur. 2d, Appellate Review, §§ 292 et seq., 421.

Am. Jur. Pleading and Practice Forms. — 2 Am. Jur. Pleading and Practice Forms, Appeal and Error, § 262.

C.J.S. — 4 C.J.S., Appeal and Error, § 477 et seq., 531 et seq.

ALR. — Reversal as affecting purchase of property involved in suit, pending appeal without supersedeas, 36 ALR 421.

Failure of obligee in supersedeas bond to accept protection thereof or his act inconsistent therewith as affecting liability on bond, 53 ALR 807.

Amount named in appeal or supersedeas bond as the maximum limit of sureties' liability or as a limitation of the amount which they undertake shall by paid on the judgment appealed from, 87 ALR 257.

Appeal from award of injunction as stay or supersedeas, 93 ALR 709.

Liability of surety on appeal or supersedeas bond as affected by death of principal before decision on appeal, 94 ALR 971.

Claim of obligee or surety on supersedeas bond, or other bond given in course of litigation, as entitled to preference over mortgage bondholders of railroad or other corporation, 113 ALR 494.

Measure and items of damages recoverable upon a suspending or supersedeas bond on appeal from an order appointing a receiver or confirming such appointment, 117 ALR 1274.

Right to stay without bond or other security pending appeal from judgment or order against executor, administrator, guardian, trustee, or other fiduciary who represents interests of other person, 119 ALR 931.

Liability on supersedeas bond which was legally insufficient to effect stay, where enforcement of judgment was in fact suspended, 120 ALR 1062.

When appeal is or is not deemed to have been prosecuted "with effect" or "to effect" within condition of supersedeas bond, 163 ALR 410.

Attorneys' fees paid by appellee in resisting unsuccessful appellate review as damages recoverable on appeal bond, 37 ALR2d 525.

Stay or supersedeas on appellate review in mandamus proceeding, 88 ALR2d 420.

Taxable costs and disbursements as including expenses for bonds incident to steps taken in action, 90 ALR2d 448.

Effect of supersedeas or stay on antecedent levy, 90 ALR2d 483.

Measure and amount of damages recoverable under supersedeas bond in action involving recovery or possession of real estate, 9 ALR3d 330.

Appealability of order directing payment of money into court, 15 ALR3d 568.

5-6-47. Operation of notice of appeal and affidavit of indigence as supersedeas in civil cases; procedure for contests as to truth of affidavit.

(a) In all civil cases where the party taking an appeal files an affidavit stating that because of his indigence he is unable to pay costs or to post a supersedeas bond, if any, as may be required by the trial judge as provided in Code Section 5-6-46, the notice of appeal and affidavit of indigence shall act as supersedeas.

(b) Any party at interest or his agent or attorney may contest the truth of the affidavit of indigence by verifying affirmatively under oath that the same is untrue. The issue thereby formed shall be heard and determined by the trial court under the rules of the court. The judgment of the court on all issues of fact concerning the ability of a party to pay costs or give bond shall be final. (Ga. L. 1965, p. 18, § 9; Ga. L. 1966, p. 723, § 1.)

Cross references. — Supersedeas, Rules of the Supreme Court of the State of Georgia, Rule 12. Filing notice of appeal and cross appeal, Rules of the Supreme Court of the State of Georgia, Rule 38. Supersedeas, Rules of the Court of Appeals of the State of Georgia, Rule 50.

Law reviews. — For article, "The Appellate Procedure Act of 1965," see 1 Ga. St. B.J. 451 (1965). For article, "1966 Amendments to the Appellate Procedure Act of 1965," see 2 Ga. St. B.J. 433 (1966).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the provisions, decisions under former Civil Code 1910, § 6166 and former Code 1933, § 6-1002, as it read prior to revision by Ga. L. 1965, p. 18, § 9 are included in the annotations for this Code section.

Truth of paupers affidavit must be attacked in court below, not in Court of Appeals. Mark Trail Campgrounds, Inc. v. Field Enterprises, Inc., 140 Ga. App. 608, 231 S.E.2d 468 (1976).

Purpose of traverse to pauper's affidavit is simply to allow hearing on ability to pay. Hubbard v. Farmers Bank, 153 Ga. App. 497, 265 S.E.2d 845 (1980).

Effect of successful traverse of pauper's affidavit. — When appellant's pauper's affidavit is successfully traversed, appellant is required to pay court costs and provide such supersedeas bond as is appropriate to the circumstances, and upon failure to comply therewith authorizes dismissal. Spaulding v. Rich's, Inc., 144 Ga. App. 467, 241 S.E.2d 584 (1978).

Remedy for failure to file or frivolously filing pauper's affidavit is not dismissal of appeal but divestiture of the protection of supersedeas. Hubbard v. Farmers Bank, 153 Ga. App. 497, 265 S.E.2d 845 (1980).

Finding that party not indigent not reviewable. — Trial court's finding that a party was able to pay the costs of preparing a record is not reviewable even though no opposing affidavit challenging the party's affidavit of indigency was filed. Saylors v. Emory Univ., 187 Ga. App. 460, 370 S.E.2d 625, cert. denied, 187 Ga. App. 908, 370 S.E.2d 625 (1988).

Ordinarily, under O.C.G.A. §§ 5-6-47(b) and 9-15-2(a)(2), a trial court's findings concerning a party's indigency are not reviewable in cases when the affidavit of indigency has been traversed by an opposing affidavit. Quaterman v. Weiss, 212 Ga. App. 563, 442 S.E.2d 813 (1994).

In a breach of contract suit brought by an oncologist against a corporation, the corporation's failure to submit an opposing affidavit to the oncologist's pauper's affidavit did not alter the fact that the trial court's findings regarding the oncologist's indigency were not subject to appellate review. Under O.C.G.A. §§ 5-6-47(b) and 9-15-2(a)(2), a trial court's ruling regarding indigency was final and not subject to appellate review; the proper forum for determining the truth of a pauper's affidavit was in the trial court. Mitchell v. Cancer Carepoint, Inc., 299 Ga. App. 881, 683 S.E.2d 923 (2009).

Insolvent corporation may make a pauper affidavit. Brunswick Timber Co. v. Guy, 52 Ga. App. 617, 184 S.E. 426 (1936) (decided under former Code 1933, § 6-1002).

Must contain statement that inability to pay is due to poverty. — It is essential to sufficiency of pauper's affidavit that it include statement that inability of affiant to pay costs is "because of his poverty," and, being without such statement, neither affiant as plaintiff in error nor the plaintiff's attorneys will be relieved from payment of costs. Stevens v. Bibb Mfg. Co., 45 Ga. App. 282, 164 S.E. 221 (1932) (decided under former Civil Code 1910, § 6166).

Emergency motion for supersedeas required. — Claim that a tenant's notice of appeal and affidavit of poverty did not act as a supersedeas of an order issuing a landlord a writ of possession was rejected as it was not a matter reflected in the appellate record and was something that should be handled by an emergency motion for supersedeas; further, the tenant did not file an enumeration of errors and brief and no extension had been requested

or granted. Hughley v. Habra, 277 Ga. App. 138, 625 S.E.2d 531 (2006).

Error to dismiss appeal. — Trial court's dismissal of an appeal from a summary judgment dismissing a wrongful death claim brought by four children, due to the failure of two of the children to pay costs or submit affidavits of indigency, was in error as to two of the children who filed affidavits of indigency; assuming the children filed true affidavits of indigence (O.C.G.A. § 9-15-2(a)(2), (b)), the children had rights to appeal from the dismissal of the children's proportionate shares of the wrongful death case as: (1) the wrongful death claim was not jointly in all the children or in none of the children; and (2) originally, each child had a separate claim for one-fourth of the value of the decedent's life. Mapp v. We Care Transp. Servs., 314 Ga. App. 391, 724 S.E.2d 790 (2012), cert. denied, No. S12C1111, 2012 Ga. LEXIS 660 (Ga. 2012).

Cited in Fowler v. Stansell, 221 Ga. 630, 146 S.E.2d 726 (1966); Green v. Fuller, 223 Ga. 204, 154 S.E.2d 220 (1967); Tootle v. Player, 225 Ga. 431, 169 S.E.2d 340 (1969); McClure v. Hopper, 234 Ga. 45, 214 S.E.2d 503 (1975); Potts v. State, 236 Ga. 230, 223 S.E.2d 120 (1976); Chambliss v. Roberson, 164 Ga. App. 579, 298 S.E.2d 550 (1982); Parks v. Atlanta Pub. Sch. Sys. Bd. of Educ., 168 Ga. App. 572, 309 S.E.2d 645 (1983); Rosemond v. Prudential Property & Cas. Ins. Co., 170 Ga. App. 189, 316 S.E.2d 541 (1984); Ball v. Duncan, 174 Ga. App. 341, 330 S.E.2d 160 (1985); Plumides v. American Engines & Transmissions, Inc., 227 Ga. App. 885, 490 S.E.2d 552 (1997).

RESEARCH REFERENCES

C.J.S. — 4 C.J.S., Appeal and Error, § 427 et seq., 453

ALR. — Reversal as affecting purchase of property involved in suit, pending appeal without supersedeas, 36 ALR 421.

Right of indigent defendant in criminal case to aid of state as regards new trial or appeal, 100 ALR 321; 55 ALR2d 1072.

When appeal is or is not deemed to have been prosecuted "with effect" or "to effect" within condition of supersedeas bond, 163 ALR 410.

Right to sue or appeal in forma pauperis as dependent on showing of financial disability of attorney or other nonparty or nonapplicant, 11 ALR2d 607.

Right of indigent defendant in criminal case to aid of state as regards new trial or appeal, 55 ALR2d 1072.

Determination of indigency of accused entitling him to transcript or similar record for purposes of appeal, 66 ALR3d 954.

5-6-48. Grounds for dismissal of appeal; amendments; correcting or supplementing record or transcript; effect of dismissal of appeal upon cross appeal; effect of deficiencies upon consideration of appeal.

(a) Failure of any party to perfect service of any notice or other paper hereunder shall not work dismissal; but the trial and appellate courts shall at any stage of the proceeding require that parties be served in such manner as will permit a just and expeditious determination of the appeal and shall, when necessary, grant such continuance as may be required under the circumstances.

(b) No appeal shall be dismissed or its validity affected for any cause nor shall consideration of any enumerated error be refused, except:

(1) For failure to file notice of appeal within the time required as provided in this article or within any extension of time granted hereunder;

(2) Where the decision or judgment is not then appealable; or

(3) Where the questions presented have become moot.

(c) No appeal shall be dismissed by the appellate court nor consideration of any error therein refused because of failure of any party to cause the transcript of evidence and proceedings to be filed within the time allowed by law or order of court; but the trial court may, after notice and opportunity for hearing, order that the appeal be dismissed where there has been an unreasonable delay in the filing of the transcript and it is shown that the delay was inexcusable and was caused by such party. In like manner, the trial court may order the appeal dismissed where there has been an unreasonable delay in the transmission of the record to the appellate court, and it is seen that the delay was inexcusable and was caused by the failure of a party to pay costs in the trial court or file an affidavit of indigence; provided, however, that no appeal shall be dismissed for failure to pay costs if costs are paid within 20 days (exclusive of Saturdays, Sundays, and legal holidays) of receipt by the appellant of notice, mailed by registered or certified mail or statutory overnight delivery, of the amount of costs.

(d) At any stage of the proceedings, either before or after argument, the court shall by order, either with or without motion, provide for all necessary amendments, require the trial court to make corrections in the record or transcript or certify what transpired below which does not appear from the record on appeal, require that additional portions of the record or transcript of proceedings be sent up, or require that a complete transcript of evidence and proceedings be prepared and sent up, or take any other action to perfect the appeal and record so that the appellate court can and will pass upon the appeal and not dismiss it. If an error appears in the notice of appeal, the court shall allow the notice of appeal to be amended at any time prior to judgment to perfect the appeal so that the appellate court can and will pass upon the appeal and not dismiss it.

(e) Dismissal of the appeal shall not affect the validity of the cross appeal where notice therefor has been filed within the time required for cross appeals and where the appellee would still stand to receive benefit or advantage by a decision of his cross appeal.

(f) Where it is apparent from the notice of appeal, the record, the enumeration of errors, or any combination of the foregoing, what judgment or judgments were appealed from or what errors are sought to be asserted upon appeal, the appeal shall be considered in accordance therewith notwithstanding that the notice of appeal fails to specify

definitely the judgment appealed from or that the enumeration of errors fails to enumerate clearly the errors sought to be reviewed. An appeal shall not be dismissed nor consideration thereof refused because of failure of the court reporter to file the transcript of evidence and proceedings within the time allowed by law or order of court unless it affirmatively appears from the record that the failure was caused by the appellant. (Ga. L. 1965, p. 18, § 13; Ga. L. 1965, p. 240, § 1; Ga. L. 1966, p. 493, § 10; Ga. L. 1968, p. 1072, §§ 2, 3; Ga. L. 1972, p. 624, § 1; Ga. L. 1978, p. 1986, § 1; Ga. L. 2000, p. 1589, § 3.)

Cross references. — Briefs of appellant and cross appellant, Rules of the Supreme Court of the State of Georgia, Rule 39. Service on opposing parties, Rules of the Supreme Court of the State of Georgia, Rule 43. Argument and citation of authority, Rules of the Supreme Court of the State of Georgia, Rule 45. Judgments deemed included and presented, Rules of the Supreme Court of the State of Georgia, Rule 46. Presenting issue where record supplemented, Rules of the Supreme Court of the State of Georgia, Rule 48. Motions in civil actions, hearing, Uniform Superior Court Rules, Rule 6.3. Transcript costs, Uniform Superior Court Rules, Rule 41.3.

Editor's notes. — Ga. L. 2000, p. 1589, § 16, not codified by the General Assembly, provides that the amendment to this Code section is applicable with respect to notices delivered on or after July 1, 2000.

Law reviews. — For article, "Synopses of 1968 Amendments Appellate Procedure Act and Georgia Civil Practice Act," see 4 Ga. St. B.J. 503 (1968). For article discussing Georgia court decision on questions of appellate practice and procedure, see 31 Mercer L. Rev. 1 (1979). For article surveying appellate practice and procedure, see 34 Mercer L. Rev. 3 (1982). For annual survey of appellate practice and procedure, see 38 Mercer L. Rev. 47 (1986). For annual survey of appellate practice and procedure, see 40 Mercer L. Rev. 51 (1988). For annual survey of appellate practice and procedure, see 57 Mercer L. Rev. 35 (2005). For survey article on appellate practice and procedure, see 60 Mercer L. Rev. 21 (2008). For annual survey on appellate practice and procedure, see 61 Mercer L. Rev. 31 (2009). For article, "Appellate Practice and Procedure," see 63 Mercer L. Rev. 67 (2011). For annual survey on trial practice and procedure, see 64 Mercer L. Rev. 305 (2012).

For comment on Davis v. Davis, 222 Ga. 579, 151 S.E.2d 123 (1966), see 4 Ga. St. B.J. 259 (1967). For comment on Durham v. Stand-By Labor of Ga., Inc., 230 Ga. 558, 198 S.E.2d 145 (1973), appearing below, see 8 Ga. L. Rev. 526 (1974).

JUDICIAL DECISIONS

Analysis

General Consideration
Failure to Perfect Service
Mandatory Dismissal of Appeal
1. In General
2. Failure to Timely File Notice of Appeal
3. Appeals From Nonfinal Judgments
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Delay in Filing Transcript
1. In General
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1. In General
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AMENDMENT OF RECORD
NOTICE OF APPEAL
APPLICATION GENERALLY

General Consideration

Constitutionality of section discussed. — See Brackett v. Allison, 119 Ga. App. 632, 168 S.E.2d 611 (1969).

Purpose of section. — Section contains specific and limited grounds for dismissal and is replete with provisions for liberal amendment to meet technical objections to appeals, to the end of facilitating a proper decision on the merits. Munday v. Brissette, 113 Ga. App. 147, 148 S.E.2d 55, rev'd on other grounds, 222 Ga. 162, 149 S.E.2d 110 (1966).

Section opens notice of appeal to extrinsic construction for first time and puts burden on court to examine orders themselves in determining from which orders an appeal has been taken. Brackett v. Allison, 119 Ga. App. 632, 168 S.E.2d 611 (1969).

Entire section gives to court a very broad discretion. Brookshire v. J.P. Stevens Co., 133 Ga. App. 97, 210 S.E.2d 46 (1974).

Appellate courts should reach merits of appeals when possible. — It is the policy of both appellate courts in Georgia to attempt to avoid dismissing appeals and to try to reach the merits of every case when it can be done consistent with the mandate of the law. Johnson v. Daniel, 135 Ga. App. 926, 219 S.E.2d 579 (1975); Gilland v. Leathers, 141 Ga. App. 680, 234 S.E.2d 338 (1977); Corbin v. First Nat'l Bank, 151 Ga. App. 33, 258 S.E.2d 697 (1979).

When the plaintiff failed to file enumerations of error as a separate document, but did set forth enumerations of error in the plaintiff's brief, it was apparent from the notice of appeal, the brief, the enumerations of error in that brief, and the record, exactly what judgment was appealed from and what errors were asserted, and a liberal construction of the Appellate Practice Act, O.C.G.A. § 5-6-30 et seq., required the court to exercise the court's discretion to reach the merits of the case. Leslie v. Williams, 235 Ga. App. 657, 510 S.E.2d 130 (1998).

Section does not limit judicial authority under rule regarding dismissal. — Judicial authority under Rule 39, Rules of the Supreme Court to dismiss appeal for failure to comply with order to file enumeration of error is not prohibited by Ga. L. 1965, p. 18, § 23 (see O.C.G.A. § 5-6-30), which expresses an intent to avoid dismissals, and is not limited by the three grounds for dismissal contained in Ga. L. 1968, p. 1072, §§ 2, 3. Taylor v. Columbia County Planning Comm'n, 232 Ga. 155, 205 S.E.2d 287 (1974).

Belated filing of separate enumerations of error is not a basis for dismissal of an appeal. Reeder v. GMAC, 235 Ga. App. 617, 510 S.E.2d 337 (1998).

Former Rule 14(a) of the Rules of the Supreme Court (see Rule 39) is directory and its violation does not constitute one of the limited grounds for dismissal as prescribed by this section. Durham v. Stand-By Labor of Ga., Inc., 230 Ga. 558, 198 S.E.2d 145 (1973).

What must be shown to order dismissal. — In order for the trial court to order the dismissal of an appeal, it must appear that the delay between the filing of the notice of appeal and the subsequent filing of the transcript was unreasonable and that the unreasonable delay was inexcusable. Gay v. City of Rome, 157 Ga. App. 368, 277 S.E.2d 741 (1981).

Discretion of court. — In passing upon issues of unreasonable delay and inexcusable delay, the trial court has discretion. However, it is a legal discretion which is subject to review in the appellate courts. Gay v. City of Rome, 157 Ga. App. 368, 277 S.E.2d 741 (1981).

Effect of dismissal on cross-appeal. — Pursuant to subsection (e) of O.C.G.A. § 5-6-48, dismissal of the appeal does not affect the validity of a cross-appeal. It is only when the appeal is dismissed for lack of jurisdiction that a cross-appeal which does not have an independent ground for jurisdiction must also be dismissed. First Union Nat'l Bank v. Floyd, 198 Ga. App. 99, 400 S.E.2d 393 (1990), cert. denied, 198 Ga. App. 897, 400 S.E.2d 393 (1991).

When the main appeal was dismissed in the appeal's entirety and the defendant filed no application for interlocutory review of the denial of the motion to transfer venue, the court had no independent jurisdiction over the cross-appeal and dismissal is proper. Patel v. Georgia Power Co., 234 Ga. App. 141, 505 S.E.2d 787 (1998).

Formal recitation of conditions of grant or denial not required. — O.C.G.A. § 5-6-41 does not, by the statute's terms, require the trial court to make a formal recitation of the conditions upon which the trial court grants or denies a motion to dismiss an appeal. When the challenged order complies with the requirements of § 5-6-48, the trial court is not required to make findings of fact and conclusions of law in the court's order denying the motion to dismiss the appeal. Gay v. City of Rome, 157 Ga. App. 368, 277 S.E.2d 741 (1981).

Hearing. — There is no conflict between the "opportunity for hearing" on a motion to dismiss, as set forth in subsection (c) of O.C.G.A. § 5-6-48, and Uniform Superior Court Rule 6.3, and when there is full opportunity to respond to an opponent's motion to dismiss, the court does not err in granting the motion without an oral hearing. Glen Restaurants, Inc. v. Building 5 Assocs., 189 Ga. App. 327, 375 S.E.2d 492, cert. denied, 189 Ga. App. 912, 375 S.E.2d 492 (1988).

Cited in Williams v. State, 112 Ga. App. 566, 145 S.E.2d 765 (1965); Undercofler v. McLennan, 221 Ga. 613, 146 S.E.2d 635 (1966); Banks v. Banks, 221 Ga. 626, 146 S.E.2d 636 (1966); Cade v. Burson, 221 Ga. 715, 146 S.E.2d 761 (1966); Gibson v. Hodges, 221 Ga. 779, 147 S.E.2d 329 (1966); Chambliss v. Hall, 113 Ga. App. 96, 147 S.E.2d 334 (1966); Birdwell v. Pippen, 113 Ga. App. 202, 147 S.E.2d 673 (1966); Seaton v. Redisco, Inc., 113 Ga. App. 256, 147 S.E.2d 828 (1966); Dawn Mem. Park v. Southern Cem. Consultants of Ga., Inc., 113 Ga. App. 814, 149 S.E.2d 760 (1966); Adams v. Morgan, 114 Ga. App. 180, 150 S.E.2d 556 (1966); LeCraw v. L.P.D., Inc., 114 Ga. App. 281, 150 S.E.2d 927 (1966); Sayers v. Rothberg, 222 Ga. 626, 151 S.E.2d 445 (1966); Puckett v. Puckett, 222 Ga. 653, 151 S.E.2d 767 (1966); Louisville & N.R.R. v. Clark, 114 Ga. App. 755, 152 S.E.2d 694 (1966); Hood v. Akins, 114 Ga. App. 733, 152 S.E.2d 704 (1966); Hicks v. Maple Valley Corp., 223 Ga. 69, 153 S.E.2d 547 (1967); Norbo Trading Corp. v. Wohlmuth, 223 Ga. 258, 154 S.E.2d 224 (1967); Griffith v. Morgan, 115 Ga. App. 518, 154 S.E.2d 822 (1967); Turner v. Bogle, 115 Ga. App. 710, 155 S.E.2d 667 (1967); State Hwy. Dep't v. Hicks, 115 Ga. App. 703, 155 S.E.2d 689 (1967); Liberty Loan & Thrift Corp. v. Meeks, 115 Ga. App. 846, 156 S.E.2d 172 (1967); Ward v. Ward, 115 Ga. App. 778, 156 S.E.2d 210 (1967); Hayes v. State, 116 Ga. App. 260, 157 S.E.2d 30 (1967); Byrd v. Moore Ford Co., 116 Ga. App. 292, 157 S.E.2d 41 (1967); Cotton States Mut. Ins. Co. v. Tiller, 116 Ga. App. 275, 157 S.E.2d 57 (1967); Olds v. Hair, 116 Ga. App. 401, 157 S.E.2d 559 (1967); Peach v. State, 116 Ga. App. 703, 158 S.E.2d 701 (1967); Bailey v. State, 224 Ga. App. 48, 159 S.E.2d 286 (1968); Mixon v. Hall, 117 Ga. App. 626, 161 S.E.2d 429 (1968); McKinney v. Schaefer, 117 Ga. App. 595, 161 S.E.2d 446 (1968); Lake Spivey Parks v. Jones, 118 Ga. App. 60, 162 S.E.2d 801 (1968); Wooten v. State ex rel. Bagby, 118 Ga. App. 366, 163 S.E.2d 870 (1968); Fahrig v. Garrett, 224 Ga. 817, 165 S.E.2d 126 (1968); Hardy v. D.G. Mach. & Gage Co., 224 Ga. 818, 165 S.E.2d 127 (1968); Daniels v. Allen, 118 Ga. App. 722, 165 S.E.2d 449 (1968); Jones v. State, 225 Ga. 114, 166 S.E.2d 350 (1969); Carroll v. Askew, 119 Ga. App. 224, 166 S.E.2d 635 (1969); Stephens v. State, 119 Ga. App. 674, 168 S.E.2d 333 (1969); Shepherd v. Shepherd, 225 Ga. 455, 169 S.E.2d 314 (1969); Joiner v. Joiner, 225 Ga. 699, 171 S.E.2d 297 (1969); Harrison v. State, 120 Ga. App. 812, 172 S.E.2d 328 (1969); Genins v. Genins, 226 Ga. 70, 172 S.E.2d 416 (1970); Reese v. State, 121 Ga. App. 189, 173 S.E.2d 351 (1970); O'Quinn v. State, 121 Ga. App. 231, 173 S.E.2d 409 (1970); Teppenpaw v. Blalock, 121 Ga. App. 320, 173 S.E.2d 442 (1970); Jacobs v. Shiver, 226 Ga. 284, 174 S.E.2d 415 (1970); Stewart v. Church, 121 Ga. App. 783, 175 S.E.2d 46 (1970); Satcher v. James H. Drew Shows, Inc., 122 Ga. App. 548, 177 S.E.2d 846 (1970); Hicks v. Seaboard Coast Line R.R., 123 Ga. App. 95, 179

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S.E.2d 532 (1970); Wellcraft Mfg., Inc. v. Troutman, 123 Ga. App. 321, 180 S.E.2d 588 (1971); Norman v. Walker, 123 Ga. App. 413, 181 S.E.2d 310 (1971); Rusk v. Rusk, 227 Ga. 756, 183 S.E.2d 209 (1971); Faulkner v. Home Fed. Sav. & Loan Ass'n, 124 Ga. App. 360, 183 S.E.2d 615 (1971); Buffalo Holding Co. v. Shores, 124 Ga. App. 868, 186 S.E.2d 339 (1971); Servall v. Southern Cross Indus., Inc., 125 Ga. App. 88, 186 S.E.2d 499 (1971); Smith v. Mayor of Lake City, 125 Ga. App. 772, 189 S.E.2d 104 (1972); Meeks v. Kirkland, 125 Ga. App. 792, 189 S.E.2d 107 (1972); Brown v. Hemperley, 125 Ga. App. 828, 189 S.E.2d 131 (1972); Palm Beach Inv. Properties, Inc. v. Dingman, 126 Ga. App. 17, 189 S.E.2d 906 (1972); Slay v. Brady, 126 Ga. App. 249, 190 S.E.2d 445 (1972); Pope v. State, 126 Ga. App. 488, 191 S.E.2d 115 (1972); Housing Auth. v. Marbut Co., 229 Ga. 403, 191 S.E.2d 785 (1972); Dixie Mgt. Corp. v. Hubbard, 127 Ga. App. 401, 194 S.E.2d 118 (1972); Model Cleaners & Laundry, Inc. v. Per Corp., 127 Ga. App. 559, 194 S.E.2d 258 (1972); George v. Southern Ry. Sys., 127 Ga. App. 583, 194 S.E.2d 284 (1972); Burroughs Corp. v. Outside Carpets, Inc., 127 Ga. App. 622, 194 S.E.2d 487 (1972); Reinhardt v. Parker, 129 Ga. App. 312, 199 S.E.2d 638 (1973); Candler v. Orkin, 129 Ga. App. 721, 200 S.E.2d 909 (1973); Tapley Fin. Corp. v. Citizens & S. Bank, 129 Ga. App. 781, 201 S.E.2d 482 (1973); Irby v. Christian, 130 Ga. App. 375, 203 S.E.2d 284 (1973); G.M.J. v. State, 130 Ga. App. 420, 203 S.E.2d 608 (1973); Jackson v. State, 130 Ga. App. 581, 203 S.E.2d 923 (1974); Fleming v. Phoenix of Hartford Ins. Co., 130 Ga. App. 771, 204 S.E.2d 460 (1974); Azar v. Baird, 232 Ga. 81, 205 S.E.2d 273 (1974); Dunbar v. Green, 232 Ga. 188, 205 S.E.2d 854 (1974); Blackshear v. Blackshear, 232 Ga. 312, 206 S.E.2d 429 (1974); Padgett v. Cowart, 232 Ga. 633, 208 S.E.2d 455 (1974); Bethsaida Dev., Inc. v. Charter Land & Housing Corp., 232 Ga. 641, 208 S.E.2d 462 (1974); Von Waldner v. Baldwin/Cheshire, Inc., 133 Ga. App. 23, 209 S.E.2d 715 (1974); Carroll v. Cates, 134 Ga. App. 10, 213 S.E.2d 120 (1975); Wade v. Ray, 234 Ga. 234, 214 S.E.2d 923 (1975); Scroggins v. Ridge Nassau Corp., 135 Ga. App. 547, 218 S.E.2d 448 (1975); Lackey v. State, 135 Ga. App. 632, 218 S.E.2d 648 (1975); Lee v. Goldner, 135 Ga. App. 744, 219 S.E.2d 5 (1975); Whitehead v. Hasty, 235 Ga. App. 331, 219 S.E.2d 443 (1975); Hughes Motor Co. v. First Nat'l Bank, 136 Ga. App. 295, 220 S.E.2d 782 (1975); Tamplin v. State, 235 Ga. 774, 221 S.E.2d 455 (1975); Herring v. Herring, 236 Ga. 43, 222 S.E.2d 331 (1976); Canon v. Canon, 236 Ga. 99, 222 S.E.2d 381 (1976); Wilson v. Coite Somers Co., 138 Ga. App. 455, 226 S.E.2d 277 (1976); Hogan v. City-County Hosp., 138 Ga. App. 906, 227 S.E.2d 796 (1976); State v. Gethers, 139 Ga. App. 1, 227 S.E.2d 832 (1976); Kowalski v. State, 139 Ga. App. 12, 228 S.E.2d 19 (1976); Hiller v. Culbreth, 139 Ga. App. 351, 228 S.E.2d 374 (1976); Pickett v. Paine, 139 Ga. App. 508, 229 S.E.2d 90 (1976); May v. May, 139 Ga. App. 672, 229 S.E.2d 145 (1976); Beatty v. Underground Atlanta, 237 Ga. 844, 229 S.E.2d 615 (1976); Hudson v. Columbus, 139 Ga. App. 789, 229 S.E.2d 671 (1976); Little v. Thompson Co., 140 Ga. App. 238, 230 S.E.2d 316 (1976); Davis v. Davis, 238 Ga. 143, 231 S.E.2d 753 (1977); Termplan, Inc. v. Dorsey, 141 Ga. App. 47, 232 S.E.2d 402 (1977); Ellis v. Continental Ins. Co., 141 Ga. App. 809, 234 S.E.2d 377 (1977); Pickens County v. Darnell, 142 Ga. App. 281, 235 S.E.2d 677 (1977); Ward v. State, 239 Ga. 205, 236 S.E.2d 365 (1977); Holloway v. Giddens, 239 Ga. 195, 236 S.E.2d 491 (1977); Foskey v. Dockery, 143 Ga. App. 63, 237 S.E.2d 532 (1977); Malloy v. Aetna Cas. & Sur. Co., 143 Ga. App. 212, 237 S.E.2d 692 (1977); Owens v. State, 144 Ga. App. 611, 241 S.E.2d 485 (1978); Spaulding v. Rich's, Inc., 144 Ga. App. 467, 241 S.E.2d 584 (1978); Solomon Refrigeration, Inc. v. Lloyd, 144 Ga. App. 542, 241 S.E.2d 642 (1978); Lawrence v. Whittle, 146 Ga. App. 686, 247 S.E.2d 212 (1978); Cousins Mtg. & Equity v. Hamilton, 147 Ga. App. 210, 248 S.E.2d 516 (1978); Citizens & S. Nat'l Bank v. Williams, 147 Ga. App. 205, 249 S.E.2d 289 (1978); Rodes v. Citizens & S. Nat'l Bank, 147 Ga. App. 782, 250 S.E.2d 513 (1978); Scocca v. Wilt, 243 Ga. 2, 252 S.E.2d 401 (1979); Black v. Cotton States Ins. Co., 149 Ga. App. 71, 253 S.E.2d 565 (1979); Pea-

cock v. Cox, 243 Ga. 261, 253 S.E.2d 728 (1979); Citizens & S. Nat'l Bank v. Brown, 149 Ga. App. 795, 256 S.E.2d 72 (1979); Shield Ins. Co. v. Hutchins, 149 Ga. App. 742, 256 S.E.2d 108 (1979); Canup v. State, 150 Ga. App. 794, 258 S.E.2d 907 (1979); Petkas v. Piedmont-Linberg Corp., 151 Ga. App. 323, 259 S.E.2d 713 (1979); McIntyre v. Gulf Oil Corp., 151 Ga. App. 855, 261 S.E.2d 766 (1979); Price v. Ortiz, 152 Ga. App. 651, 263 S.E.2d 527 (1979); Hart v. State, 153 Ga. App. 53, 264 S.E.2d 542 (1980); Middleton v. Continental Dev. Corp., 153 Ga. App. 144, 264 S.E.2d 689 (1980); Ford v. Liberty Loan Corp., 153 Ga. App. 309, 265 S.E.2d 113 (1980); City of Atlanta v. Barton, 153 Ga. App. 426, 265 S.E.2d 345 (1980); Hubbard v. Farmers Bank, 153 Ga. App. 497, 265 S.E.2d 845 (1980); Westmoreland v. Beutell, 153 Ga. App. 558, 266 S.E.2d 260 (1980); Southeast Ceramics, Inc. v. Klem, 154 Ga. App. 149, 267 S.E.2d 756 (1980); In re Norris, 154 Ga. App. 173, 267 S.E.2d 788 (1980); Hendley v. Auto Owners Ins. Co., 154 Ga. App. 316, 268 S.E.2d 722 (1980); Exum v. City of Valdosta, 246 Ga. 169, 269 S.E.2d 441 (1980); State v. Hart, 246 Ga. 212, 271 S.E.2d 133 (1980); Hawn v. Chastain, 246 Ga. 723, 273 S.E.2d 135 (1980); Knight v. First Nat'l Bank, 156 Ga. App. 167, 274 S.E.2d 139 (1980); MacDonald v. MacDonald, 156 Ga. App. 565, 275 S.E.2d 142 (1980); Caldwell v. Elbert County School Dist., 247 Ga. 359, 276 S.E.2d 43 (1981); Griswold v. Whetsell, 157 Ga. App. 800, 278 S.E.2d 753 (1981); Crosby v. Crosby, 247 Ga. 792, 279 S.E.2d 712 (1981); Colley v. Dillon, 158 Ga. App. 416, 280 S.E.2d 425 (1981); Mack v. Demming, 248 Ga. 117, 281 S.E.2d 591 (1981); Kirby v. Federated Mut. Implement & Hdwe. Ins. Co., 158 Ga. App. 778, 282 S.E.2d 139 (1981); Horton v. Diamond Auto Parts & Recycling, Inc., 158 Ga. App. 750, 282 S.E.2d 207 (1981); McKinnon v. McKinnon, 158 Ga. App. 776, 282 S.E.2d 220 (1981); Harkey v. State, 159 Ga. App. 112, 282 S.E.2d 648 (1981); Cartwright v. Alpha Transp. Serv., Inc., 159 Ga. App. 296, 283 S.E.2d 282 (1981); Tobitt v. Tobitt, 249 Ga. 245, 290 S.E.2d 49 (1982); Newman v. James M. Vardaman & Co., 162 Ga. App. 878, 293 S.E.2d 462 (1982); Collier v. Cosby, 293 S.E.2d 567 (1982); Hooper v. State, 164 Ga. App. 49, 296 S.E.2d 243 (1982); Carson v. Morris, 164 Ga. App. 732, 297 S.E.2d 513 (1982); Johnson v. G.A.B. Bus. Servs., Inc., 165 Ga. App. 284, 300 S.E.2d 325 (1983); Strickland v. State, 165 Ga. App. 197, 300 S.E.2d 537 (1983); Jernigan v. Carroll, 167 Ga. App. 40, 306 S.E.2d 45 (1983); Parks v. Atlanta Pub. Sch. Sys. Bd. of Educ., 168 Ga. App. 572, 309 S.E.2d 645 (1983); Hill Aircraft & Leasing Corp. v. Planes, Inc., 169 Ga. App. 161, 312 S.E.2d 119 (1983); Thomas v. Satterfield, 169 Ga. App. 432, 313 S.E.2d 134 (1984); State v. Waters, 170 Ga. App. 505, 317 S.E.2d 614 (1984); Hazelrig v. State, 171 Ga. App. 97, 319 S.E.2d 32 (1984); Miller v. Rosetti, 171 Ga. App. 162, 319 S.E.2d 61 (1984); Hudgins v. Bacon, 171 Ga. App. 856, 321 S.E.2d 359 (1984); Bowen v. Clayton County Hosp. Auth., 172 Ga. App. 204, 322 S.E.2d 528 (1984); Graham v. State, 172 Ga. App. 660, 324 S.E.2d 518 (1984); Davis v. State, 172 Ga. App. 710, 324 S.E.2d 559 (1984); Savage v. Newsome, 173 Ga. App. 271, 326 S.E.2d 5 (1985); Sunn v. Mercury Marine, 173 Ga. App. 593, 327 S.E.2d 562 (1985); Bouldin v. Contran Corp., 173 Ga. App. 823, 328 S.E.2d 424 (1985); Georgia Communications Corp. v. Horne, 174 Ga. App. 69, 329 S.E.2d 192 (1985); Ball v. Duncan, 174 Ga. App. 341, 330 S.E.2d 160 (1985); Franklin v. Shackelford, 174 Ga. App. 520, 330 S.E.2d 449 (1985); Haywood v. Wooden Peg, Inc., 174 Ga. App. 806, 331 S.E.2d 109 (1985); Wicker v. Harrison, 175 Ga. App. 68, 332 S.E.2d 366 (1985); Law Offices of Johnson & Robinson v. Fortson, 175 Ga. App. 706, 334 S.E.2d 33 (1985); Carpets 'N Colors, Inc. v. Hollycraft Carpets, Inc., 177 Ga. App. 534, 339 S.E.2d 793 (1986); Ehlers v. Schwall & Heuett, 177 Ga. App. 548, 340 S.E.2d 207 (1986); Belk-Hudson Co. v. Patterson, 178 Ga. App. 16, 342 S.E.2d 2 (1986); Daniel v. Leibolt, 178 Ga. App. 186, 342 S.E.2d 334 (1986); Chastain v. Baker, 178 Ga. App. 649, 344 S.E.2d 472 (1986); Dial v. Turner, 179 Ga. App. 689, 347 S.E.2d 305 (1986); McCallister v. Doe, 181 Ga. App. 602, 353 S.E.2d 89 (1987); Hanson v. Wilson, 257 Ga. 5, 354 S.E.2d 126 (1987); Kem Mfg. Corp. v. Sant, 182 Ga. App. 135, 355 S.E.2d 437 (1987); Richardson v. State, 182 Ga. App. 827, 357 S.E.2d 162 (1987);

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Staggs v. Wang, 185 Ga. App. 310, 363 S.E.2d 808 (1987); California Fed. Sav. & Loan Ass'n v. Hudson, 185 Ga. App. 384, 364 S.E.2d 582 (1987); Bruce Tile Co. v. Copelan, 185 Ga. App. 469, 364 S.E.2d 603 (1988); Watts v. State, 185 Ga. App. 654, 365 S.E.2d 501 (1988); Willis v. State, 186 Ga. App. 197, 366 S.E.2d 778 (1988); Booker v. Amdur, 186 Ga. App. 276, 367 S.E.2d 94 (1988); Palmer v. State, 186 Ga. App. 892, 369 S.E.2d 38 (1988); Computer Communications Specialists, Inc. v. Hall, 188 Ga. App. 545, 373 S.E.2d 630 (1988); Suddeth v. Forsyth County, 258 Ga. 773, 373 S.E.2d 746 (1988); Typo-Repro Servs., Inc. v. Bishop, 188 Ga. App. 576, 373 S.E.2d 758 (1988); Aldridge v. State, 188 Ga. App. 729, 374 S.E.2d 223 (1988); Seaton v. Aetna Cas. & Sur. Co., 189 Ga. App. 546, 376 S.E.2d 712 (1988); Gerdes v. Dziewinski, 189 Ga. App. 802, 377 S.E.2d 550 (1989); Rivera v. Harris, 259 Ga. 171, 377 S.E.2d 844 (1989); Jarrett v. Butts, 190 Ga. App. 703, 379 S.E.2d 583 (1989); Rozier v. Davis/Smith Mtg. Corp., 193 Ga. App. 340, 387 S.E.2d 627 (1989); Estfan v. Poole, 193 Ga. App. 507, 388 S.E.2d 373 (1989); State v. Dixon, 194 Ga. App. 146, 390 S.E.2d 600 (1990); City of Fairburn v. Cook, 195 Ga. App. 265, 393 S.E.2d 70 (1990); Val Preda Motors v. National Uniform Serv., 195 Ga. App. 443, 393 S.E.2d 728 (1990); Miller v. Jeff Davis Apts., Ltd. II, 196 Ga. App. 600, 396 S.E.2d 494 (1990); Moore v. Sinclair, 196 Ga. App. 667, 396 S.E.2d 557 (1990); Auld v. Weaver, 196 Ga. App. 782, 397 S.E.2d 51 (1990); Speir v. Nicholson, 198 Ga. App. 383, 401 S.E.2d 588 (1991); Merrill v. Eiberger, 198 Ga. App. 806, 403 S.E.2d 91 (1991); Royal v. Curry, 199 Ga. App. 133, 404 S.E.2d 302 (1991); Fabe v. Floyd, 199 Ga. App. 322, 405 S.E.2d 265 (1991); Slaughter v. State, 199 Ga. App. 695, 405 S.E.2d 897 (1991); Hall v. Bussey, 200 Ga. App. 311, 408 S.E.2d 430 (1991); Stephens v. State, 201 Ga. App. 737, 412 S.E.2d 568 (1991); Castleberry's Food Co. v. Smith, 205 Ga. App. 859, 424 S.E.2d 33 (1992); Atlanta Gas Light Co. v. Georgia Pub. Serv. Comm'n, 206 Ga. App. 315, 425 S.E.2d 340 (1992); Wal-Mart Stores, Inc. v. Curry, 206 Ga. App. 775, 426 S.E.2d 581 (1992); Metropolitan Atlanta Rapid Transit Auth. v. Harrington, 208 Ga. App. 736, 431 S.E.2d 730 (1993); Hall v. World Omni Leasing, Inc., 209 Ga. App. 115, 433 S.E.2d 297 (1993); Miller v. Ingles Mkt., Inc., 214 Ga. App. 817, 449 S.E.2d 166 (1994); Copeland v. Continental Kewitt, 218 Ga. App. 305, 461 S.E.2d 277 (1995); State v. Bishop, 219 Ga. App. 510, 466 S.E.2d 8 (1995); Howard v. City of Columbus, 219 Ga. App. 569, 466 S.E.2d 51 (1995); Richardson v. GMC, 221 Ga. App. 583, 472 S.E.2d 143 (1996); Plumides v. American Engines & Transmissions, Inc., 227 Ga. App. 885, 490 S.E.2d 552 (1997); Goldstein v. Goldstein, 229 Ga. App. 862, 494 S.E.2d 745 (1997); Hopkinson v. Labovitz, 231 Ga. App. 557, 499 S.E.2d 338 (1998); Central of Ga. R.R. v. DEC Assocs., 231 Ga. App. 787, 501 S.E.2d 6 (1998); Hipple v. Simpson Paper Co., 234 Ga. App. 516, 507 S.E.2d 156 (1998); Adams v. State, 234 Ga. App. 696, 507 S.E.2d 538 (1998); Hawkins ex rel. Pearson v. Small World Day Care Ctr., Inc., 234 Ga. App. 843, 508 S.E.2d 200 (1998); Durden v. Griffin, 270 Ga. 293, 509 S.E.2d 54 (1998); Crown Diamond Co. v. N.Y. Diamond Corp., 242 Ga. App. 674, 530 S.E.2d 800 (2000); Pinnell v. Kight, 245 Ga. App. 299, 537 S.E.2d 170 (2000); Camp v. Eichelkraut, 246 Ga. App. 275, 539 S.E.2d 588 (2000); McKinney v. Jennings, 246 Ga. App. 862, 542 S.E.2d 580 (2000); Atlanta Journal-Constitution v. Jewell, 251 Ga. App. 808, 555 S.E.2d 175 (2001); Lott v. Arrington & Hollowell, P.C., 258 Ga. App. 51, 572 S.E.2d 664 (2002); Ball v. Fulton-DeKalb Hosp. Auth., 258 Ga. App. 899, 576 S.E.2d 1 (2002); Ford Motor Co. v. Lawrence, 279 Ga. 284, 612 S.E.2d 301 (2005); Bailey v. McNealy, 277 Ga. App. 848, 627 S.E.2d 893 (2006); Randolph County v. Johnson, 282 Ga. 160, 646 S.E.2d 261 (2007); Sistrunk v. State, 287 Ga. App. 39, 651 S.E.2d 350 (2007); Blair v. Bishop, 290 Ga. App. 721, 660 S.E.2d 35 (2008); Hiner Transp., Inc. v. Jeter, 293 Ga. App. 704, 667 S.E.2d 919 (2008); Lee v. Ga. Power Co., 296 Ga. App. 719, 675 S.E.2d 465 (2009).

Failure to Perfect Service

Plaintiff not entitled to evidentiary hearing. — In a contract action, the trial

court did not err in denying the plaintiff's motion for an extension of time as the plaintiff failed to timely file a trial transcript, and because the motion was improperly filed, the plaintiff was not entitled to an evidentiary hearing. Hadavi v. Palmer, 260 Ga. App. 509, 580 S.E.2d 291 (2003).

Subsection (a) relates to procedure only and is therefore retrospective. Horton v. Western Contracting Corp., 113 Ga. App. 613, 149 S.E.2d 542 (1966).

Failure of service which causes no harm is not ground for dismissal. — When counsel for third-party defendant appears in court and argues merits of the claim both orally and by brief, the third-party defendant is not harmed by failure of service, and there is no ground to dismiss the appeal. Petroleum Carrier Corp. v. Jones, 127 Ga. App. 676, 194 S.E.2d 670 (1972).

Mandatory Dismissal of Appeal

1. In General

Dismissal of appeal mandatory only in instances provided in subsection (b). Young v. Climatrol S.E. Distrib. Corp., 237 Ga. 53, 226 S.E.2d 737 (1976).

Dismissal of cross-appeal required since cross-appeal had no independent basis for jurisdiction. — Georgia Department of Transportation's (DOT's) cross-appeal was dismissed with regard to a trial court's grant of an asphalt company's motions in limine and the denial of the DOT's partial motion for summary judgment since the asphalt company's direct appeal was dismissed for failure to file a brief and enumerations of error; therefore, the cross-appeal could not survive on the cross-appeal's own under O.C.G.A. § 5-6-48. The DOT never applied for interlocutory review of the rulings of the trial court it was challenging, therefore, the appellate court had no independent basis for jurisdiction over the cross-appeal. State, DOT v. Douglas Asphalt Co., 297 Ga. App. 511, 677 S.E.2d 728 (2009).

2. Failure to Timely File Notice of Appeal

Proper, timely filing of notice of appeal is an absolute requirement to confer appellate jurisdiction. Hester v. State, 242 Ga. 173, 249 S.E.2d 547 (1978).

Failure to file notice of appeal within time required is ground for dismissal. Stanford v. Evans, Reed & Williams, 221 Ga. 331, 145 S.E.2d 504 (1965); Shepherd v. Epps, 242 Ga. 322, 249 S.E.2d 33 (1978); Littlejohn v. Tower Assocs., 163 Ga. App. 37, 293 S.E.2d 33 (1982), overruled on other grounds, MMT Enters., Inc. v. Cullars, 218 Ga. App. 559, 462 S.E.2d 771 (1995).

When notice of appeal was given more than 30 days after entry of judgment, judgment is not reviewable and appeal must be dismissed. Buckhead Doctors' Bldg., Inc. v. Oxford Fin. Cos., 116 Ga. App. 503, 157 S.E.2d 767 (1967).

If the plaintiff wishes more than 30 days allowed by court order to deliberate on whether the plaintiff should appeal dismissal of the complaint, the plaintiff's remedy is to apply for an extension of time as provided in Ga. L. 1965, p. 18, § 6 (see O.C.G.A. § 5-6-39). When the appellant failed to exercise this provision of the law and the appellee filed a motion to dismiss the appeal under Ga. L. 1966, p. 493, § 10 (see O.C.G.A. § 5-6-48), the court had no alternative but to grant the motion and dismiss the appeal. Hearn v. DeKalb County, 118 Ga. App. 730, 165 S.E.2d 467 (1968).

Failure to file a notice of appeal within the time required, 30 days after entry of judgment complained of unless the trial judge has extended the time, will result in the judgment's dismissal. Associated Bldrs. Supply v. Georgia-Pacific Corp., 123 Ga. App. 222, 180 S.E.2d 273 (1971).

Judgment complained of by parents was a trial court's finding that the parents' children were deprived pursuant to O.C.G.A. § 15-11-2(8)(A), and not a later order ruling that the case was closed; the parents' notice of appeal filed more than three months after the order finding deprivation was untimely, and the appeal was dismissed. In the Interest of I.S., 265 Ga. App. 759, 595 S.E.2d 528 (2004).

Failure to obtain extension before expiration of previously extended time. — When the plaintiff fails to obtain an extension of time for expiration of previously extended time, and failed to file

Mandatory Dismissal of Appeal (Cont'd)
2. Failure to Timely File Notice of Appeal (Cont'd)

a transcript of the evidence within the extended time, the trial judge is authorized to enter dismissal of the appeal. Allen v. Seaboard C.L.R.R., 128 Ga. App. 391, 196 S.E.2d 878 (1973).

Filing notice one day late requires dismissal. — When notice of appeal was filed only one day late, the court was powerless to deny a motion to dismiss filed by the appellee. Associated Bldrs. Supply v. Georgia-Pacific Corp., 123 Ga. App. 222, 180 S.E.2d 273 (1971).

Inexcusable and unreasonable delay. — Considering the fact that the mistaken designation in the notice of appeal could have been easily discovered if some attention had been paid to the matter, and that the earliest inquiry about the status of the appeal did not occur until several months after the notice of appeal had been filed, the trial court was duly authorized to find that plaintiff's delay was inexcusable and unreasonable. Johnson v. Georgia Pub. Serv. Comm'n, 209 Ga. App. 224, 433 S.E.2d 65 (1993); Lindstrom v. Forsyth County, 221 Ga. App. 581, 472 S.E.2d 106 (1996).

Because a limited liability company (LLC) failed to offer an explanation as to why the company did not hire an attorney, obtain the transcript or take any other steps to pursue the company's appeal for over two and one-half years, the trial court did not abuse the court's discretion in dismissing the appeal, as the lengthy delay was unreasonable, inexcusable, and caused by the LLC. Winzer v. EHCA Dunwoody, LLC, 277 Ga. App. 710, 627 S.E.2d 426 (2006).

Notice of appeal from judgment granting child custody must meet time requirement of § 5-6-35(g). — Subsection (g) of Ga. L. 1979, p. 619, §§ 3, 6 (see O.C.G.A. § 5-6-35) read in conjunction with paragraph (b)(1) of Ga. L. 1978, p. 1986, § 1, subjects notice of appeal from judgment granting child custody to dismissal if the appellant fails to file the notice within ten days after the order is issued granting application for such appeal. Evans v. Davey, 154 Ga. App. 269, 267 S.E.2d 875 (1980).

Notice of appeal from judgment in contempt of alimony judgment. — Subsection (g) of Ga. L. 1979, p. 619, §§ 3, 6 (see O.C.G.A. § 5-6-35), read in conjunction with paragraph (b)(1) of Ga. L. 1978, p. 1986, § 1 (see O.C.G.A. § 5-6-48), subjects notice of appeal from judgment in contempt of alimony judgment to dismissal if the appellant fails to file the notice within ten days after order is issued granting the application for such appeal. Harris v. Harris, 245 Ga. 75, 263 S.E.2d 113 (1980).

Attorney's stipulation regarding record on appeal does not affect running of time. — Fact that attorneys for the parties, after time limit for filing appeal entered into a stipulation as to what would constitute the record on appeal and filed the appeal, could have no effect on running of time within which notice of appeal must be filed. Kokotis v. Lightsey, 227 Ga. 800, 183 S.E.2d 383 (1971).

Reaffirmance of dismissal of counterclaims does not extend time for filing. — When the time for filing the notice of appeal runs from the date of the voluntary dismissal of the appellees' counterclaims, the trial court is powerless to extend the time by entering a subsequent order reaffirming the dismissal of the complaint, even had the court intended to do so. Caswell v. Caswell, 157 Ga. App. 710, 278 S.E.2d 452 (1981).

Delay in filing amendment to notice of appeal. — Although it is over two months later, after the expiration of the statutory appeal period, that the appellant filed an amendment to the appellant's original notice of appeal to correct the error the appellant made, in light of O.C.G.A. §§ 5-6-30 and 5-6-48, the appellant is entitled to amend the appellant's notice of appeal to correct the name of the court to which the appeal is directed. Griffin v. Johnson, 157 Ga. App. 657, 278 S.E.2d 422 (1981).

Filing during unauthorized second extension. — Under O.C.G.A. § 5-6-39, the trial court is authorized to grant only one extension of time for filing of notice of appeal; thus, filing of notice of appeal during unauthorized second extension

comes too late to satisfy requirement of O.C.G.A. § 5-6-48. Hamby v. State, 162 Ga. App. 348, 291 S.E.2d 724 (1982).

Insufficient motion for new trial does not extend filing date. — Alleged motion for new trial which did not contest factual issues or errors contributing to the verdict, but instead challenged only the trial court's legal conclusions and judgment was not a proper motion for new trial and did not entitle party to an automatic stay in filing the party's notice of appeal. Bank S. Mtg., Inc. v. Starr, 208 Ga. App. 19, 429 S.E.2d 700 (1993).

3. Appeals From Nonfinal Judgments

Dismissal proper when judgment appealed was neither final nor certified for review under former Code 1933, § 6-701 (see O.C.G.A. § 5-6-34). Marsh v. Allgood, 118 Ga. App. 773, 165 S.E.2d 479 (1968); D.C.E. v. State, 130 Ga. App. 724, 204 S.E.2d 481 (1974).

Appeal taken from two orders that appeared to be non-final, was dismissed; moreover, as no certificate of immediate review was obtained, and since no amendment was filed to correct the defect in the notice of appeal, no other recourse remained. Southwest Health & Wellness, LLC v. Work, 282 Ga. App. 619, 639 S.E.2d 570 (2006).

Fact that matter was heard at chambers. — Judgment which was not appealable under Ga. L. 1972, p. 624, § 1 (see O.C.G.A. § 5-6-48) was is not made appealable by former Code 1933, § 6-901 (see O.C.G.A. § 5-6-33) merely because the matter was heard at chambers. Sheet Metal Workers Int'l Ass'n v. Carter, 131 Ga. App. 176, 205 S.E.2d 715 (1974).

Appeal while motion for new trial is pending must be dismissed as premature. Smith v. Smith, 128 Ga. App. 29, 195 S.E.2d 269 (1973).

Appeal from "motion to compel settlement" was dismissed since the appeal was actually intended to be taken from an interlocutory order rather than from the "final outcome" of the case, and no amendment had been filed to correct this defect. Martin v. Farrington, 179 Ga. App. 227, 346 S.E.2d 5 (1986).

4. Moot Questions

Intermediate order appealed from becomes moot when subsequent final judgment is entered. Newman v. Steinberg, 133 Ga. App. 824, 212 S.E.2d 479 (1975).

Supreme Court's affirmance of judgment denying habeas petition moots other appeals. — When Supreme Court has affirmed judgment denying the appellant's petition for writ of habeas corpus, appeal from the same judgment, filed in the Court of Appeals and transferred to the Supreme Court, must be dismissed as moot. Hubert v. State, 244 Ga. 374, 260 S.E.2d 83 (1979).

Appeal from dissolution of restraining order dismissed when issue involved has become moot. — When appellants bring action to enjoin appellees from conducting corporate stockholders meeting for purpose of electing directors, and the trial court, after hearing, dissolves restraining order and dismisses the complaint for failure to state a claim, and the appellees then held a stockholder's meeting, an appeal of order dissolving the restraining order and dismissing the complaint must be dismissed pursuant to paragraph (b)(3). Strickland v. Adams, 231 Ga. 729, 204 S.E.2d 294 (1974).

Review of earlier judgment denying summary judgment. — After verdict and judgment, it is too late to review earlier judgment denying summary judgment, for that judgment becomes moot when the court reviews the evidence upon the trial of the case. Rich v. Strickland, 168 Ga. App. 107, 308 S.E.2d 206 (1983).

Motion to dismiss as moot an appeal of the entry of summary judgment. — College's motion to dismiss as moot a Baptist convention's appeal of the entry of summary judgment for the college as to the convention's request for an injunction barring the college from dissolving was denied as the trial court's order dissolving a temporary restraining order was entered the day before the college filed articles of dissolution with the Georgia Secretary of State, the certificate of dissolution was entered nunc pro tunc, and the convention's counsel received the order on the date the certificate was effective; thus, the convention did not have

Mandatory Dismissal of Appeal (Cont'd)
4. Moot Questions (Cont'd)

notice to require the convention to obtain a supersedeas. Baptist Convention v. Shorter College, 266 Ga. App. 312, 596 S.E.2d 761 (2004), aff'd, 279 Ga. 466, 614 S.E.2d 37 (2005).

Ex-employer's motion to dismiss on appeal moot. — Trial court granted the employee leave to amend the answer to include a claim for wrongful restraint, which remained pending below, and thus, the appellate court had to decide whether the restrictive covenant actually enforced against the employee was illegal; if the restrictive covenant was, then the employee's wrongful restraint claim was meritorious, and the employee could recover such costs and damages, O.C.G.A. § 9-11-65(c), as the employee may have suffered during the period of the injunction's enforcement. Therefore, the ex-employer's motion to dismiss the appeal as moot under O.C.G.A. § 5-6-48(b)(3) was denied. Cox v. Altus Healthcare & Hospice, Inc., 308 Ga. App. 28, 706 S.E.2d 660 (2011).

Dismissal by trial court. — Although O.C.G.A. § 5-6-48 does not specifically empower a trial court to dismiss an appeal for mootness, the Court of Appeals will affirm the trial court's dismissal of notices of appeal because the decision or judgment was not then appealable and hold that the trial court is empowered to dismiss an appeal where the questions presented have become moot. Attwell v. Lane Co., 182 Ga. App. 813, 357 S.E.2d 142 (1987).

Trial court without discretion to rule on moot question. — When a father petitioned to have his name removed from the child abuse registry and challenged the constitutionality of the statute establishing the registry, and the trial court expunged the father's name as he requested, the trial court had no discretion to rule on the constitutional question and did not err in declaring the constitutional challenge moot. In re I.B., 219 Ga. App. 268, 464 S.E.2d 865 (1995).

If case is moot, but error is capable of repetition, yet evades review, the appeal will be considered. Chastain v. Baker, 255 Ga. 432, 339 S.E.2d 241 (1986).

Ground for dismissal. — Mootness is a ground for dismissal of an appeal, and not a ground for the vacation of a judgment. Harrell v. Huntington Assocs., 190 Ga. App. 421, 379 S.E.2d 194 (1989).

Appeal deemed moot and dismissed. — Glenridge Unit Owners Ass'n v. Felton, 183 Ga. App. 858, 360 S.E.2d 418 (1987); Computone Corp. v. Branch, Pike & Ganz, 264 Ga. 844, 452 S.E.2d 114 (1995); Rohm & Haas Co. v. Gainesville Paint & Supply Co., 225 Ga. App. 441, 483 S.E.2d 888 (1997); Federal Nat'l Mtg. Ass'n v. DeMoonie, 231 Ga. App. 162, 497 S.E.2d 677 (1998); Good Ol' Days Commissary, Inc. v. Longcrier Family Ltd. Partnership I, 240 Ga. App. 111, 522 S.E.2d 249 (1999).

Declaratory judgment action filed by the sole commissioner of a county in the commissioner's official capacity to determine the commissioner's power vis-a-vis that of the county advisory board to enter into a lease-purchase contract for a county jail became moot when the voters provided the budgetary authority in the referendum. Bond v. Parten, 206 Ga. App. 88, 424 S.E.2d 353 (1992).

Dismissal was required of the defendant's appeal of a consent agreement resolving a breach of contract in real estate when the defendant had specifically agreed to the agreement and was thus not an aggrieved party and when the defendant's only enumerations of error concerned the grant of partial summary judgment and did not challenge the terms, validity, or enforceability of the judgment entered pursuant to the agreement. Riverdale Pools & Constr., Inc. v. Evans, 210 Ga. App. 127, 435 S.E.2d 501 (1993).

When the county board of health had unilaterally lifted home confinement of the defendant as part of the treatment plan for the defendant's contagious tuberculosis, the defendant's appeal from the trial courts order of compliance with the board's plan was moot since reversal of the trial court would be of no practical benefit to the defendant, and the action did not fall within the class of cases which would inevitably evade review. Kappers v. DeKalb County Bd. of Health, 214 Ga. App. 117, 446 S.E.2d 794 (1994).

Because the defendant failed to file a timely direct appeal of the denial of the defendant's request for appellate counsel, the defendant was precluded from raising the same issue again; further, the defendant had withdrawn from the appellate court the record from the defendant's original appeal, and therefore the appellate court did not know whether the defendant attempted to raise the issue of appellate counsel during the defendant's initial appeal; as the initial appeal had been decided, the issue was moot under O.C.G.A. § 5-6-48(b)(3). Spear v. State, 271 Ga. App. 845, 610 S.E.2d 642 (2005).

Since a debtor had taken a direct appeal in a separate case on the dismissal of the debtor's application to appeal an order substituting a party plaintiff, any error upon the dismissal of the debtor's application for interlocutory review was moot. Kent v. A.O. White, Jr., Consulting Eng'r, Inc., 279 Ga. App. 563, 631 S.E.2d 782 (2006).

As a homeowner last operated a haunted house on the homeowner's property on October 31, 2007, a city's attempt to enjoin the activity was moot, and dismissal was appropriate under O.C.G.A. § 5-6-48(b). City of Comer v. Seymour, 283 Ga. 536, 661 S.E.2d 539 (2008).

Patients' appeal of a judgment entered against the patients in a medical malpractice action on the ground that it was error to grant a motion to transfer filed by a hospital and corporation pursuant to the forum non conveniens statute, O.C.G.A. § 9-10-31.1, was dismissed as moot because the patients admitted in the patients' appellate brief that the patients' case had already been adjudicated, and it was too late for the patients to obtain an adjudication of the patients' case in the Fulton County Superior Court; therefore, any determination by the court of appeals regarding whether the Fulton County Superior Court was authorized under the forum non conveniens statute to transfer the patients' case to Cobb County Superior Court for adjudication would be an abstract exercise unrelated to any existing facts or rights. Lamb v. Javed, No. A09A2234, 2010 Ga. App. LEXIS 44 (Jan. 19, 2010).

Denial of a bank's motion for summary judgment on a business owner's counterclaim was moot on appeal because the bank did not move for a directed verdict, which point was specifically brought to the attention of the court and the jury considered the counterclaim and returned a verdict. Ameris Bank v. Alliance Inv. & Mgmt. Co., No. A12A1721, 2013 Ga. App. LEXIS 232 (Mar. 20, 2013).

Where appeal was based on action taken pursuant to statute later declared unconstitutional, the question of abuse of discretion under the statute was moot; thus, dismissal of the appeal upon the court's own motion was proper and there could be no cross-appeal. Bergmann v. McCullough, 218 Ga. App. 353, 461 S.E.2d 544 (1995), cert. denied, 517 U.S. 1141, 116 S. Ct. 1433, 134 L. Ed. 2d 555 (1996).

Mortgagor's appeal from a writ of possession, which was granted in favor of the mortgagee after the mortgagor's property was foreclosed upon and the mortgagor refused to surrender possession, was dismissed pursuant to O.C.G.A. § 5-6-48(b)(3) because the parties had entered into a consent agreement with respect to the writ of possession and, accordingly, the matter was moot; it was noted that pursuant to the consent judgment which embodied the agreement, the mortgagor had agreed to withdraw the mortgagor's pending appeal. Hurt v. Norwest Mortg., Inc., 260 Ga. App. 651, 580 S.E.2d 580 (2003).

Issue of illegal withholding of child moot. — When the parties had a common law marriage which resulted in the father forcefully keeping the child and filing for divorce and custody of the child, once the legitimation issue was resolved, the father had an equal right to the child's physical and legal custody and the issue of his illegal withholding of the child became moot. Gregg v. Barnes, 203 Ga. App. 549, 417 S.E.2d 206, cert. denied, 203 Ga. App. 906, 417 S.E.2d 206 (1992).

Acceptance of an attorney's fees payment by the plaintiff did not render an appeal moot because there was an inference that the payment was accepted as a partial payment and because the attorney fees issue was collateral to the main judgment appealed. Claxton Enter.

Mandatory Dismissal of Appeal (Cont'd)
4. Moot Questions (Cont'd)

v. Evans County Bd. of Comm'rs, 249 Ga. App. 870, 549 S.E.2d 830 (2001).

Insured's prevailing on merits rendered insurer's appeal moot. — Insurer that sought a declaratory judgment ruling on the insurer's obligations under a multi-peril insurance policy issued to a company whose employee was under the influence of alcohol at the time of a collision because of alcoholic beverages served to the employee by other employees during a company function had no claim because the insurer could not have suffered prejudice because the company had prevailed on the merits. Southern Guar. Ins. Co. v. Viau, 203 Ga. App. 806, 418 S.E.2d 608, cert. denied, 203 Ga. App. 907, 418 S.E.2d 608 (1992).

Suit regarding county contract moot by voter approval. — Declaratory judgment action filed by the sole commissioner of a county in the commissioner's official capacity to determine the commissioner's power vis-a-vis that of the county advisory board to enter into a lease-purchase contract for a county jail became moot when the voters provided the budgetary authority in the referendum. Bond v. Parten, 206 Ga. App. 88, 424 S.E.2d 353 (1992).

Annexation challenge rendered moot by city's annexation of additional property. — Taxpayer's challenge to a city's 2007 annexation of property based on the creation of an illegal unincorporated island within the new municipal boundaries, in violation of O.C.G.A. § 36-36-4, was moot under O.C.G.A. § 5-6-48(b)(3) because the city later remedied the violation by also annexing the unincorporated island. Scarbrough Group v. Worley, 290 Ga. 234, 719 S.E.2d 430 (2011).

Appeal of denial of nomination petition was moot. — Regardless of the merits or lack thereof of the candidate's claims that the candidate's nomination petition was miscounted, improperly counted, or that there were irregularities in the process leading to the unlawful decision to keep the candidate off the November ballot, the candidate's present appeal was moot because the general election had already taken place. Bodkin v. Bolia, 285 Ga. 758, 684 S.E.2d 241 (2009).

Delay in Filing Transcript

1. In General

Time not jurisdictional. — Time provided for filing transcript of evidence and proceedings in appeals is not jurisdictional. Taylor v. Thompson, 152 Ga. App. 547, 263 S.E.2d 487 (1979).

Failure to file a transcript in accordance with § 5-6-42 is not jurisdictional, and is not a ground for dismissal unless accompanied by finding of unreasonableness and lack of excuse, as required by subsection (c) of this section. Young v. Jones, 147 Ga. App. 65, 248 S.E.2d 49 (1978).

In considering question of unreasonable delay, it should be remembered that the time provided for filing transcript or record is not jurisdictional, but merely a means of avoiding unreasonable delay so that the case can be presented on earliest possible calendar in appellate court. Young v. Climatrol S.E. Distrib. Corp., 237 Ga. 53, 226 S.E.2d 737 (1976); Gilland v. Leathers, 141 Ga. App. 680, 234 S.E.2d 338 (1977); Ray v. Williams, 144 Ga. App. 155, 240 S.E.2d 577 (1977); Compher v. Georgia Waste Sys., 155 Ga. App. 819, 273 S.E.2d 200 (1980).

Time provided for filing transcript or record is not jurisdictional, but merely a means of avoiding unreasonable delay so that case can be presented on earliest possible calendar in appellate courts. Green v. Weaver, 161 Ga. App. 295, 291 S.E.2d 247 (1982).

Failure of an appellant to cause the transcript to be filed in accordance with the time limitations set forth in O.C.G.A. § 5-6-42 is not itself a ground for dismissal of the appeal, absent a judicial determination that the resulting delay was both unreasonable and inexcusable. Llano v. DeKalb County, 174 Ga. App. 693, 331 S.E.2d 36 (1985); Barmore v. Himebaugh, 205 Ga. App. 381, 422 S.E.2d 255 (1992).

Transcript not required for appellate review. — Although a petroleum

company did not obtain a transcript of the trial court's hearing on a bank's motion to dismiss the company's action in a timely manner and a transcript could not be obtained as a result, the appellate court found that the court did not need the transcript to rule on the company's appeal, and the court upheld the trial court's judgment denying the bank's motion to dismiss the company's appeal. Griffis v. Branch Banking & Trust Co., 268 Ga. App. 588, 602 S.E.2d 307 (2004).

Failure to file transcript is no longer ground for dismissal of appeals by appellate courts. Jackson v. Fincher, 128 Ga. App. 148, 195 S.E.2d 762 (1973).

Court of Appeals lacks authority to dismiss any appeal because of failure of any party to cause transcript of evidence and proceedings to be filed within time provided by law or order of court. Reed v. Arrington-Blount Ford, Inc., 148 Ga. App. 595, 252 S.E.2d 13 (1979); Campbell v. Crumpton, 173 Ga. App. 488, 326 S.E.2d 845 (1985); State v. Jackson, 188 Ga. App. 259, 372 S.E.2d 823 (1988).

Failure to include transcript of hearing on motion to dismiss appeal. — Because a broker failed to include a transcript of the hearing on the broker's motion to dismiss the sellers' appeal, specifying in the broker's notice of appeal that a transcript of evidence and proceedings of the hearing would not be filed for inclusion in the record on appeal, the court of appeals had to assume the trial court's ruling denying the motion was correct. Cochran v. Kennelly, 306 Ga. App. 838, 703 S.E.2d 411 (2010).

Distinction between appellate courts' right to dismiss appeals and trial courts' right. — Buffalo Holding Co. v. Shores, 124 Ga. App. 868, 186 S.E.2d 339 (1971), appeal dismissed, 228 Ga. 854, 188 S.E.2d 790 (1972).

Subsection (c) does not affect appellate courts' constitutional responsibility. — Provision of subsection (c) of Ga. L. 1968, p. 1072, §§?n 2, 3 (see O.C.G.A. § 5-6-48) that trial courts, rather than appellate courts, may dismiss appeals for failure of party to file transcript within proper time, does not change responsibility of appellate court under Ga. Const. 1976, Art. VI, Sec. II, Para. V (see Ga. Const. 1983, Art. VI, Sec. IX, Para. II), and appellate court will dismiss a state appeal. Cox Enters., Inc. v. Southland, Inc., 226 Ga. 794, 177 S.E.2d 653 (1970), cert. denied, 401 U.S. 993, 91 S. Ct. 1231, 28 L. Ed. 2d 531 (1971).

Effect of Ga. L. 1968, p. 1072, §§ 2, 3 on subsection (c) was to permit disposition of case in trial court. Richardson v. Nu-Way Cleaners & Laundry, 121 Ga. App. 425, 174 S.E.2d 202 (1970).

Only way to raise question of late filing of transcript is under this section. Gilman Paper Co. v. James, 235 Ga. 348, 219 S.E.2d 447 (1975).

Determination of whether delay was unreasonable or inexcusable required. — Trial court, in reaching a decision whether a delay in filing a transcript justified dismissal of the appeal, had to consider whether the delay was unreasonable and inexcusable. Russell Morgan Landscape Mgt. v. Velez-Ochoa, 252 Ga. App. 549, 556 S.E.2d 827 (2001).

Trial court erred in denying a motion to dismiss a patient's appeal for failure to timely pay the bill of costs as required by O.C.G.A. § 5-6-48(c) because the trial court did not determine the length of the delay, the reasons for the delay, whether the patient caused the delay, and whether the delay was inexcusable; the trial court merely entered a summary order denying the motion to dismiss and relied exclusively upon the arguments and uncorroborated averments contained in the patient's responsive brief, and as a result, the court of appeals was unable to engage in meaningful appellate review of whether the trial court properly exercised the court's discretion in denying the motion to dismiss the appeal. Grant v. Kooby, 310 Ga. App. 483, 713 S.E.2d 685 (2011).

Unreasonable distinguished from inexcusable. — Question of whether a delay in filing a transcript is unreasonable is a separate matter from the issue of whether such a delay is inexcusable and refers principally to the length and effect of the delay rather than the cause of the delay. Cook v. McNamee, 223 Ga. App. 460, 477 S.E.2d 884 (1996).

Dismissal for delay in filing transcript requires exercise of discretion. — Subsection (c) which empowers trial

Delay in Filing Transcript (Cont'd)
1. In General (Cont'd)

courts to dismiss appeals for delay in filing transcript or transmitting record, requires exercise of discretion by the judge. Strother v. C. & S. Nat'l Bank, 147 Ga. App. 140, 248 S.E.2d 204 (1978).

Criteria for dismissal. — Subsection (c) of O.C.G.A. § 5-6-48 sets forth three criteria for dismissal of the appeal for failure to timely file a transcript: (1) unreasonable delay, which was (2) inexcusable and (3) "caused by such party." Department of Human Resources v. Patillo, 196 Ga. App. 778, 397 S.E.2d 47 (1990).

Provisions governing power of court to dismiss appeal for late filing. — Southeastern Plumbing Supply Co. v. Lee, 232 Ga. 626, 208 S.E.2d 449 (1974).

When appellant fails to present adequate record for review. — Subsection (c) of O.C.G.A. § 5-6-48 does not prohibit affirmance when the appellant fails to present the appellate court with record sufficient to enable the court to determine whether trial court has committed reversible error. Brown v. Frachiseur, 247 Ga. 463, 277 S.E.2d 16 (1981).

When clerk is unable to timely transmit record. — Although a court clerk's certificate under O.C.G.A. § 5-6-43 that was attached to a record on appeal indicated that the delay in the transmission of the record was not due to any fault by the insurer that had appealed, as the certificate was dated months after the trial court dismissed an earlier appeal under O.C.G.A. § 5-6-48(c), it was clearly not considered by the trial court in the court's dismissal decision, and accordingly, it was not considered by the appellate court on appeal from the dismissal. ACCC Ins. Co. v. Pizza Hut of Am., Inc., 314 Ga. App. 655, 725 S.E.2d 767 (2012).

Absent transcript, trial court findings assumed authorized. — When the defendant has not provided the appellate court with a transcript of the trial, the court must assume that the findings of the trial court were authorized by the evidence. MacDonald v. MacDonald, 156 Ga. App. 565, 275 S.E.2d 142 (1980).

Trial court did not abuse the court's discretion by dismissing a security corporation's appeal of a civil judgment against the corporation as a result of having failed to have filed a transcript within 30 days as required by O.C.G.A. § 5-6-42. Since no transcript existed, the appellate court was unable to determine whether the security corporation had rebutted the presumption that the filing of the transcript 49 days after the 30-day statutory deadline for filing transcripts was unreasonable and no extension was requested. Pioneer Sec. & Investigations, Inc. v. Hyatt Corp., 295 Ga. App. 261, 671 S.E.2d 266 (2008).

No transcript to include as part of record. — There was no abuse of discretion in the trial court's dismissal of the appeal when the appeal was delayed because of the appellant's designation of the transcript to be included as part of the record when there was no transcript and appellant's counsel made no effort to expedite the appeal since filing the notice of appeal. Teston v. Mills, 203 Ga. App. 20, 416 S.E.2d 133 (1992).

Affidavits of indigency precluded dismissal. — Although the plaintiff's delay in following up on the transmission of the record was unreasonable and inexcusable, the language of O.C.G.A. §§ 5-6-30 and 5-6-48 mandated that the appellate practice provisions be liberally construed. Accordingly, the trial court properly denied the defendant's motion to dismiss when the plaintiffs had filed affidavits of indigency. Carter v. Fulton-DeKalb County Hosp. Auth., 209 Ga. App. 384, 433 S.E.2d 433 (1993).

2. Unreasonable, Inexcusable Delay

Cause for delay in processing of appeal is fact issue for determination in trial court. Gilman Paper Co. v. James, 235 Ga. 348, 219 S.E.2d 447 (1975); ITT Indus. Credit Co. v. Burnham, 152 Ga. App. 641, 263 S.E.2d 482 (1979).

Whether there has been unreasonable delay in filing transcript is fact issue for trial court determination. Johnson v. Clements, 135 Ga. App. 495, 218 S.E.2d 109 (1975).

Finding of unreasonable and inexcusable delay required for dismissal. — Failure to timely file transcript is not basis for dismissal of appeal unless the trial court finds that the delay was unrea-

sonable, and that the unreasonable delay was inexcusable. Patterson v. Professional Resources, Inc., 242 Ga. 459, 249 S.E.2d 248 (1978); Ballenger Corp. v. Dresco Mechanical Contractors, 156 Ga. App. 425, 274 S.E.2d 786 (1980); White v. Olderman Realty & Dev. Co., 163 Ga. App. 57, 293 S.E.2d 726 (1982).

Provision authorizing trial court to dismiss the appeal for failure to make timely filing of the transcript specifies that two elements must be present: one is that the delay is unreasonable and the other is that the unreasonable delay is inexcusable. Young v. Climatrol S.E. Distrib. Corp., 237 Ga. 53, 226 S.E.2d 737 (1976); ITT Indus. Credit Co. v. Carpet Factory, Inc., 140 Ga. App. 204, 230 S.E.2d 354 (1976), appeal dismissed, 143 Ga. App. 218, 237 S.E.2d 687 (1977); Young v. Jones, 147 Ga. App. 65, 248 S.E.2d 49 (1978); Smith v. Georgia Power Co., 183 Ga. App. 295, 358 S.E.2d 879 (1987).

With regard to delays in transmitting an appeal record to the appellate court, a trial court may dismiss an appeal when the delay was unreasonable, inexcusable, and caused by the failure of a party to pay costs in the trial court or file an affidavit of indigence. Hameed v. Hall, 234 Ga. App. 890, 508 S.E.2d 680 (1998).

Discretion is in trial court. — Section gives discretion to trial court to dismiss appeal if delay in transmitting record is both unreasonable and inexcusable. Corbin v. First Nat'l Bank, 151 Ga. App. 33, 258 S.E.2d 697 (1979).

When there has been unreasonable delay in filing of transcript and it is shown that the delay was inexcusable and was caused by the appellant, the trial court may order the appeal dismissed, and in such cases, it is error to dismiss the appeal based upon jurisdictional grounds and to fail to determine whether or not delay, if any, was "unreasonable" and "inexcusable." Green v. Weaver, 161 Ga. App. 295, 291 S.E.2d 247 (1982).

Failure to apply for an extension of time within which to file the transcript does not automatically convert a subsequent delay into one which fits all of the conditions necessary to vest the trial court with the discretion to dismiss the appeal. The trial court has discretion to dismiss an appeal for failure to timely file a transcript only if: (1) the delay in filing was unreasonable; or (2) the failure to timely file was inexcusable in that it was caused by some act of the party responsible for filing the transcript. Baker v. Southern Ry., 260 Ga. 115, 390 S.E.2d 576 (1990); Burns v. Howard, 239 Ga. App. 315, 520 S.E.2d 491 (1999).

Trial court did not abuse the court's discretion in finding that the delay in timely filing a transcript was caused by plaintiffs and was inexcusable, given the plaintiffs undisputed failure to seek another extension of the deadline and the trial court's authorization to conclude that the plaintiffs had failed even to order the additional portions of the transcript until the deadline had passed. Van Diviere v. Delta Airlines, 204 Ga. App. 573, 420 S.E.2d 27, cert. denied, 204 Ga. App. 922, 420 S.E.2d 27 (1992).

There was no abuse of discretion in the trial court's dismissal of the notice of appeal from the directed verdict on a counterclaim, on the grounds that the three-month delay was inexcusable, unreasonable, and caused by the party's failure to pay the required deposit for preparation of the transcript. Crocker v. Stevens, 210 Ga. App. 231, 435 S.E.2d 690 (1993), cert. denied, 511 U.S. 1053, 114 S. Ct. 1613, 128 L. Ed. 2d 340 (1994), overruled on other grounds, Kim v. Lim, 254 Ga. App. 627, 563 S.E.2d 485 (2002).

No finding of lack diligence. — Trial court's finding that the appellants had not been diligent in determining that there would be a delay was not supported by the record which revealed that the appellants' counsel ordered the transcript in a timely manner, made timely payment, and made reasonable inquiry as to the status of its preparation and that the court reporter knew the reporter needed to complete the transcript as soon as possible, that the reporter was aware of the 30-day deadline, and that the earliest the reporter could complete the transcript was the end of July. Welch v. Welch, 212 Ga. App. 667, 442 S.E.2d 857 (1994).

Findings of fact required. — Trial court's failure to make findings with regard to the reasonableness and excusability of the delay, as well as on the issue of causation, mandates a reversal of

Delay in Filing Transcript (Cont'd)
2. Unreasonable, Inexcusable Delay (Cont'd)

the court's dismissal order and a remand with direction that findings of fact be entered on these issues. Wood v. Notte, 238 Ga. App. 748, 519 S.E.2d 923 (1999).

Trial court's order dismissing appeal for the failure to file the transcript was affirmed when the evidence showed: (1) that although the transcript was completed sometime in late September or early October, the appellant failed to have the transcript filed by November 13 as ordered by the court; (2) that the delay was due to the appellant's own failure to timely pay the court reporter; and (3) that the delay was inexcusable as the appellant sought the third extension of time on the ground that the court reporter needed more time to prepare the transcript, accepting no responsibility for, and making no mention of, the appellant's own failure to pay the court reporter the balance due. Quarles v. Saddleback Ridge Condos. Ass'n, 266 Ga. App. 467, 597 S.E.2d 460 (2004).

Trial court did not abuse the court's discretion in granting a dismissal of the plaintiff's appeal, pursuant to O.C.G.A. § 5-6-42, because the plaintiff failed to file a transcript for the plaintiff's appeal for more than 17 months after the plaintiff filed the notice of appeal, the plaintiff never sought an extension of time for such filing under O.C.G.A. § 5-6-39, and the court held that the plaintiff's action was unreasonable, inexcusable, and caused by the plaintiff's own conduct; there was no requirement that a hearing be held on the motion to dismiss, pursuant to O.C.G.A. § 5-6-48(c), as the plaintiff was only entitled to an opportunity to be heard, which the plaintiff received. Lemmons v. Newton, 269 Ga. App. 880, 605 S.E.2d 626 (2004).

Appeal was properly dismissed for failure to timely file a transcript under O.C.G.A. § 5-6-42 since the 150 day delay in filing the transcript was unreasonable under O.C.G.A. § 5-6-48, in that it resulted in a delay of the consideration of the appeal for another term and affected the appellee's ability to administer the estate in question; the delay was inexcusable since the record indicated that the attorney had the transcript when the attorney filed the notice of appeal. Adams v. Hebert, 279 Ga. App. 158, 630 S.E.2d 652 (2006).

Inexcusable delay in failing to file transcript. — Trial court properly dismissed the debtors' appeal as a transcript was not filed until over two months after the statutory due date, and the debtors did not request an extension of time to file the transcript; any delay in completing the record past the 30 days granted by statute was presumptively unreasonable and inexcusable. Dye v. U.S. Bank Nat'l Ass'n, 273 Ga. App. 652, 616 S.E.2d 476 (2005).

Since a construction company bringing an appeal of a jury verdict in favor of the homeowners never sought an extension of time to file the transcript from the post-trial hearing on its motions for new trial and judgment notwithstanding the verdict, nor communicated with the court reporter during the nine-month period after the hearing, the record did not support the trial court's finding that the delay in filing that transcript caused by the construction company was excusable and the trial court's denial of the homeowners' motion to dismiss the appeal was error; the record showed that the construction company's actions delayed a just disposition of the case by delaying the docketing of the appeal and hearing of the case by the appellate court, and, consequently, the homeowners were forced to wait for a final disposition on the construction company's appeal of the verdict against the company. Coptic Constr. Co. v. Rolle, 279 Ga. App. 454, 631 S.E.2d 475 (2006).

Trial court did not abuse the court's discretion in dismissing the parents' appeal under O.C.G.A. § 5-6-48(c) on the ground that the parent' delay in the filing of the transcript was unreasonable, inexcusable, and caused by the parents because the parents took no steps whatsoever to have the transcript prepared until almost ten months after the parents filed the parents' notice of appeal, over seven months after the court reporter informed the parents of the necessary deposit, and almost five months after the trial court

informed the parents that the parents would be responsible for bearing the full costs of having the transcript prepared; by waiting to pay the deposit and order the transcript, the parents prevented the case from being docketed and heard in the earliest possible appellate term of court. Bush v. Reed, 311 Ga. App. 328, 715 S.E.2d 747 (2011).

Trial court did not abuse the court's discretion in finding that a mother's failure to timely pursue the filing of the transcript from the mother's parental rights termination hearing or seek an extension of time for almost one year was unreasonable and inexcusable and in dismissing the appeal under O.C.G.A. § 5-6-48(a). In the Interest of T.H., 311 Ga. App. 641, 716 S.E.2d 724 (2011).

In an attorney lien case, the trial court did not abuse the court's discretion by dismissing the former client's appeal for a delay in transmitting the record appendix because the delay of 55 days was inexcusable and caused by the former client, who had elected to take responsibility for transmitting the record by stating in the notice of appeal that the client would file a record appendix and never amended the client's notice of appeal to provide that the clerk would be responsible for transmission of the record. McAlister v. Abam-Samson, 318 Ga. App. 1, 733 S.E.2d 58 (2012).

While good faith is a factor in determining whether conduct is inexcusable or excusable, it is but one factor to be considered; existence of good faith does not automatically render an unreasonable delay excusable; whether conduct is incapable of being justified and thus inexcusable must be determined by examining the totality of the circumstances of a given appeal and, among the factors which should be considered is the existence of negligence on the part of the appealing party causing unreasonable delay, whether such delay reasonably should have been detected and timely corrected, and whether any such negligence was so severe as to prejudice the opposing party or to cause the appeal to become stale. Jackson v. Beech Aircraft Corp., 217 Ga. App. 498, 458 S.E.2d 377 (1995).

Discretion of court. — In passing upon issues of unreasonableness and lack of excuse, trial court has discretion. Ray v. Williams, 144 Ga. App. 155, 240 S.E.2d 577 (1977).

Determination that delay is unreasonable and inexcusable is within discretion of trial court. ITT Indus. Credit Co. v. Burnham, 152 Ga. App. 641, 263 S.E.2d 482 (1979).

Trial court's determination subject to review. — In passing upon whether delay was unreasonable and inexcusable, trial court has legal discretion which is subject to review in appellate courts. Young v. Climatrol S.E. Distrib. Corp., 237 Ga. 53, 226 S.E.2d 737 (1976); Ray v. Williams, 144 Ga. App. 155, 240 S.E.2d 577 (1977); Corbin v. First Nat'l Bank, 151 Ga. App. 33, 258 S.E.2d 697 (1979); Galletta v. Hillcrest Abbey W., Inc., 185 Ga. App. 20, 363 S.E.2d 265 (1987), cert. denied, 185 Ga. App. 910, 363 S.E.2d 265 (1988); Smith v. Georgia Power Co., 183 Ga. App. 295, 358 S.E.2d 879 (1987); Lloyd v. Hodge, 191 Ga. App. 355, 381 S.E.2d 540 (1989).

Losing party has right to appeal trial court's ruling on question of late filing of transcript. Gilman Paper Co. v. James, 235 Ga. 348, 219 S.E. 447 (1975).

Specific findings of unreasonable and unexcusable delay. — Fact that trial court does not render specific findings of unreasonable and unexcusable delay does not prevent trial court judge from dismissing appeal on these grounds pursuant to this section. Karlsberg v. Hoover, 142 Ga. App. 590, 236 S.E.2d 520, cert. dismissed, 240 Ga. 295, 240 S.E.2d 553 (1977).

While this section sets forth conditions upon which the trial court may dismiss appeal for delay, it does not by its terms require court to make formal recitation of those conditions in the court's order. Lee v. White Truck Lines, 143 Ga. App. 94, 238 S.E.2d 120 (1977).

Delay of nine months after the notice of appeal was filed and the total failure to pay the cost of the transcript as of the date of the trial court's order was both inexcusable and unreasonable. Kendall v. Burke, 237 Ga. App. 742, 516 S.E.2d 791 (1999).

Standard of review. — Trial court's finding on reasonable delay will be reversed only for abuse of discretion. DuBois

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v. DuBois, 240 Ga. 314, 240 S.E.2d 706 (1977); Patterson v. Professional Resources, Inc., 242 Ga. 459, 249 S.E.2d 248 (1978); Ballenger Corp. v. Dresco Mechanical Contractors, 156 Ga. App. 425, 274 S.E.2d 786 (1980); Hunt v. Lee, 190 Ga. App. 403, 379 S.E.2d 215 (1989).

In reviewing a finding of unreasonable and inexcusable delay in filing a transcript, this court will not disturb the lower court's finding absent an abuse of discretion. Teston v. Mills, 203 Ga. App. 20, 416 S.E.2d 133 (1992).

Trial judge's failure to exercise discretion will result in reversal. — When trial judge under subsection (c) fails to exercise discretion, resting the judge's decision instead solely upon a point of law, a reversal will result. Strother v. C. & S. Nat'l Bank, 147 Ga. App. 140, 248 S.E.2d 204 (1978).

Court not required to make express finding that delay was inexcusable. — Since no requirement exists that the trial court make specific recitals of the elements necessary to authorize dismissal, the presumption should adhere as in other appeals that the judgment was correct, with the burden upon the appellant to show otherwise to the reviewing court. Cooper v. State, 235 Ga. App. 66, 508 S.E.2d 447 (1998).

When the delay is attributable to clerk of court rather than to counsel, the Constitution forbids dismissal of the case. AMOCO v. McCluskey, 116 Ga. App. 706, 158 S.E.2d 431 (1967), rev'd on other grounds, 224 Ga. 253, 161 S.E.2d 271 (1968).

Appeal was timely as the notice of appeal was filed within 30 days after entry of an appealable judgment as required by O.C.G.A. § 5-6-38(a); although the court reporter inexplicably did not file the transcript with the court until two years later, the defendant did not cause an unreasonable and inexcusable delay in filing the appeal. Johnson v. State, 259 Ga. App. 452, 576 S.E.2d 911 (2003).

When delay in filing of transcript does not delay docketing and hearing dismissal is not warranted. AMOCO v. McCluskey, 116 Ga. App. 706, 158 S.E.2d 431 (1967), rev'd on other grounds, 224 Ga. 253, 161 S.E.2d 271 (1968).

Trial court's finding that the delay in filing the transcript in a timely fashion was unreasonable so as to warrant dismissal was an abuse of discretion and the delay in filing did not delay transmission of the record to the Court of Appeals. Sellers v. Nodvin, 262 Ga. 205, 415 S.E.2d 908 (1992).

Because there was no evidence that an 11-day delay in the filing of a transcript for transmission as part of the appellate record discernibly delayed the docketing of the record in the appellate court, the trial court abused the court's discretion by concluding that the delay was unreasonable, and erred by dismissing an appeal. Fulton County Bd. of Tax Assessors v. Love, 289 Ga. App. 252, 656 S.E.2d 576 (2008).

Party must request extension of time though initial delay not his fault. — Fact that initial delay in preparation of transcript may not have been the fault of the defendant does not excuse the filing delay, in absence of proper request by the defendant for an extension of time. Dampier v. First Bank & Trust Co., 153 Ga. App. 756, 266 S.E.2d 539 (1980).

Fact that an unreasonable delay in the preparation of the transcript is not the fault of the appellant does not excuse a filing delay, in the absence of a proper request by the appellant for an extension of time. This being so, the trial court is authorized to dismiss the appeal. In re G.W.H., 168 Ga. App. 845, 310 S.E.2d 573 (1983).

Dismissal not required where appellant does not cause delay and judge denies extension. — To construe Ga. L. 1965, p. 18, § 6 (see O.C.G.A. § 5-6-39) as requiring dismissal when the appellant did not cause delay and the trial judge declined to grant a requested extension would shut off the right of appeal, and would thus violate the constitutional

mandate of Ga. Const. 1976, Art. VI, Sec. II, Para. V (see Ga. Const. 1983, Art. VI, Sec. IX, Para. II). Such a construction would also be contrary to the legislative intent expressed in subsection (c) of Ga. L. 1966, p. 493, § 10 (see O.C.G.A. § 5-6-48) and Ga. L. 1965, p. 18, § 23 (see O.C.G.A. § 5-6-30) as to a decision upon the merits. Elliott v. Leathers, 223 Ga. 497, 156 S.E.2d 440 (1967).

Grant of extension of time for filing transcript does not excuse unreasonable delay in filing. Johnson v. Clements, 135 Ga. App. 495, 218 S.E.2d 109 (1975).

Six-day delay not unreasonable. — When the transcript was completed by the court reporter, who failed to file Ga. L. 1965, p. 18, § 23 (see O.C.G.A. in the clerk's office, a six-day delay did not amount to an unreasonable delay in filing, nor was it inexcusable. Wagner v. Howell, 257 Ga. 801, 363 S.E.2d 759 (1988).

Eight-month delay held unreasonable. — When there was an eight-month delay in the filing of the transcript, failure to request an extension of time, and absence of any articulated excuse for the failure, the court did not abuse the court's discretion in finding the delay to be unreasonable and inexcusable. Fuller v. Mayor of Savannah, 193 Ga. App. 716, 389 S.E.2d 7 (1989), cert. denied, 496 U.S. 906, 110 S. Ct. 2589, 110 L. Ed. 2d 270 (1990).

151-day delay unreasonable. — When the record showed a 151-day delay between when the transcript was required to be filed, and when it was ultimately filed, which was caused by the appellants' failure to order the transcript, subsection (f) of O.C.G.A. § 5-6-48 was inapplicable and the delay was unreasonable. Burton v. Hamilton, 204 Ga. App. 18, 418 S.E.2d 398 (1992).

Trial court erred in not granting the appellee's motion to reconsider the denial of the appellee's motion to dismiss when the appellant's obvious shirking of the responsibility for seeing to it that a transcript of proceedings of the appellant's medical malpractice case was filed in the trial court and that shirking of responsibility led to a greater than three-year delay in filing the transcript that prejudiced the surgical business and the doctor. Atlanta Orthopedic Surgeons v. Adams, 254 Ga. App. 532, 562 S.E.2d 818 (2002).

Misunderstanding clerk's directions not inexcusable. — When the wife's attorney offered under oath an explanation for the delay in filing the transcript, claiming misunderstood the directions given to counsel by an unidentified deputy court clerk, the explanation provided by the attorney as the reason for the counsel's delay, could not be said to be inexcusable as a matter of law. Hammontree v. Hammontree, 186 Ga. App. 819, 368 S.E.2d 576 (1988).

Remand for fact determination. — When the trial court never made the requisite fact determination regarding whether the delay in filing the transcript was unreasonable, inexcusable, and caused by the plaintiff, the appropriate course of action was to remand the case to the trial court to make that determination and rule on the defendant's motion to dismiss. Beavers v. Gilstrap, 210 Ga. App. 46, 435 S.E.2d 267 (1993).

Delay held unreasonable. — See A. Roberts Corp. v. Roberts, 207 Ga. App. 663, 428 S.E.2d 671 (1993).

Delay of almost two years in filing transcript warranted dismissal of appeals. Boveland v. YWCA, 227 Ga. App. 241, 489 S.E.2d 35 (1997).

Transcript filing delay of more than six months was unreasonable. Bass v. Mercer, 240 Ga. App. 545, 524 S.E.2d 260 (1999).

Transcript filing delay of more than six months was unreasonable. — Trial court did not abuse the court's discretion in dismissing the defendant's notice of appeal due to the defendant's unreasonable and inexcusable delay in transmitting the record to the appellate court since the defendant waited 108 days before transmitting the record, waited three months to pay court costs, and was represented by counsel. Strickland v. State, 257 Ga. App. 304, 570 S.E.2d 713 (2002).

Because a lender's O.C.G.A. § 9-11-41(a)(1)(A) notice to withdraw an appeal after sustaining an adverse judgment on the merits did not toll the time in which the lender was required to file a transcript on appeal, the renewal statute, O.C.G.A. § 9-2-61, did not apply; thus, the appeal was properly dismissed pursuant

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to O.C.G.A. § 5-6-48(c). Schreck v. Standridge, 273 Ga. App. 58, 614 S.E.2d 185 (2005).

Trial court did not abuse the court's discretion in ruling that an appellant had not satisfied O.C.G.A. §§ 5-6-42 and 5-6-48, that the appellant's delay in filing a transcript was unreasonable and inexcusable, and that the delay in the appeal process was the appellant's fault because the case was remanded to the trial court for the purpose of supplementing or reconstructing the transcript, and at the hearing more than a year later, the appellant offered no evidence as to efforts taken by the appellant to obtain the transcript or, if necessary, to file the appropriate motions to extend the time to file the transcript or to have the transcript reconstructed; at no time did the appellant file a motion to reconstruct the record, pursuant to O.C.G.A. § 5-6-41(g), or to extend the time to file the transcript, pursuant to O.C.G.A. § 5-6-39, after the case was remanded to the trial court. Lavalle v. Jarrett, 306 Ga. App. 260, 701 S.E.2d 886 (2010).

Delay was not unreasonable or inexcusable. — Trial court did not err in finding claimant's 91 day delay in paying costs was not unreasonable nor inexcusable when the court conducted an evidentiary hearing and the claimant suffered from both financial and mental disability. Logan v. St. Joseph Hosp., 227 Ga. App. 853, 490 S.E.2d 483 (1997).

Trial court did not abuse the court's discretion in denying the appellee's motion to dismiss an appeal because of the appellant's late filing of a transcript since the evidence showed that the delay was excusable, attributable to a third party, and did not directly prejudice the appellee. Brandenburg v. All-Fleet Refinishing, Inc., 252 Ga. App. 40, 555 S.E.2d 508 (2001).

Trial court did not abuse the court's discretion, pursuant to O.C.G.A. § 5-6-48(c), in granting the appellee's motion to dismiss with regard to the transcript on appeal because the appellants' delay in filing the transcript, pursuant to O.C.G.A. §§ 5-6-41(c) and 5-6-42, was unreasonable, inexcusable, and caused by the appellants. Pistacchio v. Frasso, 314 Ga. App. 119, 723 S.E.2d 322 (2012).

Delay Occasioned by Nonpayment of Costs

1. In General

Rebuttable presumption of delivery of notice. — Clerk's affidavit is sufficient evidence to establish the elements necessary to create a rebuttable presumption that the notice of the amount of costs was delivered to counsel, and to create a duty to show it was not wilfully refused. Crenshaw v. Georgia Underwriting Ass'n, 202 Ga. App. 610, 414 S.E.2d 915 (1992).

Issue of failure to pay costs cannot be raised for first time on appeal. — When no issue was raised in the trial court as to whether the notice of appeal should be dismissed for unreasonable and inexcusable delay in transmitting the record due to failure to pay costs; the issue may not be raised for the first time on appeal. Jones v. Monroe Nursing Home, Inc., 149 Ga. App. 582, 254 S.E.2d 902 (1979).

Appellant entitled to opportunity for hearing on motion to dismiss for delay in paying costs. Scocca v. Wilt, 241 Ga. 334, 245 S.E.2d 295 (1978).

Plaintiffs required to pay calculated costs. — Notice received by the plaintiffs contained calculated, not estimated costs, thus requiring the plaintiffs to pay when the state court appeals clerk testified at the hearing on the motion to dismiss that costs are determined by multiplying the number of pages to be photocopied by the cost per page and then adding a small fee ($5.50) for recording and certifying the record. CRA Transp., Inc. v. Rolls Royce Motors, Inc., 204 Ga. App. 825, 420 S.E.2d 757, cert. denied, 204 Ga. App. 921, 420 S.E.2d 757 (1992).

Transmittal of record prior to ruling on motion to dismiss appeal. — Where, whether transmitted erroneously or not, the record and transcript in an appeal was sent to the Court of Appeals prior to any ruling by the trial court in regard to the appellee's motion to dismiss

the appeal, even assuming that the trial court's dismissal of the appeal was premised not only upon the failure to pay costs timely but also upon the basis that such failure resulted in unreasonable delay in the transmission of the record to this court and that the delay was inexcusable as required under O.C.G.A. § 5-6-48(c), the order of dismissal is a nullity. Pursuant to Court of Appeals Rule 47, as amended effective March 1, 1985, the trial court was relieved of the court's jurisdiction to consider objections to records or transcripts when there was no ruling upon such objection prior to transmittal of the record. Turner v. Taylor, 179 Ga. App. 574, 346 S.E.2d 920 (1986).

Nonprejudicial delay. — When the delay in paying the costs did not appreciably lengthen the litigation or prejudice the opponents, there was no abuse of discretion in the trial court's denial of the motion to dismiss. Jim Walter Homes, Inc. v. Strickland, 185 Ga. App. 306, 363 S.E.2d 834 (1987), cert. denied, 185 Ga. App. 910, 363 S.E.2d 834 (1988).

Trial court properly denied the appellee's motion to dismiss an appeal for the appellant's unreasonable delay in the payment of costs, when the delay was caused by confusion surrounding the post-trial the appellate procedure and was neither unreasonable nor inexcusable, and appellant showed no prejudice from the delay. DOT v. Southeast Timberlands, Inc., 263 Ga. App. 805, 589 S.E.2d 575 (2003).

Trial court properly found that a delay in paying costs was excusable considering the pendency of the motion to accept a pauper's affidavit; because the opposing party failed to show any prejudice resulting from the delay, and given that the trial court had broad discretion in this area, the trial court's judgment was affirmed. Hiers v. ChoicePoint Servs., 270 Ga. App. 128, 606 S.E.2d 29 (2004).

Refusal to accept letter is equivalent of receipt. — Refusal to accept a letter delivered to the proper address with adequate postage is the equivalent of receipt of notice. Crenshaw v. Georgia Underwriting Ass'n, 202 Ga. App. 610, 414 S.E.2d 915 (1992).

Discretion of court. — Whether to dismiss a notice of appeal for delay in paying costs rested in the sound discretion of the trial court when the grounds to dismiss were met. Style Craft Homes, Inc. v. Chapman, 226 Ga. App. 634, 487 S.E.2d 32 (1997).

Dismissal of state's appeal under O.C.G.A. § 5-6-48(c) upheld. — Trial court properly dismissed the state's appeal from an order barring the defendant's trial on speedy trial grounds, pursuant to O.C.G.A. § 5-6-48(c), as order was not the type the state had a right to pursue under O.C.G.A. § 5-7-1; moreover, the order was not void as the order was entered by a court of competent jurisdiction. State v. Glover, 281 Ga. 633, 641 S.E.2d 543 (2007).

Trial court did not abuse the court's discretion in dismissing the defendant's notice of appeal when the defendant failed to request a hearing within 15 days of the court's order dismissing the appeal for failure of the defendant to pay the cost bill. Ledee v. Kissiah, 215 Ga. App. 850, 452 S.E.2d 558 (1994).

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Failure to pay costs which does not occasion delay. — When record in lower court is forwarded prior to payment of costs in that court, and failure to pay costs has not worked a delay in appellate court, there is no ground for dismissal. AMOCO v. McCluskey, 116 Ga. App. 706, 158 S.E.2d 431 (1967), rev'd on other grounds, 224 Ga. 253, 161 S.E.2d 271 (1968).

Failure to pay costs when record otherwise properly transmitted. — Failure to pay court costs to clerk of court below before record is transmitted to appellate court will not result in dismissal of case when the record is otherwise properly transmitted (albeit inadvertently). Elliott v. Walton, 136 Ga. App. 211, 220 S.E.2d 696 (1975).

Unreasonable delay warrants dismissal. — When there has been an unreasonable delay and it is shown that the delay was inexcusable and was caused by failure of the party to pay costs in the trial court or file the pauper's affidavit, the trial court may order an appeal dismissed. Brookshire v. J.P. Stevens Co., 133 Ga. App. 97, 210 S.E.2d 46 (1974).

Court properly dismissed the plaintiff's

Delay Occasioned by Nonpayment of Costs (Cont'd)
2. Unreasonable, Inexcusable Delay (Cont'd)

appeal after the plaintiff failed to appear and present evidence at an indigency hearing and failed to pay the costs of the appeal within the statutory time limit. Cody v. Coldwell Banker Real Estate Corp., 253 Ga. App. 752, 560 S.E.2d 275 (2002).

Because an unsuccessful Georgia Bar applicant, who sought review of a trial court's denial of a petition for mandamus, failed to pay the bill of costs for the appellate record, despite filing numerous notices of appeal, receiving updated bills, and receiving extensions of time to pay the bill, a trial court properly found the delay of over two years was both inexcusable and unreasonable under O.C.G.A. § 5-6-48(c), and dismissal of the appeal was properly granted. Cottrell v. Askew, 276 Ga. App. 717, 624 S.E.2d 203 (2005).

Notice of appeal filed by several related companies in an action under O.C.G.A. § 14-2-1604 was properly dismissed for failure to timely pay a bill of costs pursuant to O.C.G.A. § 5-6-48(c) as the 64-day delay in paying was due to counsel's failure to confirm that payment had been made; thus, the delay was inexcusable and unreasonable. Langdale Co. v. Langdale, 295 Ga. App. 372, 671 S.E.2d 863 (2008).

Trial court did not abuse the court's discretion when the court dismissed an insurer's appeal under O.C.G.A. § 5-6-48(c) as the insurer did not rebut the presumption that a delay of over five months in filing a transcript as part of the record on appeal was unreasonable and inexcusable. ACCC Ins. Co. v. Pizza Hut of Am., Inc., 314 Ga. App. 655, 725 S.E.2d 767 (2012).

Trial court's dismissal of an appeal from a summary judgment dismissing a wrongful death claim brought by four children, due to the failure of two of the children to pay costs or submit affidavits of indigency, was in error as to two of the children who filed affidavits of indigency; assuming the children filed true affidavits of indigence (O.C.G.A. § 9-15-2(a)(2), (b)), the children had rights to appeal from the dismissal of the children's proportionate shares of the wrongful death case as: (1) the wrongful death claim was not jointly in all the children or in none of the children; and (2) originally, each child had a separate claim for one-fourth of the value of the decedent's life. Mapp v. We Care Transp. Servs., 314 Ga. App. 391, 724 S.E.2d 790 (2012), cert. denied, No. S12C1111, 2012 Ga. LEXIS 660 (Ga. 2012).

Trial court's dismissal of an appeal from a summary judgment dismissing a wrongful death claim brought by four children, due to the failure of two of the children to pay costs or submit affidavits of indigency, was not an abuse of discretion as to the two children who did not pay costs or submit affidavits; the children, in addition to failing to pay costs or submit affidavits, offered no explanation for the children's failure to do so, which caused an unreasonable delay. Mapp v. We Care Transp. Servs., 314 Ga. App. 391, 724 S.E.2d 790 (2012), cert. denied, No. S12C1111, 2012 Ga. LEXIS 660 (Ga. 2012).

Hearing required. — Trial court must conduct a hearing or otherwise consider evidence to make a determination as to whether under the circumstances the delay was unreasonable and, if so, whether the delay was inexcusable. Crenshaw v. Georgia Underwriting Ass'n, 202 Ga. App. 610, 414 S.E.2d 915 (1992).

Trial court erred in dismissing the development corporation's appeal from a judgment against it in a contract action after it did not pay a bill of costs that the clerk of the court mailed to it and did not request more time to pay since the trial court had an obligation to hold a hearing and determine whether the failure to pay and the failure to request more time to pay were inexcusable and unreasonably delayed transmission of the record to the appellate court. McCorvey Dev. v. D. G. Jenkins Dev. Corp., 260 Ga. App. 276, 581 S.E.2d 308 (2003).

Delay of 45 days in paying costs is in fact unreasonable and inexcusable. — When the total elapsed time between filing of notice of appeal and mailing of record was 70 days, 25 of which were chargeable to clerk and additional 45 to plaintiff's tardiness in paying costs,

such delay is in fact unreasonable and inexcusable, nothing further appearing. Jones v. State, 123 Ga. App. 672, 182 S.E.2d 190 (1971).

Determination by trial court was not an abuse of discretion when all arguments presented were fully considered and the reasons for the delay were found neither reasonable nor excusable. McDonald v. Garden Servs., Inc., 163 Ga. App. 851, 295 S.E.2d 551 (1982), cert. vacated, 251 Ga. 337, 304 S.E.2d 914 (1983).

Error by inexperienced employee of counsel as giving rise to delay. — Trial court did not abuse the court's discretion in denying the motion to dismiss the appeal due to an alleged unreasonable and inexcusable delay in paying the costs, which had not been paid more promptly, according to the appellant, due to a mistake by an inexperienced former employee, and due to lack of knowledge by counsel of the receipt by counsel's office of the bill. ITT Terryphone Corp. v. Modems Plus, Inc., 171 Ga. App. 710, 320 S.E.2d 784 (1984).

Delays of over 30 days have been suggested as being prima facie unreasonable and inexcusable. Continental Inv. Corp. v. Cherry, 124 Ga. App. 863, 186 S.E.2d 301 (1971); Bouldin v. Parker, 173 Ga. App. 526, 327 S.E.2d 760 (1985); Hatfield v. Great Am. Mgt. & Inv., Inc., 190 Ga. App. 534, 379 S.E.2d 544 (1989); Stone v. Boyne, 245 Ga. App. 868, 539 S.E.2d 209 (2000).

Delay of more than 30 days in paying costs is prima facie unreasonable and inexcusable. However, the inference arising from such a delay is not conclusive and may be rebutted by evidence presented by an opposing party. Leonard v. Ognio, 201 Ga. App. 260, 410 S.E.2d 814 (1991).

Trial court's denial of plaintiff's motion to dismiss the defendants' notice of appeal was an abuse of discretion, when there was a delay of more than 30 days in the payment of costs and no evidence as to why the delay occurred. Leonard v. Ognio, 201 Ga. App. 260, 410 S.E.2d 814 (1991).

Delay of over 100 days unreasonable. — Trial court properly dismissed an oncologist's appeal in a breach of contract suit based on the oncologist's failure to pay costs under O.C.G.A. § 5-6-48(c). The oncologist did not pay the costs until over 100 days after the initial bill was sent, over 90 days after seeking permission to proceed in forma pauperis, and over 70 days after the denial of the request to proceed in forma pauperis; it had been determined that a delay in excess of 30 days was prima facie unreasonable and inexcusable. Mitchell v. Cancer Carepoint, Inc., 299 Ga. App. 881, 683 S.E.2d 923 (2009).

Delay of 106 days found unreasonable. — Appellant's 106 day delay in paying costs was unreasonable and warranted dismissal. Roach v. Boyce, Thompson & O'Brien, 201 Ga. App. 212, 410 S.E.2d 748, cert. denied, 201 Ga. App. 904, 410 S.E.2d 748 (1991).

Delay not unreasonable or inexcusable. — Trial court did not err in declining to dismiss a contractor's appeal for failure to pay costs timely pursuant to O.C.G.A. § 5-6-48(c) as the court was authorized to find that the delay in the clerk's receipt of payment was not unreasonable or inexcusable; the original bill of costs had been erroneously mailed to the former address of the contractor's counsel, which delayed receipt, and when the bill of costs was finally received, the contractor attempted to tender prompt payment of the costs and immediately delivered a new check upon finding that the contractor's previous check had not been received by the clerk of court. J. Kinson Cook of Ga., Inc. v. Heery/Mitchell, 284 Ga. App. 552, 644 S.E.2d 440 (2007).

Considerations in determining reasonableness of delay of less than 30 days. — Continental Inv. Corp. v. Cherry, 124 Ga. App. 863, 186 S.E.2d 301 (1971).

Counsel's inability to contact client and latter's delay in obtaining money for costs. — When counsel for the appellant states that the delay in transmitting the record to appellate court was caused by an inability to contact the client and the time the client took to obtain money to pay costs, the appellate court cannot say that the judge of the superior court erred in dismissing the appeal because of a delay in forwarding the record. Williford v. General Ins. Co. of America, 119 Ga. App. 1, 165 S.E.2d 924 (1969).

Amendment of Record

Record before the court is what appellate courts should rely on in passing on the merits of an appeal from a final judgment. Interstate Fin. Corp. v. Appel, 233 Ga. 649, 212 S.E.2d 821 (1975).

Supplementation of record. — If record before it is insufficient to pass upon merits, the appellate court should require supplementation if necessary additions are available in trial court. Interstate Fin. Corp. v. Appel, 233 Ga. 649, 212 S.E.2d 821 (1975); Scott v. Allstate Ins. Co., 190 Ga. App. 135, 378 S.E.2d 332 (1989).

In the state's action to condemn game machines, it was error not to grant the machine owners' timely and proper motion to supplement the record on appeal. The Court of Appeals did not have the complete record before it, and it had considered the state's expert report to the exclusion of the owners' expert report, which it did not have and which the trial court had relied upon along with the state's report. Damani v. State, 284 Ga. 372, 667 S.E.2d 372 (2008).

Appellate court should allow parties to send up necessary documents rather than dismiss appeal. — Ends of justice are better served by allowing appellant or appellee to send up through clerk of trial court additional available documents or transcripts that will enable appellate courts to render decisions on merits than by dismissing the appeal for failure to provide documents. Interstate Fin. Corp. v. Appel, 233 Ga. 649, 212 S.E.2d 821 (1975).

When omission of proper party was inadvertent. — In order to add additional proper party by amendment to notice of appeal under subsection (d), original omission of that party must have been an inadvertent error. Hamilton Mtg. Corp. v. Bowles, 142 Ga. App. 882, 237 S.E.2d 198 (1977).

Failure to perfect record. — Appellant, seeking an interlocutory review of a denial of a motion to dismiss, is not entitled, after the reviewing court has rendered the court's decision, to supplement the court's record on appeal in order to correct an omission resulting from the failure of counsel to perfect the record. Consolidated Government v. Williams, 184 Ga. App. 815, 363 S.E.2d 20, cert. denied, 184 Ga. App. 909, 363 S.E.2d 20 (1987).

Motion erroneously brought under O.C.G.A. § 5-6-41(f). — Once the appellate court renders the court's decision, O.C.G.A. § 5-6-48, under which the action originates in the appellate court, becomes the exclusive method for supplementing the record. Therefore, the appellate court's refusal to entertain, on motion for rehearing under O.C.G.A. § 5-6-41(f), under which the action originates in the trial court, the supplementation of the record was not error. However, in holding that what the defendant wore at trial, not shown in the record other than a reference to "prison garb," was new evidence and not subject to § 5-6-41(f), the appellate court erred. State v. Pike, 253 Ga. 304, 320 S.E.2d 355 (1984).

O.C.G.A. § 5-6-41(f) is not to be used after rendition of an appellate court's decision as a vehicle to secure the grant of a motion for reconsideration or application for certiorari. Once the appellate court renders the court's decision, O.C.G.A. § 5-6-48 becomes the exclusive method for supplementing the record. Hirsch v. Joint City County Bd. of Tax Assessors, 218 Ga. App. 881, 463 S.E.2d 703 (1995).

Notice of Appeal

Trial court does not lose complete jurisdiction by mere filing of notice of appeal. Allied Prods., Inc. v. Peterson, 233 Ga. 266, 211 S.E.2d 123 (1974).

Trial court does not lose complete jurisdiction in a case by the mere filing of a notice of appeal. Hooper v. Southern Bell Tel. & Tel. Co., 195 Ga. App. 629, 394 S.E.2d 798 (1990).

Plain language and import of subsection (c) of O.C.G.A. § 5-6-48 is that the filing of the notice of appeal does not divest the trial court of authority to consider dismissal of an appeal. Hooper v. Southern Bell Tel. & Tel. Co., 195 Ga. App. 629, 394 S.E.2d 798 (1990).

Plaintiff's request for an extension on the basis of inability to pay costs, filed a month after receiving the bill, was untimely, and the plaintiff's belated payment of costs did not eliminate the court's authority to determine the reasonable-

ness and excusability of the payment delay, in ruling on dismissal. Hooper v. Southern Bell Tel. & Tel. Co., 195 Ga. App. 629, 394 S.E.2d 798 (1990).

When appealable judgment or order not included in notice. — It is duty of appellate courts to inquire into the court's own jurisdiction and dismiss the appeal when an appealable judgment or order is not included in the notice of appeal. Interstate Fire Ins. Co. v. Chattam, 222 Ga. 436, 150 S.E.2d 618, answer conformed to, 114 Ga. App. 332, 151 S.E.2d 486 (1966).

Notice of appeal must specify an appealable judgment from which the appeal is entered, absent which the appeal must be dismissed. Parish v. Georgia R.R. Bank & Trust Co., 115 Ga. App. 540, 154 S.E.2d 750 (1967).

When the notice of appeal fails to specify any judgment whatever, the appeal must be dismissed. Ballew v. State, 225 Ga. 547, 170 S.E.2d 242 (1969); Zachery v. State, 233 Ga. App. 519, 504 S.E.2d 466 (1998).

Notice of appeal from jury verdict neither constitutes substantial compliance nor is amendable. — When notice of appeal states that it is an appeal from a jury verdict, this section does not authorize appellate courts to cause notice of appeal to be perfected by requiring appeal to be amended to show appeal from judgment or to treat appeal from verdict as a substantial compliance with the statute. Interstate Fire Ins. Co. v. Chattam, 222 Ga. 436, 150 S.E.2d 618, answer conformed to, 114 Ga. App. 332, 151 S.E.2d 486 (1966).

Fact that notice of appeal is improperly styled is not ground for dismissal. Bagwell v. Henson, 124 Ga. App. 92, 183 S.E.2d 485 (1971).

Incorrect designation of date of judgment does not render notice of appeal insufficient. Bagwell v. Henson, 124 Ga. App. 92, 183 S.E.2d 485 (1971).

Failure to state offense and punishment prescribed. — Deficiencies in the defendant's notice of appeal, which did not state the offense and punishment prescribed, did not justify dismissal of the appeal when the notice did provide the specific case number, style, court and date on which the final judgment appealed from was entered and information contained in the notice, considered in conjunction with even a cursory inspection of the record, would make clear the judgment appealed from, as well as the offense and punishment. Brumby v. State, 264 Ga. 215, 443 S.E.2d 613 (1994).

Technical error in referring to judgment n.o.v. as directed verdict. — When trial court's ruling was made after a jury verdict for the appellant, the appellee is technically correct in denominating it as a judgment notwithstanding the verdict, rather than a directed verdict. Nevertheless, the appellant's misnomer did not require dismissal. Sanders v. Looney, 247 Ga. 379, 276 S.E.2d 569 (1981).

Failure to specify whether transcript will be included on appeal not ground for dismissal. AMOCO v. McCluskey, 116 Ga. App. 706, 158 S.E.2d 431 (1967), rev'd on other grounds, 224 Ga. 253, 161 S.E.2d 271 (1968).

Notice of appeal may be amended. — In view of the plain language, a notice of appeal may be amended. Blackwell v. Cantrell, 169 Ga. App. 795, 315 S.E.2d 29 (1984).

Sufficiency of notice. — Amended notice of appeal complied with the requirement of O.C.G.A. § 5-6-37 since an examination of the record clearly identified the judgment appealed from. In re Burton, 271 Ga. 491, 521 S.E.2d 568 (1999).

Notice of appeal containing the petitioner's name, indicating the opposing party, specifying the case number and that the appeal involved an adverse ruling in the petitioner's habeas corpus action satisfied the requirements of the Appellate Practice Act, O.C.G.A. § 5-6-30 et seq., and, in conjunction with a timely application for a certificate of probable cause, was sufficient to confer jurisdiction over the case upon the Supreme Court. Hughes v. Sikes, 273 Ga. 804, 546 S.E.2d 518 (2001).

When it was apparent from the notice of appeal, the record, the enumeration of errors, or any combination of the foregoing, what judgment or judgments were appealed from or what errors were sought to be asserted upon appeal, the appeal was not subject to dismissal and shall be considered in accordance therewith.

Notice of Appeal (Cont'd)

Carter v. Fayette County, 287 Ga. App. 175, 651 S.E.2d 108 (2007).

Failure to state grounds of appeal. — Notice of appeal which fails to specifically state the grounds of appeal, can be amended prior to judgment to perfect the appeal. Spencer v. Lamar County Bd. of Tax Assessors, 202 Ga. App. 742, 415 S.E.2d 332 (1992).

Amendments to notices of appeal to superior courts from administrative boards. — Since policy of law is in favor of deciding tax appeals on merits, even at expense of procedural technicalities, subsection (d) which allows amendments of notice of appeal from superior courts, also applies to notices of appeal to superior courts from administrative boards. Mundy v. Clayton County Tax Assessors, 146 Ga. App. 473, 246 S.E.2d 479 (1978) (see O.C.G.A. § 5-6-38).

Error in stating prior action from which appeal sought. — As it was clear that the appellant was appealing the entry of judgment in favor of the appellee, the notice of appeal was deemed filed within 30 days of the entry of judgment, despite the fact that the notice erroneously stated that it was from the prior directed verdict. Horton v. Allstate Ins. Co., 171 Ga. App. 707, 320 S.E.2d 761 (1984), overruled on other grounds, Carter v. Banks, 254 Ga. 550, 330 S.E.2d 866 (1985).

Failure to include dismissal of city as defendant. — Because it is clear from the enumerations of error that the plaintiffs sought to appeal from the trial court's dismissal of the city as a defendant, as well as the grant of summary judgment as to other defendants, the failure to include the dismissal of the city in the notice of appeal does not prevent the court's review of the matter. Rea v. Bunce, 179 Ga. App. 628, 347 S.E.2d 676 (1986), overruled on other grounds, Martin v. Georgia Dep't of Pub. Safety, 257 Ga. 300, 357 S.E.2d 569 (1987), cert. denied, 484 U.S. 998, 108 S. Ct. 685, 98 L. Ed. 2d 638 (1988).

Judge had no discretion to deny permission to file notice of direct appeal. — As no claims remained, and the case was no longer pending in the court below, a judge's order was a final judgment as contemplated by O.C.G.A. § 5-6-34(a)(1), and thus, a direct appeal was appropriate, and children could raise any issues in the direct appeal from the order that were ruled upon in all previous non-final orders; the judge erred in refusing permission for the children to file a notice of direct appeal from the order dismissing the timely-filed direct appeals, and the judge did not have the discretion to deny such permission. Sotter v. Stephens, 291 Ga. 79, 727 S.E.2d 484 (2012).

Application Generally

When court can ascertain what judgment is appealed from. — Whernfrom examination of notice of appeal, record, and enumeration of errors, the court is able to determine what judgment is appealed from, a motion to dismiss the appeal is without merit. Franklin v. Sea Island Bank, 120 Ga. App. 654, 171 S.E.2d 866 (1969).

Patently inadvertent misdescription of judgment appealed from will not cause dismissal of the appeal when examination of whole record clearly reveals identity of judgment from which appellant intended to take appeal. Eubank v. Barber-Colman Co., 115 Ga. App. 217, 154 S.E.2d 638 (1967).

When claim is clear, although formal enumeration and brief not filed. — When claim is clear and apparent from face of pro se pleading and notice of appeal, motion to dismiss for failure to file formal enumeration of errors and brief will be denied. Parris v. State, 232 Ga. 687, 208 S.E.2d 493 (1974).

Although the defendant, who was convicted of a criminal offense and appealed pro se from a denial of the defendant's motion for new trial, failed to set out the defendant's enumerations of errors as part two of the defendant's brief, as required by Ga. Ct. App. R. 22(a), and the defendant also failed to clearly set out the defendant's enumerations of errors within the brief that the defendant filed, the court considered the merits of the defendant's appeal pursuant to O.C.G.A. § 5-6-48(f), as was the defendant's duty when it was apparent from the notice of appeal, the record, the enumeration of

errors, or any combination thereof what errors were sought to be asserted upon appeal. Phillips v. State, 267 Ga. App. 733, 601 S.E.2d 147 (2004).

Inclusion of motion in enumeration of errors and not in notice of appeal. — Since denial of motion for summary judgment was included in enumeration of errors, requirements of law were adequately met despite failure to include denial of motion in notice of appeal. Southeast Ceramics, Inc. v. Klem, 246 Ga. 294, 271 S.E.2d 199 (1980).

Failure to include jurisdictional statement in enumeration of errors. — Failure of the enumeration of errors to contain statement of reasons why Court of Appeals and not Supreme Court has jurisdiction will not result in dismissal of case. Kitchens v. Hall, 116 Ga. App. 41, 156 S.E.2d 920 (1967).

Appellant cannot by brief substitute new and different enumeration for one actually and clearly made. Daniel v. State, 118 Ga. App. 370, 163 S.E.2d 863 (1968), cert. denied, 394 U.S. 919, 89 S. Ct. 1193, 22 L. Ed. 2d 453 (1969).

Mere failure to argue some errors insisted upon in brief. — When there is a general insistence in brief of counsel for the defendant in criminal case upon all of the errors assigned in the defendant's petition for certiorari, upon the overruling of which the defendant assigns error in Court of Appeals, a mere failure to argue some of the assignments of error does not constitute abandonment of those issues. Cole v. State, 86 Ga. App. 770, 72 S.E.2d 537 (1952) (decided under former Code 1933, § 6-1601).

Independent motions for new trial may be appealed separately. — Each party has right to make motion for new trial independently of the other and to test ruling thereon by separate appeal, so that neither may be dismissed against movant's will. Munday v. Brissette, 113 Ga. App. 147, 148 S.E.2d 55, rev'd on other grounds, 222 Ga. 162, 149 S.E.2d 110 (1966).

Error sufficiently "set out separately." — In order to take into account the duty imposed by subsection (f) of O.C.G.A. § 5-6-48, when the enumeration of errors filed in the appellate court identifies the trial court ruling asserted to be error, the error relied upon is sufficiently "set out separately" to require the appellate court to shoulder the court's constitutional responsibility to be a court of review. Felix v. State, 271 Ga. 534, 523 S.E.2d 1 (1999).

Appeals from denials of motions for judgment n.o.v. or for new trial are unnecessary. — Since enumeration of errors is deemed to include all judgments necessary to determine appeal, it is no longer necessary to appeal from denial of motions for judgment n.o.v. or for new trial. Contractors Mgt. Corp. v. McDowell-Kelley, Inc., 136 Ga. App. 116, 220 S.E.2d 473 (1975).

Remedy for erroneous ruling on motion to dismiss is appeal. — If trial court commits error by abusing the court's discretion in ruling on motion to dismiss appeal under this section, appeal should be filed from order of trial court by losing party as provided by law and not by new motion to dismiss appeal in appellate court. Gilman Paper Co. v. James, 235 Ga. 348, 219 S.E.2d 447 (1975).

Burden is on appellant to bring up necessary record and to specify intended omissions. — Burden is on appellant in first instance to bring up all record and evidence introduced under it bearing on review of the appellant's enumerations of error, and in particular it is the appellant's duty, if the appellant wishes something omitted, to state it with precision in the appellant's notice of appeal pursuant to Ga. L. 1965, p. 18, § 11 (see O.C.G.A. § 5-6-42). Ayers Enterprises, Ltd. v. Adams, 131 Ga. App. 12, 205 S.E.2d 16 (1974).

Notice specifically designating nonfinal judgment. — Subsection (f) providing for situations where notice of appeal fails "to specify definitely the judgment" is inapplicable when the notice of appeal does specifically designate a particular order, but one which does not constitute a final judgment. Thompson v. Consumer Credit of Valdosta, Inc., 123 Ga. App. 281, 180 S.E.2d 595 (1971).

All matter forwarded on appeal must be part of transcript. — Subsection (f) does not require all matter to be forwarded to Court of Appeals, but only

Application Generally (Cont'd)

that all matter so forwarded shall be part of the transcript rather than, as was formerly permissible, included as an exhibit to the bill of exceptions (see O.C.G.A. §§ 5-6-49, 5-6-50) or assignments of error. G.E.C. Corp. v. Southern Fabricators, Inc., 122 Ga. App. 452, 177 S.E.2d 497 (1970).

Judges of superior courts have no jurisdiction to dismiss appeal pending in either of appellate courts. Davis v. Davis, 222 Ga. 369, 149 S.E.2d 802 (1966).

When appellant becomes a fugitive from justice after filing notice, the appeal can be dismissed. Russell v. State, 152 Ga. App. 663, 263 S.E.2d 552 (1979).

When trial judge dismissed case previously and reversal would not benefit appellants dismissal of the appeal is required. McGalliard v. Jones, 133 Ga. App. 44, 209 S.E.2d 664 (1974).

Dismissal of appeal docketed in error. — When the plaintiffs appealed from a grant of summary judgment, the defendants filed a motion to dismiss the appeal which was granted and, between the filing of the defendants' motion and the trial court's action on the motion, the clerk mistakenly transmitted the record to the court of appeals on plaintiffs' instructions, the appeal was subject to dismissal because of the trial court's dismissal which was unappealed from; the plaintiffs' instructing the clerk to transmit the record when there was a pending motion filed by the defendants could not be permitted to deprive the trial court of jurisdiction. Ovestco Corp. v. Bowen, 216 Ga. App. 121, 453 S.E.2d 94 (1994).

Supreme Court of Georgia may take judicial notice of the court's own records in immediate case or proceedings before the court. Davis v. Davis, 222 Ga. 369, 149 S.E.2d 802 (1966).

Specific grounds stated for directed verdict must be same ones asserted on appeal. — Enumeration of error in a dispossessory case as to the trial court's failure to direct a verdict on the grounds of the lessor's failure to prove demand for possession cannot be construed to encompass, as error, the later refusal to grant judgment n.o.v. on the basis of the lessee's belatedly raised "complete defense" of payment of rent. The trial court's refusal to direct a verdict cannot be expanded to encompass other defects on appeal, because the specific grounds stated for the directed verdict must be the same ones asserted on appeal. Able-Craft, Inc. v. Bradshaw, 167 Ga. App. 725, 307 S.E.2d 671 (1983).

Jurisdiction over cross-appeal. — When an appeal from the denial of a summary judgment motion is filed as a cross-appeal, the appellate jurisdiction over the cross-appeal necessarily arises from the court's jurisdiction over the main appeal from the directly appealable order, and thus the cross-appeal must derive its life from the main appeal. Serco Co. v. Choice Bumper, Inc., 199 Ga. App. 846, 406 S.E.2d 276 (1991).

Survival of cross-appeal after dismissal of main appeal. — Although under subsection (e) of O.C.G.A. § 5-6-48, a cross-appeal may survive the dismissal of the main appeal, this is true only when the cross-appeal can stand on the appeal's own merit. Serco Co. v. Choice Bumper, Inc., 199 Ga. App. 846, 406 S.E.2d 276 (1991).

Dismissal of cross-appeal with main appeal. — When the main appeal is dismissed for failure to comply with O.C.G.A. § 5-6-35(a)(6), any cross-appeal which is dependent on that main appeal will also be dismissed. Jones Roofing & Constr. Co. v. Roberts, 179 Ga. App. 169, 345 S.E.2d 683 (1986).

Although under O.C.G.A. § 5-6-48(e), a cross-appeal may survive the dismissal of the main appeal, that is true only when the cross-appeal can stand on its own merit, and the Court of Appeals has no jurisdiction to entertain a cross-appeal which must derive its life from the main appeal. An appellant's voluntary withdrawal of its direct appeal requires the dismissal of a cross-appeal that has no independent basis for jurisdiction and, to the extent it holds otherwise, MARTA v. Harrington, George & Dunn, P.C., 208 Ga. App. 736 (1993) is overruled. State, DOT v. Douglas Asphalt Co., 297 Ga. App. 511, 677 S.E.2d 728 (2009).

Unreasonable delay in filing transcript caused by conduct of appellant

or attorney. — When neither the appellant nor the appellant's counsel (trial or appellate) files the transcript within 30 days of the filing of the notice of appeal (or, within 30 days of the entry of judgment), nor is any request made for an extension of time for filing, the appellate counsel's efforts being concentrated on attempting to obtain a release from trial counsel of the transcript, and there is no issue of substantive or technical ineffective assistance of counsel, the delay in filing the transcript is unreasonable and the unreasonable delay is inexcusable and is caused by appellant's conduct or appellant's conduct in concert with that of appellant's attorney. Curtis v. State, 168 Ga. App. 235, 308 S.E.2d 599 (1983).

When trial court failed to conduct a hearing to decide appellant's motion for extension of time for filing a transcript, but instead granted defendant's motion to dismiss the appeal without hearing or notice of hearing to appellant, the trial court's action was error and the matter remanded for a determination on whether the delay in forwarding the transcript was both unreasonable and inexcusable. Hosch v. Pickett, 172 Ga. App. 13, 321 S.E.2d 777 (1984).

Court did not err in finding 51 day delay in transmitting transcript unreasonable, and to be inexcusably caused by the appellant's failure to pay costs, even after the appellant admittedly had received notice of the amount due, although not by registered or certified mail. Neese v. Long, 178 Ga. App. 105, 341 S.E.2d 861 (1986).

Appellant not obligated to prepare record. — Oligation of the appellant relates to the transcript, and the obligation for the preparation of the record rests with the clerk. After the appellant has filed a notice of appeal, the appellant's duty as to the record is limited to the payment of costs. When the clerk fails to transmit the record, but there is no indication that this failure is occasioned by the failure of a party to pay costs, the trial court has no discretion to dismiss the appeal. Long v. City of Midway, 251 Ga. 364, 306 S.E.2d 639 (1983); Holy Fellowship Church of God in Christ v. First Community Bank, 242 Ga. App. 400, 530 S.E.2d 24 (2000).

Neither improper certification of service of brief or failure to support enumerated error by specific reference to the record or transcript is a statutorily recognized ground for dismissal of an appeal. Allen v. ABKO Properties, Inc., 166 Ga. App. 776, 305 S.E.2d 477 (1983).

County's appeal properly filed. — Fact that the county board of commissioners never voted to file an appeal at any meeting would not provide a legal basis for dismissing the appeal when the county met all the requirements of O.C.G.A. § 5-6-48 for filing the county's notice of appeal. Board of Comm'rs v. Guthrie, 273 Ga. 1, 537 S.E.2d 329 (2000).

Appeal dismissed for failure to file notice of appeal within time required by statute. Mathis v. Hegwood, 169 Ga. App. 547, 314 S.E.2d 122, cert. denied, 469 U.S. 830, 105 S. Ct. 115, 83 L. Ed. 2d 58 (1984), overruled on other grounds, MMT Enters., Inc. v. Cullars, 218 Ga. App. 559, 462 S.E.2d 771 (1995).

Appeal by defendants, an individual and corporations, was dismissed under O.C.G.A. § 5-6-48(c). A total delay of 19 months was caused in significant part by the defendants, not only by the defendants' failure to pay costs until 200 days after filing the notice of appeal and the defendants' failure to ensure the prompt filing of the transcript, but also by the defendants' deliberate employment of multiple bankruptcy filings and inadequate affidavits of indigence. Morrell v. W. Servs., LLC, 291 Ga. App. 369, 662 S.E.2d 215 (2008).

Landlord was entitled to dismissal of a tenant's appeal because Ga. Ct. App. R. 23(a) required the tenant to file a brief containing an enumeration of errors within 20 days after the appeal was docketed; the appeal was docketed in October 2007, and the tenant had yet to file a brief with an enumeration of errors or respond to the landlord's motion to dismiss. Smith v. R. James Props., Inc., 292 Ga. App. 317, 665 S.E.2d 19 (2008).

Case dismissed for lack of jurisdiction. Fredericks v. State, 168 Ga. App. 278, 308 S.E.2d 693 (1983).

Defendant's flight and continued uncertainty as to defendant's whereabouts divested defendant of right to

Application Generally (Cont'd)

appeal. — Despite the fact that the defendant was not an escapee from custody, an appeal from the judgments entered was dismissed based on the defendant's flight and continued uncertainty as to the defendant's whereabouts; those actions amounted to an open defiance of the court's order and divestment of the right to appeal. Mohamed v. State, 289 Ga. App. 394, 657 S.E.2d 307 (2008).

Effect of action in sister state. — That an insurer filed a declaratory judgment action which has since resulted in a final declaratory judgment that no coverage exists, and which was pending at the time the insured initiated the instant Georgia action, is not a ground for dismissing the instant appeals. Atlantic Wood Indus., Inc. v. Lumbermen's Underwriting Alliance, 196 Ga. App. 503, 396 S.E.2d 541, cert. denied, 498 U.S. 1085, 111 S. Ct. 958, 112 L. Ed. 2d 1046 (1990).

Motion to dismiss appeal denied. First Fed. Sav. & Loan Ass'n v. White, 168 Ga. App. 516, 309 S.E.2d 858 (1983).

Because the defendant's notice of appeal from Stephens County superior court was timely, the defendant's error in confusing the counties in an appeal brief was inconsequential to the disposition of the case; thus, the state's motion to dismiss the appeal was denied. McCroskey v. State, 291 Ga. App. 15, 660 S.E.2d 735 (2008).

District attorney's motion to dismiss the defendant's appeal of a judgment denying the defendant's motion to strike an illegal sentence was denied because a direct appeal from the trial court's ruling was authorized; the defendant was contending that the defendant's sentence was illegal because the sentence was based on an unconstitutional statute, which was a colorable claim that the defendant's sentence imposed was void. Wiggins v. State, 288 Ga. 169, 702 S.E.2d 865 (2010), cert. denied, 131 S. Ct. 2906, 179 L. Ed. 2d 1251, 2011 U.S. LEXIS 4005 (U.S. 2011).

Dismissal inappropriate sanction for party's refusal to sign deposition. — Dismissal of a party's appeal is not an appropriate sanction for the party's failure to comply with an order to review and sign a deposition. Gerdes v. Dziewinski, 182 Ga. App. 764, 357 S.E.2d 110 (1987).

Dismissal proper for delay in ordering transcript. — There was no abuse of discretion by the trial court's dismissal of the appellant's appeal based on the appellant's unreasonable and inexcusable delay in ordering the transcript. Kleber v. Cobb County, 212 Ga. App. 441, 442 S.E.2d 296 (1994).

Dismissal proper since record didn't include all evidence. — In the pageant organizers' appeal from the trial court's denial of a judgment notwithstanding the verdict in the model's action for, inter alia, slander, the case was removed from the appeal docket as the record on appeal did not include all of the evidence presented to the jury. Galardi v. Steele-Inman, 259 Ga. App. 249, 575 S.E.2d 921 (2002).

No error in favoring transcript. — Trial court did not err in denying a wife's request that the court reporter's audiotapes be replayed in her presence to establish the accuracy of the certified transcript of the wife's remarks against her recollection thereof because the wife did not show error in the trial court's failure to adopt the wife's recollected version of what transpired during the hearing in favor of the court reporter's certified transcript. Willis v. Willis, 288 Ga. 577, 707 S.E.2d 344 (2010).

Appeals based on void sentence. — State's motion to dismiss the defendant's appeal was without merit and had to be denied as the defendant was entitled to directly appeal the denial of the defendant's petition attacking the defendant's sentence based on the contention that the sentence was void; however, defendant was unable to show that the sentence was void, and, therefore, the defendant's sentence was permissible. Daniel v. State, 262 Ga. App. 474, 585 S.E.2d 752 (2003).

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Appellate Review, § 155 et seq. 5 Am. Jur. 2d, Appellate Review, §§ 252 et seq., 809, 810.

C.J.S. — 4 C.J.S., Appeal and Error, § 161 et seq. 5 C.J.S., Appeal and Error, § 748 et seq.

ALR. — Public interest as ground for refusal to dismiss an appeal, where question has become moot, or dismissal is sought by one or both parties, 132 ALR 1185.

Dismissal of appeal for appellant's failure to obey court order, 49 ALR2d 1425.

Dismissal of appeal or writ of error for want of prosecution as bar to subsequent appeal, 96 ALR2d 312.

Failure or refusal of state court judge to have record made of bench conference with counsel in criminal proceeding, 31 ALR5th 704.

Effect of escape by, or fugitive status of, state criminal defendant on availability of appeal or other post-verdict or post-conviction relief — State cases, 105 ALR5th 529.

5-6-49. Bills of exceptions, exceptions pendente lite, assignments of error abolished; contents of motions for new trial and for j.n.o.v.

(a) Bills of exceptions, exceptions pendente lite, assignments of error, and all rules relating thereto are abolished.

(b) Motions for new trial and for judgment notwithstanding the verdict need not set out portions of the record or transcript of evidence and it shall not be necessary that the grounds thereof be complete in themselves or be approved by the court; provided, however, that the motions must be sufficiently definite to inform the opposite party of the contention of the movant. (Ga. L. 1965, p. 18, § 3.)

Cross references. — Rulings on motions for judgment notwithstanding the verdict and motions for new trial, § 9-11-50.

JUDICIAL DECISIONS

Time limitation for grant of new trial on unspecified grounds on court's own motion. — Court may not grant new trial on unspecified ground on own motion after more than 30 days from entry of judgment and after expiration of term. Darby v. Commercial Bank, 135 Ga. App. 462, 218 S.E.2d 252 (1975), overruled on other grounds, Smith v. Telecable of Columbus, Inc., 140 Ga. App. 755, 232 S.E.2d 100 (1976).

Issue preserved for review. — Claim on appeal that the trial court erred by refusing to consider a request for a nonjury bench trial in a criminal matter was preserved for review despite the fact that the counsel did not state an exception or file an objection to the trial court's ruling, as the "bill of exceptions" requirement was abolished a long time ago pursuant to O.C.G.A. § 5-6-49(a); the trial court did not err, as there was no requirement that a defendant be given a nonjury trial upon a request and nothing prevented the trial courts from ensuring that the defendants were given the defendants' constitutional jury trial right pursuant to Ga. Const. 1983, Art. I, Sec. I, Para. XI. Lindo v. State, 278 Ga. App. 228, 628 S.E.2d 665 (2006).

Given that once the trial court addressed the defendant's motion regarding sequestration of the lead investigating officer and the trial court issued a ruling, the defendant did not need to further object to the ruling in order to preserve

the issue for appeal. Stafford v. State, 288 Ga. App. 733, 655 S.E.2d 221 (2007), cert. denied, No. S08C0654, 2008 Ga. LEXIS 489 (Ga. 2008).

Cited in Murcherson v. State, 112 Ga. App. 299, 145 S.E.2d 58 (1965); Bishop v. Lamkin, 221 Ga. 691, 146 S.E.2d 769 (1966); Wright v. Wright, 222 Ga. 777, 152 S.E.2d 363 (1966); Travelers Ins. Co. v. Merritt, 124 Ga. App. 42, 183 S.E.2d 73 (1971); Brown v. Rooks, 139 Ga. App. 770, 229 S.E.2d 548 (1976); State v. Eubanks, 239 Ga. 483, 238 S.E.2d 38 (1977); Hienrichsen v. Harris, 155 Ga. App. 810, 273 S.E.2d 213 (1980); Turner v. National Bank, 160 Ga. App. 165, 286 S.E.2d 500 (1981); Hiers-Wright Assocs. v. Manufacturers Hanover Mtg. Corp., 182 Ga. App. 732, 356 S.E.2d 903 (1987).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 2 Am. Jur. Pleading and Practice Forms, Appeal and Error, § 399.

C.J.S. — 4 C.J.S., Appeal and Error, § 591.

5-6-50. Procedure provided by article supersedes former appellate procedure.

The procedure provided in this article shall serve all purposes which a bill of exceptions or writ of error has served in the past; and, where under any law of force in this state provision is made for the taking of writs of error or bills of exception, the procedure prescribed in this article shall be deemed to apply in lieu thereof as to the procedure and as to all time requirements. (Ga. L. 1965, p. 18, § 19.)

JUDICIAL DECISIONS

Judgments traditionally reviewable under writ of error are reviewable under notice of appeal. — Basically whatever judgments were traditionally reviewable as being final a judgment under a writ of error are reviewable under a notice of appeal. Crowe v. Holloway Dev. Corp., 114 Ga. App. 856, 152 S.E.2d 913 (1966).

Cited in Bishop v. Lamkin, 221 Ga. 691, 146 S.E.2d 769 (1966); Peters v. Liberty Mut. Ins. Co., 113 Ga. App. 41, 147 S.E.2d 26 (1966); Travelers Ins. Co. v. Merritt, 124 Ga. App. 42, 183 S.E.2d 73 (1971); Rucker v. State, 124 Ga. App. 491, 184 S.E.2d 228 (1971); Milam v. Housing Auth., 129 Ga. App. 188, 199 S.E.2d 107 (1973); State v. Eubanks, 239 Ga. 483, 238 S.E.2d 38 (1977); Middle Ga. Bank v. Continental Real Estate & Assocs., 168 Ga. App. 611, 309 S.E.2d 893 (1983).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 2 Am. Jur. Pleading and Practice Forms, Appeal and Error, § 2.

5-6-51. Forms.

The following suggested forms are declared to be sufficient, but any other form substantially complying therewith shall also be sufficient:

(1) **Notice of appeal — Civil cases.**

IN THE _____ COURT OF _____ COUNTY
STATE OF GEORGIA

_____	)	
Plaintiffs	)	
	)	
v.	)	Civil action
	)	File no. _____
	)	
_____	)	
Defendants	)	

NOTICE OF APPEAL

Notice is hereby given that _____ and _____, defendants above-named, hereby appeal to the _____ (Court of Appeals or Supreme Court) from the _____ (describe order or judgment) entered in this action on _____(date)_____, _____.

Motion for new trial (or motion for judgment n.o.v., etc.) was filed and overruled (or granted, etc.) on _____(date)_____, _____.

The clerk will please omit the following from the record on appeal:

1. _____

2. _____

3. _____

Transcript of evidence and proceedings will/will not be filed for inclusion in the record on appeal.

This court, rather than the (Court of Appeals or Supreme Court) has jurisdiction of this case on appeal for the reason that _____.

Dated: _____.

_____
Attorney for appellants

_____
Address

(CERTIFICATE OF SERVICE)

(2) **Notice of appeal — Criminal cases.**

IN THE _____ COURT OF _____ COUNTY
STATE OF GEORGIA

_____	)	
The State (etc.)	)	
	)	
	)	(Indictment)
v.	)	(Accusation)
	)	No. _____
_____	)	
Defendant	)	

NOTICE OF APPEAL

Notice is hereby given that _____, defendant above-named, hereby appeals to the _____ (Court of Appeals or Supreme Court) from the judgment of conviction and sentence entered herein on _____(date)_____, _____.

The offense(s) for which defendant was convicted is (are) _____, and the sentence(s) imposed is (are) as follows: _____.

Motion for new trial (or motion in arrest of judgment, etc.) was filed and overruled on _____(date)_____, _____.

The clerk will please omit the following from the record on appeal:

1. _____

2. _____

3. _____

Transcript of evidence and proceedings will/will not be filed for inclusion in the record on appeal.

This court, rather than the (Court of Appeals or Supreme Court) has jurisdiction of this case on appeal for the reason that _____.

Dated: _____.

_____
Attorney for appellant

_____
Address

(CERTIFICATE OF SERVICE)

(3) **Notice of cross appeal.**

IN THE _____ COURT OF _____ COUNTY
STATE OF GEORGIA

_____	)	
Plaintiffs	)	
	)	
v.	)	Civil action
	)	File no. _____
	)	
_____	)	
Defendants	)	

NOTICE OF CROSS APPEAL

Notice is hereby given that _____, one of the defendants above-named, hereby cross appeals to the _____ (Court of Appeals or Supreme Court) from the _____ (describe order or judgment) entered in this action on _____(date)_____, _____.

Notice of appeal was heretofore filed on _____(date)_____, _____.

The clerk will please include the following in the record on appeal, all of which were designated for omission by appellant:

1. _____

2. _____

3. _____

Transcript of evidence and proceedings (will be filed) (will not be filed) (has already been designated to be filed by appellant) for inclusion in the record on appeal.

Dated: _____.

_____
Attorney for cross appellant

_____
Address

(CERTIFICATE OF SERVICE)

(4) **Enumeration of errors.**

ENUMERATION OF ERRORS

1. The court erred in charging the jury on gross negligence.

2. The court erred in admitting the testimony of witness Smith concerning his opinion as to how the collision happened.

3. The court erred in refusing to grant a mistrial because of the misconduct of plaintiff's attorney in oral argument.

4. The court erred in refusing to admit in evidence testimony of witness Jones concerning his estimate as to damages.

5. The court erred in denying defendant's motion for continuance.

(Ga. L. 1965, p. 18, § 20; Ga. L. 1966, p. 493, §§ 8, 8A; Ga. L. 1973, p. 303, § 2; Ga. L. 1984, p. 22, § 5; Ga. L. 1999, p. 81, § 5.)

Cross references. — Objection to failure to comply with Appellate Practice Act, Rules of the Supreme Court of the State of Georgia, Rule 20. Objections to records or transcripts, Rules of the Court of Appeals of the State of Georgia, Rule 47.

Code Commission notes. — The sentences in paragraphs (1) and (2) relating to motion for new trial or motion for judgment n.o.v. would be included only where such a motion was filed, for the purpose of showing that the time for appeal from the judgment complained of had been automatically extended under Code Section 5-6-38.

Law reviews. — For article, "The Appellate Procedure Act of 1965," (Art. 2, Ch. 6, T. 5), see 1 Ga. St. B.J. 451 (1965). For article, "1966 Amendments to the Appellate Procedure Act of 1965," (Art. 2, Ch. 6, T. 5), see 2 Ga. St. B.J. 433 (1966). For article, "The 1967 Amendments to the Georgia Civil Practice Act (Ch. 11, T. 9), and the Appellate Procedure Act (Art. 2, Ch. 6, T. 5)," see 3 Ga. St. B.J. 383 (1967).

JUDICIAL DECISIONS

Analysis

General Consideration
Enumeration of Error
1. Form
2. Content

General Consideration

Under this article, appeals are decided on their merits. MacDonald v. MacDonald, 156 Ga. App. 565, 275 S.E.2d 142 (1980).

Cited in Mobley v. State, 221 Ga. 716, 146 S.E.2d 735 (1966); Interstate Fire Ins. Co. v. Chattam, 222 Ga. 436, 150 S.E.2d 618 (1966), answer conformed to, 114 Ga. App. 332, 151 S.E.2d 486 (1966); Hardnett v. United States Fid. & Guar. Co., 116 Ga. App. 732, 158 S.E.2d 303 (1967); Noble v. State Hwy. Dep't, 117 Ga. App. 33, 159 S.E.2d 715 (1967); City of Atlanta v. Barton, 153 Ga. App. 426, 265 S.E.2d 345 (1980); Smiway, Inc. v. DOT, 178 Ga. App. 414, 343 S.E.2d 497 (1986).

Enumeration of Error

1. Form

Section sets out forms for enumerations of error and makes them sufficient without reasons given. Dawson v. Garner, 119 Ga. App. 469, 167 S.E.2d 741 (1969).

Fact that notice of appeal is not in form suggested in section is immaterial for reason that section specifically provides that "any other form substantially complying therewith shall be sufficient." Chambliss v. Hall, 113 Ga. App. 96, 147 S.E.2d 334 (1966).

While enumerated errors are in proper form they may still be ruled

insufficient or held not to be meritorious from record. MacDonald v. MacDonald, 156 Ga. App. 565, 275 S.E.2d 142 (1980).

2. Content

Enumeration must identify subject matter of objection. — This section, although allowing enumerations of error in highly abbreviated notice form, at very least requires that subject of objection be identified. DeKalb County v. Fulton Nat'l Bank, 156 Ga. App. 253, 274 S.E.2d 649 (1980).

Subject matter of objection need be indicated only in a general way. Pinyan v. Liberty Mut. Ins. Co., 113 Ga. App. 130, 147 S.E.2d 452 (1966); MacDonald v. MacDonald, 156 Ga. App. 565, 275 S.E.2d 142 (1980).

Errors apparent from notice, record, enumeration or combination thereof. — Where it is apparent from the notice of appeal, the record, the enumerations of error, or any combination of the foregoing, what errors are sought to be asserted upon appeal, the appeal shall be considered notwithstanding that the enumerations of error fail to enumerate clearly the errors sought to be reviewed. Robinson v. State, 210 Ga. App. 278, 435 S.E.2d 718 (1993).

Where error enumerated is not intelligible in itself the brief must make it so, or court has nothing before it for decision. Pinyan v. Liberty Mut. Ins. Co., 113 Ga. App. 130, 147 S.E.2d 452 (1966); MacDonald v. MacDonald, 156 Ga. App. 565, 275 S.E.2d 142 (1980).

Since subject matter need be indicated only in most general way, appellate court frequently cannot identify or pass upon contention which appellant seeks to urge as cause for reversal unless made intelligible in brief. Wall v. Rhodes, 112 Ga. App. 572, 145 S.E.2d 756 (1965).

Hazy, yet conforming, enumeration suffices. — MacDonald v. MacDonald, 156 Ga. App. 565, 275 S.E.2d 142 (1980).

Raising inadequacy of damages by enumerating general grounds of motion for new trial. — Although good practice would call for enumerating as error the inadequacy of jury's verdict for damages, question of inadequacy is sufficiently raised for consideration by court where overruling of general grounds of a motion for new trial is enumerated as error, and question of inadequacy of verdict is presented and argued in briefs. Kirkman v. Miller, 116 Ga. App. 78, 156 S.E.2d 558 (1967).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 2 Am. Jur. Pleading and Practice Forms, Appeal and Error, §§ 67, 69.

ALR. — Failure, due to fraud, duress, or misrepresentation by adverse party, to file notice of appeal within prescribed time, 149 ALR 1261.

Adequacy of defense counsel's representation of criminal client regarding venue and recusation matters, 7 ALR4th 942.

CHAPTER 7

APPEAL OR CERTIORARI BY STATE IN CRIMINAL CASES

Sec.
5-7-1. (For effective date, see note.) Orders, decisions, or judgments appealable; defendant's right to cross appeal.
5-7-1.1. Right of state to direct appeal in certain delinquency cases [Repealed].
5-7-2. Certification required for immediate review of nonfinal orders, decisions, or judgments; exception; motion for new trial.
5-7-3. Right of certiorari.
5-7-4. Time limits and procedures governing appeal and certiorari by state.
5-7-5. Right of accused to bail; amount of bail reviewable by appellate court.
5-7-6. Construction of chapter.

Law reviews. — For article, "The 1967 Amendments to the Georgia Civil Practice Act and the Appellate Procedure Act," see 3 Ga. St. B.J. 383 (1967).

JUDICIAL DECISIONS

Chapter strictly construed in allowing appeals. — In allowing appeals under any specific provision of this chapter, the statute must be strictly construed. State v. Watson, 143 Ga. App. 785, 240 S.E.2d 194 (1977).

Cited in State v. Gould, 232 Ga. 844, 209 S.E.2d 312 (1974); State v. Blosfield, 165 Ga. App. 111, 299 S.E.2d 588 (1983).

RESEARCH REFERENCES

ALR. — Appealability of order suspending imposition or execution of sentence, 51 ALR4th 939.

5-7-1. (For effective date, see note.) Orders, decisions, or judgments appealable; defendant's right to cross appeal.

(a) An appeal may be taken by and on behalf of the State of Georgia from the superior courts, state courts, and juvenile courts and such other courts from which a direct appeal is authorized to the Court of Appeals and the Supreme Court in criminal cases and adjudication of delinquency cases in the following instances:

(1) From an order, decision, or judgment setting aside or dismissing any indictment, accusation, or a petition alleging that a child has committed a delinquent act, or any count thereof;

(2) From an order, decision, or judgment arresting judgment of conviction or adjudication of delinquency upon legal grounds;

(3) From an order, decision, or judgment sustaining a plea or motion in bar, when the defendant has not been put in jeopardy;

(4) From an order, decision, or judgment suppressing or excluding evidence illegally seized or excluding the results of any test for alcohol or drugs in the case of motions made and ruled upon prior to the impaneling of a jury or the defendant being put in jeopardy, whichever occurs first;

(5) From an order, decision, or judgment excluding any other evidence to be used by the state at trial on any motion filed by the state or defendant at least 30 days prior to trial and ruled on prior to the impaneling of a jury or the defendant being put in jeopardy, whichever occurs first, if:

(A) Notwithstanding the provisions of Code Section 5-6-38, the notice of appeal filed pursuant to this paragraph is filed within two days of such order, decision, or judgment; and

(B) The prosecuting attorney certifies to the trial court that such appeal is not taken for purpose of delay and that the evidence is a substantial proof of a material fact in the proceeding;

(6) From an order, decision, or judgment of a court where the court does not have jurisdiction or the order is otherwise void under the Constitution or laws of this state;

(7) (For effective date, see note.) From an order, decision, or judgment of a superior court transferring a case to the juvenile court pursuant to Code Section 15-11-560 or subsection (b) of Code Section 17-7-50.1;

(8) From an order, decision, or judgment of a court granting a motion for new trial or an extraordinary motion for new trial;

(9) From an order, decision, or judgment denying a motion by the state to recuse or disqualify a judge made and ruled upon prior to the defendant being put in jeopardy; or

(10) From an order, decision, or judgment issued pursuant to subsection (c) of Code Section 17-10-6.2.

(b) In any instance in which any appeal is taken by and on behalf of the State of Georgia in a criminal case, the defendant shall have the right to cross appeal. Such cross appeal shall be subject to the same rules of practice and procedure as provided for in civil cases under Code Section 5-6-38.

(c) In any instance in which the defendant in a criminal case applies for and is granted an interlocutory appeal as provided in Code Section

5-6-34 or an appeal is taken pursuant to Code Section 17-10-35.1, the state shall have the right to cross appeal on any matter ruled on prior to the impaneling of a jury or the defendant being put in jeopardy. Such cross appeal shall be subject to the same rules of practice and procedure as provided for in civil cases under Code Section 5-6-38. The state shall not be required to obtain a certificate of immediate review for such cross appeal. (Ga. L. 1973, p. 297, § 1; Ga. L. 1984, p. 22, § 5; Ga. L. 1994, p. 311, § 1; Ga. L. 1994, p. 1012, § 28; Ga. L. 2000, p. 20, § 3; Ga. L. 2000, p. 862, § 2; Ga. L. 2003, p. 247, § 2; Ga. L. 2005, p. 20, § 3/HB 170; Ga. L. 2006, p. 379, § 3/HB 1059; Ga. L. 2012, p. 899, § 1-1/HB 1176; Ga. L. 2013, p. 141, § 5/HB 79; Ga. L. 2013, p. 222, § 1/HB 349; Ga. L. 2013, p. 294, § 4-2/HB 242.)

Delayed effective date. — Paragraph (a)(7), as set out above, becomes effective January 1, 2014. For version of paragraph (a)(7) in effect until January 1, 2014, see the 2013 amendment note.

The 2012 amendment, effective July 1, 2012, deleted "superior" preceding "court" in paragraph (a)(7). See the editor's note for applicability.

The 2013 amendments. — The first 2013 amendment, effective April 24, 2013, part of an Act to revise, modernize, and correct the Code, substituted "the Court of Appeals and the Supreme Court" for "the Court of Appeals of Georgia and the Supreme Court of Georgia" in the introductory language of subsection (a). The second 2013 amendment, effective July 1, 2013, deleted "City Court of Atlanta," following "state courts," in the introductory paragraph of subsection (a); in paragraph (a)(1), inserted "a" preceding "petition" and inserted a comma following "act"; added paragraph (a)(5); redesignated former paragraphs (a)(5) through (a)(9) as present paragraphs (a)(6) through (a)(10), respectively; added "or subsection (b) of Code Section 17-7-50.1" at the end of paragraph (a)(7); and added subsection (c). See editor's note for applicability. The third 2013 amendment, effective January 1, 2014, substituted "Code Section 15-11-560" for "subparagraph (b)(2)(B) of Code Section 15-11-28" in former paragraph (a)(6) (now paragraph (a)(7)). See editor's note for applicability.

Cross references. — Payment by state of bill of costs in appeals or applications filed on behalf of state by a district attorney, § 15-18-13. Unified appeal, Uniform Superior Court Rules, Rule 34.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2013, in subsection (c), in the first sentence, "case" was substituted for "cases" and "in" was inserted preceding "Code Section 5-6-34" near the beginning.

Editor's notes. — Ga. L. 1994, p. 1012, § 1, not codified by the General Assembly, provides that the Act shall be known and may be cited as the "School Safety and Juvenile Justice Reform Act of 1994."

Ga. L. 1994, p. 1012, § 2, not codified by the General Assembly, sets forth legislative findings and determinations for the "School Safety and Juvenile Justice Reform Act of 1994."

Ga. L. 1994, p. 1012, § 29, not codified by the General Assembly, provides: "In the event any section, subsection, sentence, clause, or phrase of this Act shall be declared or adjudged invalid or unconstitutional, such adjudication shall in no manner affect the other sections, subsections, sentences, clauses, or phrases of this Act, which shall remain of full force and effect as if the section, subsection, sentence, clause, or phrase so declared or adjudged invalid or unconstitutional were not originally a part hereof. The General Assembly declares that it would have passed the remaining parts of this Act if it had known that such part or parts hereof would be declared or adjudged invalid or unconstitutional."

Ga. L. 2005, p. 20, § 1/HB 170, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Criminal Justice Act of 2005.'"

Ga. L. 2005, p. 20, § 17/HB 170, not

codified by the General Assembly, provides that this Act shall apply to all trials which commence on or after July 1, 2005.

Ga. L. 2006, p. 379, § 1/HB 1059, not codified by the General Assembly, provides that: "The General Assembly finds and declares that recidivist sexual offenders, sexual offenders who use physical violence, and sexual offenders who prey on children are sexual predators who present an extreme threat to the public safety. Many sexual offenders are extremely likely to use physical violence and to repeat their offenses; and some sexual offenders commit many offenses, have many more victims than are ever reported, and are prosecuted for only a fraction of their crimes. The General Assembly finds that this makes the cost of sexual offender victimization to society at large, while incalculable, clearly exorbitant. The General Assembly further finds that the high level of threat that a sexual predator presents to the public safety, and the long-term effects suffered by victims of sex offenses, provide the state with sufficient justification to implement a strategy that includes:

"(1) Incarcerating sexual offenders and maintaining adequate facilities to ensure that decisions to release sexual predators into the community are not made on the basis of inadequate space;

"(2) Requiring the registration of sexual offenders, with a requirement that complete and accurate information be maintained and accessible for use by law enforcement authorities, communities, and the public;

"(3) Providing for community and public notification concerning the presence of sexual offenders;

"(4) Collecting data relative to sexual offenses and sexual offenders;

"(5) Requiring sexual predators who are released into the community to wear an electronic monitoring system for the rest of their natural life and to pay for such system; and

"(6) Prohibiting sexual predators from working with children, either for compensation or as a volunteer.

"The General Assembly further finds that the state has a compelling interest in protecting the public from sexual offenders and in protecting children from predatory sexual activity, and there is sufficient justification for requiring sexual offenders to register and for requiring community and public notification of the presence of sexual offenders. The General Assembly declares that in order to protect the public, it is necessary that the sexual offenders be registered and that members of the community and the public be notified of a sexual offender's presence. The designation of a person as a sexual offender is neither a sentence nor a punishment but simply a regulatory mechanism and status resulting from the conviction of certain crimes. Likewise, the designation of a person as a sexual predator is neither a sentence nor a punishment but simply a regulatory mechanism and status resulting from findings by the Sexual Offender Registration Review Board and a court if requested by a sexual offender."

Ga. L. 2006, p. 379, § 30(c)/HB 1059, not codified by the General Assembly, provides that: "The provisions of this Act shall not affect or abate the status as a crime of any such act or omission which occurred prior to the effective date of the Act repealing, repealing and reenacting, or amending such law, nor shall the prosecution of such crime be abated as a result of such repeal, repeal and reenactment, or amendment."

Ga. L. 2012, p. 899, § 9-1(a)/HB 1176, not codified by the General Assembly, provides, in part, that the amendment to this Code section shall apply to offenses which occur on or after July 1, 2012. Any offense occurring before July 1, 2012, shall be governed by the statute in effect at the time of such offense and shall be considered a prior conviction for the purpose of imposing a sentence that provides for a different penalty for a subsequent conviction for the same type of offense, of whatever degree or level, pursuant to this Act.

Ga. L. 2013, p. 222, § 21/HB 349, not codified by the General Assembly, provides: "This Act shall become effective on July 1, 2013, and shall apply to offenses which occur on or after that date. Any offense occurring before July 1, 2013, shall be governed by the statute in effect at the time of such offense."

Ga. L. 2013, p. 294, § 5-1/HB 242, not

codified by the General Assembly, provides that: "This Act shall become effective on January 1, 2014, and shall apply to all offenses which occur and juvenile proceedings commenced on and after such date. Any offense occurring before January 1, 2014, shall be governed by the statute in effect at the time of such offense and shall be considered a prior adjudication for the purpose of imposing a disposition that provides for a different penalty for subsequent adjudications, of whatever class, pursuant to this Act. The enactment of this Act shall not affect any prosecutions for acts occurring before January 1, 2014, and shall not act as an abatement of any such prosecutions."

Law reviews. — For survey of cases dealing with criminal law and criminal procedure from June 1, 1977 through May 1978, see 30 Mercer L. Rev. 27 (1978). For article surveying appellate practice and procedure, see 34 Mercer L. Rev. 3 (1982). For annual survey of appellate practice and procedure, see 38 Mercer L. Rev. 47 (1986). For annual survey of appellate practice and procedure, see 43 Mercer L. Rev. 73 (1991). For annual survey of death penalty decisions, see 57 Mercer L. Rev. 139 (2005). For article on 2006 amendment of this Code section, see 23 Ga. St. U.L. Rev. 11 (2006). For survey article on criminal law, see 59 Mercer L. Rev. 89 (2007). For survey article on criminal law, see 60 Mercer L. Rev. 85 (2008). For article on the 2012 amendment of this Code section, see 29 Ga. St. U.L. Rev. 290 (2012). For annual survey on criminal law, see 64 Mercer L. Rev. 83 (2012).

For note on the 2003 amendment to this Code section, see 20 Ga. St. U.L. Rev. 119 (2003).

JUDICIAL DECISIONS

Analysis

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General Consideration

Section must be construed strictly against state in allowing appeals under specific conditions provided by General Assembly. State v. Clendinin, 136 Ga. App. 303, 221 S.E.2d 71 (1975), overruled on other grounds, 253 Ga. 287, 319 S.E.2d 864 (1984); State v. McIntyre, 191 Ga. App. 565, 382 S.E.2d 669 (1989); State v. Clark, 191 Ga. App. 923, 382 S.E.2d 670, cert. denied, State v. Clark, 191 Ga. App. 923, 382 S.E.2d 670; State v. Sosebee, 191 Ga. App. 725, 382 S.E.2d 681 (1989).

The General Assembly having placed in this section specific conditions upon appeals by state in criminal cases, the Court of Appeals will not by judicial construction extend the right of appeal beyond these instances, especially where intent is expressed to limit state to appeals under this chapter. State v. Hollomon, 132 Ga. App. 304, 208 S.E.2d 167 (1974).

State may appeal directly illegal judgment. — Notwithstanding the provisions of this Code section, the state may appeal directly an illegal judgment. State v. Bilal, 192 Ga. App. 185, 384 S.E.2d 253 (1989); State v. Mohamed, 203 Ga. App. 21, 416 S.E.2d 358 (1992); State v. James, 211 Ga. App. 149, 438 S.E.2d 399 (1993).

State is authorized to appeal a void sentence pursuant to O.C.G.A. § 5-7-1(a)(5), and the state's appeals are governed by the same time limitations as those applied to other appellants in criminal cases, pursuant to O.C.G.A. § 5-7-4. State v. Jones, 265 Ga. App. 493, 594 S.E.2d 706 (2004).

In the absence of express statutory authority requiring the state to file a motion to amend an improper sentence as a prerequisite to appealing that sentence, the state may appeal directly the sentence imposed by the trial court or file a motion to amend the sentence and then directly

appeal the denial thereof, but in any event, the state has 30 days from judgment or from the denial of the motion to amend to file its notice of appeal; however, should the defendant file a motion for new trial, that motion tolls the time within which the state can directly appeal the sentence, and in that case, the state has 30 days from the denial of the motion for new trial to appeal the alleged improper sentence. State v. Jones, 265 Ga. App. 493, 594 S.E.2d 706 (2004).

Order compelling return of seized property to defendant. — State could not appeal from order compelling the return of seized property to defendant, where the state stipulated it would not use the property at issue in the trial of the charges pending against defendant, and the state did not challenge the trial court's ruling on defendant's motion to suppress. State v. McIntyre, 191 Ga. App. 565, 382 S.E.2d 669 (1989).

State may not appeal grant of new trial. — Where, at the close of the defendant's evidence, the court volunteered that in its opinion the state had failed to prove the criminal trespass charge and that, if the jury returned a verdict of guilty, the court would either "set that judgment aside" or "grant a motion for new trial instantly" if defendant requested one on that basis and, immediately following return of the verdicts, the court stated that it was granting "a new trial" on the criminal trespass charge, the court effectively acquitted defendant. Even if the order had been a proper grant of new trial, it would not have been appealable by the State, as it is not encompassed in § 5-7-1. State v. Seignious, 197 Ga. App. 766, 399 S.E.2d 559 (1990).

Defendant properly granted new trial. — Upon the state's appeal pursuant to O.C.G.A. § 5-7-1(a)(7), as amended in 2005, the appeals court found that the defendant was properly granted a new trial based on the ineffective assistance of trial counsel, given counsel's failure to interview any of the state's witnesses, present a viable defense to the charge of involuntary manslaughter, and adequately investigate whether the victim's death might have been an accident. State v. McMillon, 283 Ga. App. 671, 642 S.E.2d 343 (2007).

Order striking immaterial allegation of accusation could not be appealed by the state. State v. Phillips, 206 Ga. App. 421, 425 S.E.2d 412 (1992).

The state cannot circumvent this section and create avenues for appeal by requesting a trial court convert an adverse evidentiary ruling into a motion to quash the indictment and then appeal the adverse ruling that it requested. State v. Land-O-Sun Dairies, Inc., 204 Ga. App. 485, 419 S.E.2d 743 (1992).

A revocation of probation hearing. — Appeal by the state from the grant of probationer's motion to suppress was dismissed since a revocation of probation hearing is not a criminal proceeding for purposes of a direct appeal; jurisdiction would lie upon application only. State v. Wilbanks, 215 Ga. App. 223, 450 S.E.2d 293 (1994).

Court of Appeals lacked jurisdiction. — The Court of Appeals was without jurisdiction to entertain the state's appeal of a dismissal of a juvenile court petition. In re J.H., 228 Ga. App. 154, 491 S.E.2d 209 (1997).

Because the state, in the person of the district attorney, attempted to avoid the restrictions in O.C.G.A. § 5-7-1 et seq., by attacking by way of mandamus and prohibition an alleged magistrate court policy concerning rulings made in criminal prosecutions, and because the state had no ability to appeal the policy, the trial court erred by considering the state's petition for mandamus and prohibition. Magistrate Court v. Fleming, 284 Ga. 457, 667 S.E.2d 356 (2008).

Supreme court lacked jurisdiction. — State's appeal of an order granting the defendant's motion for new trial was dismissed because the supreme court lacked jurisdiction to consider the state's appeal; the state had no right to file a direct appeal under O.C.G.A. § 5-7-1(a)(7). State v. Caffee, 291 Ga. 31, 728 S.E.2d 171 (2012).

No jurisdiction to grant extraordinary motion for a new trial. — An extraordinary motion for new trial is not among those statutorily enumerated circumstances in which the state may challenge a judgment in a criminal case, therefore, the trial court was without ju-

General Consideration (Cont'd)

risdiction to entertain the state's motion or to grant the requested relief. Moody v. State, 272 Ga. 55, 525 S.E.2d 360 (2000).

Dismissal of petition for writs of mandamus and prohibition. — In an original action brought before the Supreme Court of Georgia, the Court dismissed a petition for writs of mandamus and prohibition filed by a prosecutor regarding a criminal prosecution as the prosecutor was not entitled to use the writs to circumvent the statutory limitations on the state's ability to appeal under O.C.G.A. §§ 5-7-1 and 5-7-2. Howard v. Fuller, No. S08O0357, 2007 Ga. LEXIS 873 (Nov. 30, 2007).

Cited in State v. David, 130 Ga. App. 872, 204 S.E.2d 773 (1974); State v. Ogles, 133 Ga. App. 802, 213 S.E.2d 60 (1975); State v. Houston, 134 Ga. App. 36, 213 S.E.2d 139 (1975); Potts v. State, 236 Ga. 230, 223 S.E.2d 120 (1976); State v. McCranie, 137 Ga. App. 369, 223 S.E.2d 765 (1976); State v. Moore, 237 Ga. 269, 227 S.E.2d 241 (1976); State v. Rowe, 138 Ga. App. 904, 228 S.E.2d 3 (1976); State v. Foster, 141 Ga. App. 258, 233 S.E.2d 215 (1977); State v. Holmes, 142 Ga. App. 847, 237 S.E.2d 406 (1977); State v. Strickland, 144 Ga. App. 128, 240 S.E.2d 579 (1977); State v. White, 145 Ga. App. 730, 244 S.E.2d 579 (1978); State v. Bowen, 145 Ga. App. 790, 245 S.E.2d 10 (1978); State v. Willis, 149 Ga. App. 509, 254 S.E.2d 743 (1979); Adult Bookmart, Inc. v. State, 152 Ga. App. 838, 264 S.E.2d 273 (1979); State v. Benton, 154 Ga. App. 141, 267 S.E.2d 775 (1980); State v. Brannon, 154 Ga. App. 285, 267 S.E.2d 888 (1980); State v. Williams, 157 Ga. App. 393, 278 S.E.2d 499 (1981); State v. Izquierdo, 160 Ga. App. 33, 285 S.E.2d 769 (1981); State v. Bigler, 160 Ga. App. 225, 286 S.E.2d 758 (1981); Parrish v. State, 160 Ga. App. 601, 287 S.E.2d 603 (1981); State v. Hopkins, 163 Ga. App. 141, 293 S.E.2d 529 (1982); State v. Chumley, 164 Ga. App. 828, 299 S.E.2d 564 (1982); State v. Allen, 165 Ga. App. 86, 299 S.E.2d 158 (1983); State v. Gardner, 254 Ga. 264, 328 S.E.2d 546 (1985); State v. Thomas, 176 Ga. App. 106, 335 S.E.2d 697 (1985); State v. Harris, 256 Ga. 24, 343 S.E.2d 483 (1986); State v. Howell, 180 Ga. App. 449, 349 S.E.2d 476 (1986); Doe v. State, 185 Ga. App. 347, 364 S.E.2d 78 (1987); State v. Eaves, 185 Ga. App. 740, 365 S.E.2d 535 (1988); State v. Richardson, 186 Ga. App. 888, 368 S.E.2d 825 (1988); State v. Greenwood, 206 Ga. App. 188, 424 S.E.2d 870 (1992); Brooks v. State, 206 Ga. App. 485, 425 S.E.2d 911 (1992); In re R.J.C., 210 Ga. App. 286, 435 S.E.2d 759 (1993); State v. Schuman, 212 Ga. App. 231, 441 S.E.2d 466 (1994); State v. Williams, 212 Ga. App. 164, 441 S.E.2d 501 (1994); State v. Crank, 212 Ga. App. 246, 441 S.E.2d 531 (1994); State v. Levins, 235 Ga. App. 739, 507 S.E.2d 246 (1998); State v. Levins, 235 Ga. App. 739, 507 S.E.2d 246 (1998); State v. Alexander, 245 Ga. App. 666, 538 S.E.2d 550 (2000); State v. Murphy, 246 Ga. App. 246, 540 S.E.2d 231 (2000); State v. Ware, 258 Ga. App. 564, 574 S.E.2d 632 (2002); State v. Smith, 276 Ga. 14, 573 S.E.2d 64 (2002); State v. Allen, 262 Ga. App. 724, 586 S.E.2d 378 (2003); State v. Lowe, 263 Ga. App. 1, 587 S.E.2d 169 (2003); State v. Glass, 279 Ga. 696, 620 S.E.2d 371 (2005); Pierce v. State, 278 Ga. App. 162, 628 S.E.2d 235 (2006); State v. Hardy, 281 Ga. App. 365, 636 S.E.2d 36 (2006); State v. Johnson, 282 Ga. App. 102, 637 S.E.2d 825 (2006); State v. Austell, 285 Ga. App. 18, 645 S.E.2d 550 (2007); State v. Lamb, 287 Ga. App. 389, 651 S.E.2d 504 (2007); Kramer v. State, 287 Ga. App. 796, 652 S.E.2d 843 (2007), cert. denied, 2008 Ga. LEXIS 289 (Ga. 2008); State v. Pye, 282 Ga. 796, 653 S.E.2d 450 (2007); State v. Sammons, 283 Ga. 364, 659 S.E.2d 598 (2008); State v. O'Neal, 292 Ga. App. 884, 665 S.E.2d 926 (2008); State v. Jones, 284 Ga. 302, 667 S.E.2d 76 (2008); State v. Felton, 297 Ga. App. 35, 676 S.E.2d 434 (2009); State v. Jeffries, 298 Ga. App. 141, 679 S.E.2d 368 (2009); State v. Burks, 285 Ga. 781, 684 S.E.2d 269 (2009); State v. Corhen, 306 Ga. App. 495, 700 S.E.2d 912 (2010); Tyner v. State, 289 Ga. 592, 714 S.E.2d 577 (2011); Ellington v. State, 292 Ga. 109, 735 S.E.2d 736 (2012); State v. James, 292 Ga. 440, 738 S.E.2d 601 (2013); State v. Mosley, No. A12A1830,

2013 Ga. App. LEXIS 217 (Mar. 19, 2013).

Judgments Dismissing Indictment or Accusations

State may appeal order dismissing indictment even if order is entered during trial. State v. Williams, 246 Ga. 788, 272 S.E.2d 725 (1980).

State was entitled to appeal directly from the sustaining of defendant's special demurrer, because the sustaining of a special demurrer, the result of which is either to strike from or add to the material allegations of an indictment, is equivalent to sustaining a general demurrer and quashing the indictment. State v. Mendoza, 190 Ga. App. 831, 380 S.E.2d 357 (1989).

The state's appeal of an order directing a verdict of acquittal on charges against a defendant for family violence battery and cruelty to children was valid because the order was not based on the merits of the case but rather on the fact that the state could not prove any wrongdoing by the defendant on the date stated within the accusation; thus, the trial court's order was actually a dismissal of the accusation. State v. Swint, 284 Ga. App. 343, 643 S.E.2d 840 (2007).

The state was permitted to appeal a judgment of a trial court sustaining defendant's demurrer as, while the hearing transcript showed that the trial court considered granting defendant's motion for a directed verdict, the trial court's ultimate ruling was limited to sustaining the demurrer and, in effect, dismissing the accusation because of how the accusation was worded. When the ruling of the trial court is in substance a dismissal of the indictment, the state may appeal an order dismissing an indictment under O.C.G.A. § 5-7-1(a)(1). State v. Shabazz, 291 Ga. App. 751, 662 S.E.2d 828 (2008).

Dismissal of state's appeal under O.C.G.A. § 5-6-48(c) upheld. — The trial court properly dismissed the state's appeal from an order barring the defendant's trial on speedy trial grounds, pursuant to O.C.G.A. § 5-6-48(c), as the order was not the type the state had a right to pursue under O.C.G.A. § 5-7-1; moreover, the order was not void, as it was entered by a court of competent jurisdiction. State v. Glover, 281 Ga. 633, 641 S.E.2d 543 (2007).

Transfer order was appealable by state. — O.C.G.A. § 5-7-1(a)(1) granted the state the right to appeal in a criminal case from an order transferring a case from the state court to the recorder's court as the order effectively set aside or dismissed the state court accusation against defendant and precluded defendant's prosecution there; defendant's motion to dismiss the state's appeal of the order granting the motion to transfer was denied. State v. Serio, 257 Ga. App. 369, 571 S.E.2d 168 (2002).

Transfer order was not appealable by state. — Juvenile court erred in finding that a juvenile case involving armed robbery with a firearm was subject to the transfer provisions delineated in O.C.G.A. § 15-11-30.2 because, under subsection (f) of that section, the transfer provisions did not apply in cases involving armed robbery with a firearm, which were subject to the exclusive jurisdiction of the superior court under O.C.G.A. § 15-11-28(b)(2)(A)(vii). However, because the juvenile court had concurrent jurisdiction to enter the judgment due to the state's filing a petition in the juvenile court, the state had no right to appeal from the petition pursuant to O.C.G.A. § 5-7-1(A)(5). In re D. L., 302 Ga. App. 234, 690 S.E.2d 522 (2010).

Authority to dismiss charge. — Where a criminal case was called for trial, the court granted the state's motion for continuance and the case was then reset for trial, and the state was not ready to try the case on that date, the court properly dismissed the charges against the defendant. State v. Grimes, 194 Ga. App. 736, 392 S.E.2d 727 (1990).

Trial court's order quashing an indictment based solely on the failure to revise the grand jury list during the time period set forth in O.C.G.A. § 15-12-40(a)(1) was reversed, as the statute was not obligatory, but directory in nature, merely suggesting a timetable for grand jury lists to be revised; hence, the trial court's order was reversed. State v. Parlor, 281 Ga. 820, 642 S.E.2d 54 (2007).

Charge improperly dismissed. — Because the defendant's alleged mistake

Judgments Dismissing Indictment or Accusations (Cont'd)

of fact regarding a charge of possession of a firearm by a convicted felon required consideration of facts extrinsic to the accusation to be decided by a jury, the trial court erred in dismissing the charge, sua sponte; moreover, as such dismissal was not an adjudication of guilt, the state could appeal from the same without violating the defendant's double jeopardy rights. State v. Henderson, 283 Ga. App. 111, 640 S.E.2d 686 (2006).

Judgments Sustaining Pleas in Bar

Discharge and acquittal based on denial of demand for trial. — State may appeal trial court's grant of criminal defendant's motion for discharge and acquittal, where such motion is based on denial of defendant's demand for trial pursuant to § 17-7-170, as such motion constitutes a plea in bar. State v. Benton, 246 Ga. 132, 269 S.E.2d 470 (1980). But see State v. Clendinin, 136 Ga. App. 303, 221 S.E.2d 71 (1975).

Double Jeopardy

Determining questions of double jeopardy. — Title 16 contains proscription of double jeopardy beyond that provided for in the United States and Georgia Constitutions. Therefore questions of double jeopardy in Georgia must now be determined under expanded statutory proscriptions: §§ 16-1-6, 16-1-7 and 16-1-8. State v. Warren, 133 Ga. App. 793, 213 S.E.2d 53 (1975).

State has a right to appeal the grant of a plea in bar based on double jeopardy. State v. Stowe, 167 Ga. App. 65, 306 S.E.2d 663 (1983).

O.C.G.A. § 5-7-1(a)(3) gave an appellate court authority to consider the State of Georgia's appeal with regard to the defendant's plea in bar contending that double jeopardy prohibited a second trial on the same charges. State v. Caffee, 291 Ga. 31, 728 S.E.2d 171 (2012).

Orders Suppressing Evidence

Appeal permitted from pretrial exclusions. — This Code section is not so limited in scope as to authorize the state to appeal only from the grant of a pretrial motion to suppress under O.C.G.A. § 17-5-30. If the defendant in a criminal case files any pretrial motion to exclude evidence on the ground that it was obtained in violation of law, the grant of such a motion may be appealed by the state. State v. McKenna, 199 Ga. App. 206, 404 S.E.2d 278 (1991).

State appeal not allowed. — Because the state failed to request that the trial court put an oral order of suppression in writing, and show that the trial court refused to do so, it did not have the right to appeal from said order; moreover, while the state could have filed a mandamus petition seeking to require the court to do put the oral order in writing, it did not seek said relief. State v. Morrell, 281 Ga. 152, 635 S.E.2d 716 (2006).

In a defendant's prosecution for drug possession, the state did not have the right to appeal under O.C.G.A. § 5-7-1(a)(4) from an oral ruling that suppressed the defendant's statements prior to the defendant's arrest at a stop scene for failure to give Miranda warnings because the transcript did not affirmatively show that the state requested the trial court to put the oral order in written form and that the trial court refused to do so. State v. Kipple, 294 Ga. App. 420, 669 S.E.2d 185 (2008).

Basis for suppression order. — Paragraph (4) authorizes the state to bring a direct appeal only when the trial court's exclusion of evidence is based upon the determination that the state unlawfully obtained it, and not when the exclusion is based upon some general rule of evidence. State v. Brown, 185 Ga. App. 701, 365 S.E.2d 865 (1988); State v. Lavell, 214 Ga. App. 525, 448 S.E.2d 270 (1994).

Exclusion based upon general rule of evidence. — An appeal from an order dismissing a case for lack of prosecution was not authorized where the order was the result of the exclusion of evidence based upon some general rule of evidence; reversing State v. Berky, 214 Ga. App. 174, 447 S.E.2d 147 (1994). Berky v. State, 266 Ga. 28, 463 S.E.2d 891 (1995).

"Evidence" is not necessarily physical or externally real. — Paragraph (4)

refers to "evidence," not "property," and "evidence" is not necessarily physical or externally real. State v. Watson, 143 Ga. App. 785, 240 S.E.2d 194 (1977).

State may appeal orders suppressing oral admissions, or written or tape recorded statements. — State has right under section to appeal trial judge's order suppressing as evidence any oral admissions, written statements, or tape recordings of statements made to law enforcement officers while in custody. State v. Watson, 143 Ga. App. 785, 240 S.E.2d 194 (1977).

Motion, in whatever form, to exclude evidence appealable by state. — If a defendant moves before trial to exclude evidence on the ground that it was obtained in violation of law, the grant of such a motion, whatever its name, is subject to direct appeal on the part of the state. Strickman v. State, 253 Ga. 287, 319 S.E.2d 864 (1984); State v. McCard, 173 Ga. App. 504, 326 S.E.2d 856 (1985); State v. Frye, 205 Ga. App. 508, 422 S.E.2d 915 (1992); State v. Peters, 213 Ga. App. 352, 444 S.E.2d 609 (1994).

Motion made and ruled on in mid-trial. — A suppression motion which has been made and ruled upon in mid-trial is not an order which may be appealed by the state. State v. Lawrence, 208 Ga. App. 588, 431 S.E.2d 409 (1993).

Decision to exclude testimony of intoximeter test. — The state had no right of direct appeal from a decision by the trial court to exclude testimony regarding the results of an intoximeter test which had been administered to defendant at the time of his arrest, where the state failed to provide him with a copy of the test results. State v. Gosch, 179 Ga. App. 613, 347 S.E.2d 353 (1986).

Where defendant's pretrial motion did not seek the exclusion of any evidence on the ground that it had been obtained in violation of law, and the exclusion of intoximeter test results was based upon the trial court's finding of a material alteration thereof, paragraph (4) was not authority for the state to bring an appeal. State v. McKenna, 199 Ga. App. 206, 404 S.E.2d 278 (1991).

State appeal allowed. — The state could appeal an order suppressing evidence that was based on general rules of evidence and on grounds that the evidence had been obtained in violation of law. State v. Pastorini, 226 Ga. App. 260, 486 S.E.2d 399 (1997).

Although the state may not appeal from an order excluding evidence on the basis only of some general rule of evidence, the state may appeal under O.C.G.A. § 5-7-1(a)(4) from an order, decision, or judgment suppressing or excluding evidence illegally seized, including orders that suppress evidence based both upon general rules of evidence and a determination that the evidence was illegally obtained; thus, where the basis for the trial court's order granting a defendant's suppression motion was not stated in the order, but the suppression motion itself was based both on the warrant being improper and on the evidence being inadmissible apart from the warrant issue, the state's appeal was authorized pursuant to O.C.G.A. § 5-7-1(a)(4). State v. Kramer, 260 Ga. App. 546, 580 S.E.2d 314 (2003).

After a trial court granted the defendant's suppression motion with respect to DNA evidence that was obtained pursuant to a search warrant, which the trial court found was not executed in compliance with statutory prerequisites, the state had a right to appeal that ruling directly pursuant to O.C.G.A. § 5-7-1(a)(4). State v. Stafford, 277 Ga. App. 852, 627 S.E.2d 802 (2006).

Because O.C.G.A. § 5-7-1(a)(4) afforded the state a direct right of appeal from an order granting suppression of the defendant's statement to law enforcement as involuntarily made, the defendant's motion to dismiss the state's appeal was denied. State v. Stanfield, 290 Ga. App. 62, 658 S.E.2d 837 (2008).

State's direct appeal of a judgment granting the defendant's motion to suppress evidence that the victims identified the defendant from photographic lineups was authorized by O.C.G.A. § 5-7-1(a)(4) because the state's direct appeal was from an order that: (1) was issued prior to the impaneling of a jury or the defendant being put in jeopardy; and (2) granted the defendant's motion to suppress evidence that was allegedly obtained in an illegal manner, and which the trial court deemed

Orders Suppressing Evidence (Cont'd)

to be "meritorious" even apart from the prosecutor's supposed dilatory conduct. During the final hearing on the defendant's motion, the trial court refused to allow the state to present evidence to contest the motion as a means of sanctioning the state for prosecutorial conduct that the trial court deemed to be dilatory in nature, and the fact that the trial court was the direct cause of the state's inability to meet the state's burden of showing that the identifications were lawfully obtained in no way divested the court of appeals of jurisdiction to hear its appeal pursuant to § 5-7-1(a)(4). State v. Smith, 308 Ga. App. 345, 707 S.E.2d 560 (2011).

Admission of videotape. — In a prosecution for obstruction of a law enforcement officer and simple battery, suppression of a videotape on the ground that it did not capture the entire encounter between the officer and the defendant was error because the probative value of the videotape was not substantially outweighed by the danger of unfair prejudice to the defendant. State v. Forehand, 246 Ga. App. 590, 542 S.E.2d 110 (2000).

Application Generally

Directed verdicts of acquittal are not appealable judgments. State v. Warren, 133 Ga. App. 793, 213 S.E.2d 53 (1975), rev'd on other grounds, 246 Ga. 788, 272 S.E.2d 725 (1980); State v. Williams, 155 Ga. App. 144, 270 S.E.2d 281 (1980).

The government may not appeal a trial court's grant to a criminal defendant of a directed verdict of acquittal based on insufficiency of evidence to support conviction, in that new trial would be barred by double jeopardy clause of fifth amendment. State v. Williams, 246 Ga. 788, 272 S.E.2d 725 (1980).

Trial court's determination that the state did not establish the essential elements of burglary constituted a directed verdict of acquittal on the merits, and the state could not appeal and subject defendants to a new trial on the merits. State v. Bryant, 182 Ga. App. 698, 356 S.E.2d 656 (1987).

State had no right to appeal in the case of an acquittal. State v. Fly, 193 Ga. App. 190, 387 S.E.2d 347, cert. denied, 193 Ga. App. 911, 387 S.E.2d 347 (1989).

No direct appeal in delinquency case. — The statute only allows the state to appeal directly in criminal cases and not in a delinquency case, i.e., a civil case. In re D.Q.H., 212 Ga. App. 271, 441 S.E.2d 411 (1994).

No appeal from transfer order entered under O.C.G.A. § 17-7-50.1(b). — State could not appeal the transfer order entered under O.C.G.A. § 17-7-50.1(b) because O.C.G.A. § 17-7-50.1(b) did not speak of "setting aside," "dismissing," or taking any other action regarding an indictment returned against a juvenile. Instead, the provision directed that the juvenile's entire case be transferred to juvenile court if the 180-day charging deadline was not met. State v. Johnson, 292 Ga. 409, 738 S.E.2d 86 (2013).

Dismissal of charges before jeopardy attaches. — Entry of a directed verdict of acquittal based on an insufficiency of the evidence to support the charge is not generally appealable by the state. An exception exists where the trial court dismisses charges on erroneous grounds before jeopardy attaches. State v. Vansant, 208 Ga. App. 772, 431 S.E.2d 708 (1993), aff'd in part and rev'd in part, 264 Ga. 319, 443 S.E.2d 474 (1994), vacated on other grounds, 214 Ga. App. 127, 447 S.E.2d 348 (1994).

Appellate jurisdiction not found. — This court has declined to find appellate jurisdiction when the state appealed an order granting a defendant's motion in limine on general evidentiary grounds. State v. Land-O-Sun Dairies, Inc., 204 Ga. App. 485, 419 S.E.2d 743 (1992).

This section did not authorize the state to appeal from an order of the trial court merging various counts for sentencing. Gibbins v. State, 229 Ga. App. 896, 495 S.E.2d 46 (1998).

Under O.C.G.A. § 5-7-1, the State of Georgia was not authorized to appeal a trial court's ruling as to an anticipated jury charge. Height v. State, 278 Ga. 592, 604 S.E.2d 796 (2004).

Because a trial court's order denying defendant's special demurrer was not a

final order, and because an O.C.G.A. § 5-7-2 certificate of immediate review was not issued, the Court of Appeals lacked jurisdiction under O.C.G.A. § 5-7-1 to affirm the trial court's order. State v. Outen, 289 Ga. 579, 714 S.E.2d 581 (2011).

Order discharging and acquitting defendant under § 17-7-170 is not appealable under this section. State v. Clendinin, 136 Ga. App. 303, 221 S.E.2d 71 (1975). But see State v. Benton, 246 Ga. 132, 269 S.E.2d 470 (1980).

State is not authorized to appeal the grant of a new trial in a criminal case. State v. Thurmond, 195 Ga. App. 369, 393 S.E.2d 518 (1990).

Reinstatement of dismissed appeal. — Trial court's order reinstating a dismissed appeal in the state court is not one of the instances set out by statute from which the state may appeal. State v. Welch, 201 Ga. App. 803, 413 S.E.2d 747 (1991).

District attorney request for declaratory judgment on admissibility of hearsay evidence. — Supreme Court of Georgia reversed the judgment of the lower courts granting a district attorney a declaratory judgment because the district attorney did not have the right to bring a declaratory judgment action to obtain review of the probable cause decisions of magistrate judges at preliminary hearings or to challenge the admissibility of hearsay evidence at such hearings. Leitch v. Fleming, 291 Ga. 669, 732 S.E.2d 401 (2012).

Motion in limine not a plea in bar. — Defendant's motion in limine was not a plea in bar as argued by the state and thus, this appeal was not authorized under this section. State v. Land-O-Sun Dairies, Inc., 204 Ga. App. 485, 419 S.E.2d 743 (1992).

Appeal from order denying state's motion for reconsideration of sentence is not allowed under this section. State v. O'Neal, 156 Ga. App. 384, 274 S.E.2d 575 (1980).

Orders denying state's motions to allow similar transaction evidence and for reconsideration not directly appealable. — Supreme court could not review the trial court's denial of the state's motion to allow similar transaction evidence and its motion for reconsideration because neither of these rulings was directly appealable; where the state appeals from one or more orders listed in O.C.G.A. § 5-7-1(a), O.C.G.A. § 5-6-34(d) does not authorize appellate review of any other ruling in the case because § 5-6-34(d) was not intended to apply to appeals pursuant to § 5-7-1 et seq. since the General Assembly deliberately omitted from § 5-6-34(d) appeals taken or authorized under § 5-7-1. State v. Lynch, 286 Ga. 98, 686 S.E.2d 244 (2009).

State's appeal from void order. — State could properly challenge a trial court's order denying its motion to vacate an order granting a defendant's motion for a mistrial two months after the jury returned its verdict through a direct appeal because the order granting the mistrial was legally void. State v. Sumlin, 281 Ga. 183, 637 S.E.2d 36 (2006).

Recusal of trial judge. — An order denying the state's motion to recuse is not expressly included in the list enumerated in the statute of situations in which the state may appeal and, therefore, such an order is not appealable by the state. Ritter v. State, 269 Ga. 884, 506 S.E.2d 857 (1998).

Dismissal for lack of prosecution. — The state's right to appeal is controlled by this section, which does not authorize an appeal from the trial court's dismissal of a case for lack of prosecution after the close of evidence. State v. Gribble, 169 Ga. App. 446, 313 S.E.2d 720 (1984).

Right to appeal case dismissed due to statute of limitations. — Where trial court's order appealed from was not a directed verdict of acquittal on the merits, but a dismissal because the statute of limitations, subject to judicial notice, had allegedly expired, state had right to appeal direction of verdict for defendant. State v. Williams, 172 Ga. App. 708, 324 S.E.2d 557 (1984).

Where defendant sought dismissal of the charges against him based on the statute of limitations, the grant of the plea effectively dismissed the indictment, and the state could appeal the ruling. State v. Lowman, 198 Ga. App. 8, 400 S.E.2d 373 (1990).

Application Generally (Cont'd)

In a quasi-criminal proceeding on violation of a county zoning ordinance, the state was authorized under paragraph (2) of subsection (a) to appeal from the lower court's decision dismissing the citation because of expiration of the applicable limitation period, not on evidentiary grounds. Johnson v. DeKalb County, 214 Ga. App. 756, 449 S.E.2d 311 (1994).

Appeal from finding of immunity from prosecution. — Because O.C.G.A. § 5-7-1(a)(1) provides that the state may appeal an order dismissing "any count" of the indictment, the trial court's order that in effect dismissed two of the three counts by finding that the defendant was immune from prosecution under O.C.G.A. § 16-3-24.2 was appealable. State v. Yapo, 296 Ga. App. 158, 674 S.E.2d 44 (2009).

Order of trial court disqualifying district attorney. — State did not have the right to appeal an order of the trial court disqualifying the district attorney from prosecuting a criminal defendant. State v. Smith, 268 Ga. 75, 485 S.E.2d 491 (1997).

Motion to disclose identity of informant. — State was without authority to appeal from the grant of a motion to disclose the identity of the confidential informant because it was not among the enumerated instances set forth in this section, nor was the order dispositive of the charges against defendant. Glenn v. State, 271 Ga. 604, 523 S.E.2d 13 (1999).

Order placing case on dead docket not appealable. — Trial court's order placing a case on the court's dead docket was not a dismissal of the accusation from which the state could bring an appeal. State v. Creel, 216 Ga. App. 394, 454 S.E.2d 804 (1995).

Criminal defendants cannot cross appeal suits brought by state. — Despite resultant justice and judicial economy, court will not allow criminal defendants to cross appeal suits brought before court by state pursuant to this section; O.C.G.A. § 5-6-38 limits that right to civil parties and the court will not encroach upon the legislature's prerogative by extending that right. State v. Crapse, 173 Ga. App. 100, 325 S.E.2d 620 (1984), overruled on other grounds, Hubbard v. State, 176 Ga. App. 622, 337 S.E.2d 60 (1985).

Order in arrest of judgment. — Where the jury returned a verdict finding defendant guilty of the offenses of murder and hindering apprehension involving the same victim, and the trial court concluded as a matter of law that the verdicts were mutually exclusive and, therefore, vacated the felony-murder conviction and sentence, the court's order was, in effect, an order in arrest of judgment and the state was entitled to file a direct appeal. State v. Freeman, 272 Ga. 813, 537 S.E.2d 92 (2000).

Void sentences. — Although this section, enumerating those specific situations wherein the state may appeal, does not allow for appeal from an order denying the state's motion to amend sentence, void sentences are appealable by the state. State v. Shuman, 161 Ga. App. 304, 287 S.E.2d 757 (1982).

Where the state contended that the trial court's action in probating defendant's sentence to confinement was void, the matter would be reviewed on the premise that void sentences are appealable by the state. State v. Johnson, 183 Ga. App. 236, 358 S.E.2d 840, cert. denied, 183 Ga. App. 907, 358 S.E.2d 840 (1987).

Upon a conviction of methamphetamine trafficking, because the sentence imposed by a trial judge against the defendant under O.C.G.A. § 16-13-31(g)(2) was supported by the record evidence that the defendant assisted the police in identifying a methamphetamine supplier, and did not result from an illegal departure from O.C.G.A. § 16-13-31(e)(1), the state's appeal from imposition of the same on grounds that it was void was dismissed. State v. Carden, 281 Ga. App. 886, 637 S.E.2d 493 (2006).

State cannot appeal defendant's choice to proceed without jury. — Since the trial court's ruling denying the state's objection to conducting defendant's criminal trial without a jury was not the type of ruling that the state was statutorily authorized to appeal, the state's appeal to the state supreme court regarding that denial and the denial of the state's petition for a writ of prohibition to compel a trial with a jury had to be dismissed.

Howard v. Lane, 276 Ga. 688, 581 S.E.2d 1 (2003).

Because the trial court's adjudication of guilt entered against the defendant after a bench trial over the state's objection did not grant the state a right to appeal under O.C.G.A. § 5-7-1(a)(5), and the adjudication did not amount to a void judgment entered without jurisdiction, the state's appeal was dismissed. State v. Evans, 282 Ga. 63, 646 S.E.2d 77 (2007).

State appeal from granting of motion to suppress. — While the state had a right to appeal from the trial court's act of granting defendant's motion to suppress, the trial court's ruling that defendant invoked defendant's right to remain silent was not clearly erroneous as the record showed that defendant shook defendant's head in the negative when the state police investigator asked the defendant, "You don't want to talk about it?" and, thus, the inculpatory statements defendant made in regard to the shooting of another person had to be suppressed. State v. Nash, 279 Ga. 646, 619 S.E.2d 684 (2005).

State's appeal from void sentence. — Since the state was authorized to directly appeal from an allegedly void sentence, the state's argument that a trial court erred in failing to allow it to withdraw from a plea agreement was properly before the appellate court. State v. Harper, 279 Ga. App. 620, 631 S.E.2d 820 (2006).

State was required to file certificate of immediate review in order to appeal an order granting defendant a new trial. — Upon an appeal by the state from an order granting the defendant a new trial, because the state failed to obtain a certificate of immediate review pursuant to O.C.G.A. § 5-7-2, the state's attempted appeal was nugatory and did not activate the appellate jurisdiction of the Supreme Court of Georgia. Accordingly, that appeal was dismissed. State v. Ware, 282 Ga. 676, 653 S.E.2d 21 (2007).

Because the former version of O.C.G.A. § 5-7-2, which was then in effect, required the State of Georgia to obtain a certificate within ten days of the entry of an order granting a new trial and the state did not obtain the required certificate, the state did not have a right to file a direct appeal under O.C.G.A. § 5-7-1(a)(7). State v. Caffee, 291 Ga. 31, 728 S.E.2d 171 (2012).

State's appeal to grant of new trial to defendant. — In the state's appeal, a trial court erred in granting the defendant a new trial with regard to child sex abuse convictions because the defendant failed to show ineffective assistance of counsel since the two witnesses that were not called by defense counsel were not shown to have been reasonably known to defense counsel. State v. Wofford, No. A12A2296, 2013 Ga. App. LEXIS 219 (Mar. 19, 2013).

Motion to dismiss based on speedy trial violation. — Trial court properly denied the defendant's motion to dismiss the indictment because the defendant failed to follow the interlocutory appeal procedures of O.C.G.A. § 5-6-34(b), the defendant waited over five years to assert the defendant's right to a speedy trial, and failed to show that the defendant had been prejudiced by the delay. Sosniak v. State, 292 Ga. 35, 734 S.E.2d 362 (2012).

RESEARCH REFERENCES

Am. Jur. 2d. — 5 Am. Jur. 2d, Apellate Review, § 349 et seq. 14 Am. Jur. 2d, Certiorari, § 107 et seq.

C.J.S. — 24 C.J.S., Criminal Law, § 2342 et seq.

ALR. — Adequacy of remedy by appeal in criminal cases to preclude prohibition sought on the ground of lack or loss of jurisdiction, 141 ALR 1262.

Evidence erroneously stricken out as proper for consideration by appellate court to sustain finding or verdict, 152 ALR 371.

Constitutionality of statute permitting appeal by state in criminal case, 157 ALR 1065.

Appealability of order pertaining to pretrial examination, discovery, interrogatories, production of books and papers, or the like, 37 ALR2d 586.

Appeal by state of order granting new trial in criminal case, 95 ALR3d 596.

5-7-1.1. Right of state to direct appeal in certain delinquency cases.

Repealed by Ga. L. 2000, p. 862, § 3, effective July 1, 2000.

Editor's notes. — This Code section was based on Ga. L. 1994, p. 856, § 1.

5-7-2. Certification required for immediate review of nonfinal orders, decisions, or judgments; exception; motion for new trial.

(a) Except as provided in subsection (b) of this Code section, in any appeal under this chapter where the order, decision, or judgment is not final, it shall be necessary that the trial judge certify within ten days of entry thereof that the order, decision, or judgment is of such importance to the case that an immediate review should be had.

(b) A certificate of immediate review shall not be required from an:

(1) Order, decision, or judgment suppressing or excluding evidence as set forth in paragraph (4) or (5) of subsection (a) of Code Section 5-7-1; or

(2) Order, decision, or judgment described in paragraph (1) or (7) of subsection (a) of Code Section 5-7-1.

(c) For purposes of this Code section, the granting of a motion for new trial or an extraordinary motion for new trial shall be considered a final order. (Ga. L. 1973, p. 297, § 2; Ga. L. 2011, p. 612, § 1/HB 390; Ga. L. 2012, p. 899, § 1-2/HB 1176; Ga. L. 2013, p. 222, § 2/HB 349.)

The 2011 amendment, effective May 12, 2011, designated the existing provisions as subsection (a); substituted "Except as provided in subsection (b) of this Code section" for "Other than from an order, decision, or judgment sustaining a motion to suppress evidence illegally seized" at the beginning of subsection (a); and added subsections (b) and (c).

The 2012 amendment, effective July 1, 2012, inserted "(1) or" in paragraph (b)(2). See the editor's note for applicability.

The 2013 amendment, effective July 1, 2013, substituted the present provisions of paragraph (b)(1) for the former provisions, which read: "Order, decision, or judgment suppressing or excluding illegally seized evidence; or". See editor's note for applicability.

Cross references. — Review of orders, decisions, or judgments not subject to direct appeal, § 5-6-34(b).

Editor's notes. — Ga. L. 2012, p. 899, § 9-1(a)/HB 1176, not codified by the General Assembly, provides, in part, that the amendment to this Code section shall apply to offenses which occur on or after July 1, 2012. Any offense occurring before July 1, 2012, shall be governed by the statute in effect at the time of such offense and shall be considered a prior conviction for the purpose of imposing a sentence that provides for a different penalty for a subsequent conviction for the same type of offense, of whatever degree or level, pursuant to this Act.

Ga. L. 2013, p. 222, § 21/HB 349, not codified by the General Assembly, provides: "This Act shall become effective on July 1, 2013, and shall apply to offenses which occur on or after that date. Any

offense occurring before July 1, 2013, shall be governed by the statute in effect at the time of such offense."

Law reviews. — For article on the 2012 amendment of this Code section, see 29 Ga. St. U.L. Rev. 290 (2012). For annual survey on criminal law, see 64 Mercer L. Rev. 83 (2012).

JUDICIAL DECISIONS

State's right of appeal in criminal cases is strictly construed. — The General Assembly having placed in § 5-7-1 specific conditions upon appeals by state in criminal cases, Court of Appeals will not by judicial construction extend right of appeal beyond these instances, especially where intent is expressed to limit state to appeals under this chapter. State v. Hollomon, 132 Ga. App. 304, 208 S.E.2d 167 (1974).

Upon an appeal by the state from an order granting the defendant a new trial, because the state failed to obtain a certificate of immediate review pursuant to O.C.G.A. § 5-7-2, the state's attempted appeal was nugatory and did not activate the appellate jurisdiction of the Supreme Court of Georgia. Accordingly, that appeal was dismissed. State v. Ware, 282 Ga. 676, 653 S.E.2d 21 (2007).

Because a trial court's order denying defendant's special demurrer was not a final order, and because an O.C.G.A. § 5-7-2 certificate of immediate review was not issued, the Court of Appeals lacked jurisdiction under O.C.G.A. § 5-7-1 to affirm the trial court's order. State v. Outen, 289 Ga. 579, 714 S.E.2d 581 (2011).

Motion to dismiss accusation not final judgment. — Where defendant was charged with abandoning his two minor children and filed a motion to dismiss the accusation, asserting general grounds, the trial court properly denied the motion to dismiss, because defendant did not comply with the interlocutory appeal procedure prescribed by subsection O.C.G.A. § 5-6-34(b); the overruling of defendant's motion to dismiss the accusation, leaving the case pending for trial, was not a final judgment from which appeal could be taken, absent a certificate of immediate review. Boyd v. State, 191 Ga. App. 435, 383 S.E.2d 906 (1989).

Sustaining of motion to suppress evidence illegally seized authorizes direct appeal by state. State v. Smalley, 138 Ga. App. 747, 227 S.E.2d 488 (1976).

Interlocutory orders. — The enactment of O.C.G.A. § 5-6-34(b) which changed the method by which interlocutory orders are appealed made no essential modification of the principal effect of this section. State v. Blosfield, 165 Ga. App. 111, 299 S.E.2d 588 (1983).

Failure to obtain required certificate. — Because the former version of O.C.G.A. § 5-7-2, which was then in effect, required the state to obtain a certificate within ten days of the entry of an order granting a new trial and the state did not obtain the required certificate, the state did not have a right to file a direct appeal under O.C.G.A. § 5-7-1(a)(7). State v. Caffee, 291 Ga. 31, 728 S.E.2d 171 (2012).

State's appeal of an order granting the defendant's motion for new trial was dismissed because O.C.G.A. § 5-7-2 required the state to obtain a certificate of immediate review to appeal the entry of the order granting a new trial, but the state did not obtain the required certificate. State v. Caffee, 291 Ga. 31, 728 S.E.2d 171 (2012).

State may not waive defendant's failure to obtain certificate. — Defendant's failure to obtain the certificate of immediate review of the trial court's judgment notwithstanding a mistrial would result in a dismissal of appeal even where the state would voluntarily waive any objection regarding the departure from the appeal procedure. Blackburn v. State, 169 Ga. App. 498, 314 S.E.2d 244 (1984); State v. Strain, 177 Ga. App. 874, 341 S.E.2d 481 (1986).

Dismissal of petition for writs of mandamus and prohibition. — In an original action brought before the Supreme Court of Georgia, the Court dismissed a petition for writs of mandamus and prohibition filed by a prosecutor regarding a criminal prosecution as the prosecutor was not entitled to use the

writs to circumvent the statutory limitations on the State's ability to appeal under O.C.G.A. §§ 5-7-1 and 5-7-2. Howard v. Fuller, No. S08O0357, 2007 Ga. LEXIS 873 (Nov. 30, 2007).

Cited in State v. Boswell, 131 Ga. App. 657, 206 S.E.2d 682 (1974); State v. Roberts, 133 Ga. App. 206, 210 S.E.2d 387 (1974); State v. Johnson, 282 Ga. App. 102, 637 S.E.2d 825 (2006); State v. Sammons, 283 Ga. 364, 659 S.E.2d 598 (2008); State v. Felton, 297 Ga. App. 35, 676 S.E.2d 434 (2009); Cmty. State Bank v. Strong, 651 F.3d 1241 (11th Cir. 2011); State v. Wofford, No. A12A2296, 2013 Ga. App. LEXIS 219 (Mar. 19, 2013).

RESEARCH REFERENCES

C.J.S. — 24 C.J.S., Criminal Law, § 2342 et seq.

5-7-3. Right of certiorari.

A proceeding by certiorari may be taken by and on behalf of the State of Georgia from one court to another court of this state, where the right of certiorari is provided as a procedure for appealing a judgment, in the specified situations set forth in Code Sections 5-7-1 and 5-7-2. (Ga. L. 1973, p. 297, § 3.)

Cross references. — Certiorari to the Court of Appeals, Rules of the Supreme Court of the State of Georgia, Rules 28 — 36.

JUDICIAL DECISIONS

Cited in State v. Moore, 237 Ga. 269, 227 S.E.2d 241 (1976).

RESEARCH REFERENCES

Am. Jur. 2d. — 14 Am. Jur. 2d, Certiorari, § 7 et seq.

C.J.S. — 24 C.J.S., Criminal Law, § 2342 et seq.

5-7-4. Time limits and procedures governing appeal and certiorari by state.

An appeal by the state, except as otherwise provided for in this chapter, and certiorari by the state, when authorized by this chapter, shall be governed by the same laws and provisions as to time and other procedures as apply to other appellants in criminal cases. (Ga. L. 1973, p. 297, § 4.)

JUDICIAL DECISIONS

State is authorized to appeal a void sentence pursuant to O.C.G.A. § 5-7-1(a)(5), and the state's appeals are governed by the same time limitations as those applied to other appellants in criminal cases. State v. Jones, 265 Ga. App. 493, 594 S.E.2d 706 (2004).

In the absence of express statutory authority requiring the state to file a motion to amend an improper sentence as a pre-

requisite to appealing that sentence, the state may appeal directly the sentence imposed by the trial court or file a motion to amend the sentence and then directly appeal the denial thereof, but in any event, the state has 30 days from judgment or from the denial of the motion to amend to file its notice of appeal; however, should the defendant file a motion for new trial, that motion tolls the time within which the state can directly appeal the sentence, and in that case, the state has 30 days from the denial of the motion for new trial to appeal the alleged improper sentence. State v. Jones, 265 Ga. App. 493, 594 S.E.2d 706 (2004).

Out-of-time appeal. — Defendant's out-of-time appeal was dismissed as defendant's attorney was not entitled to file a sua sponte notice of out-of-time appeal based on the subjective acknowledgment of the attorney's own ineffectiveness; only the trial court could determine whether the failure to file a timely notice of appeal was attributable to an attorney's ineffectiveness and, if so, grant a right to file an out-of-time appeal. Carr v. State, 281 Ga. 43, 635 S.E.2d 767 (2006).

Only trial court can grant right to out-of-time appeal. — Only the trial court can determine whether the failure to file a timely notice of appeal was attributable to an attorney's ineffectiveness and, if so, grant a right to file an out-of-time appeal; Adams v. State, 440 S.E.2d 639 (1994), and other such decisions cited in Rowland v. State, 452 S.E.2d 756 (1995), are expressly overruled to the extent that they approve another method for addressing procedurally deficient criminal appeals. Carr v. State, 281 Ga. 43, 635 S.E.2d 767 (2006).

5-7-5. Right of accused to bail; amount of bail reviewable by appellate court.

In the event the state files an appeal as authorized in this chapter, the accused shall be entitled to be released on reasonable bail pending the disposition of the appeal, except in those cases punishable by death. The amount of the bail, to be set by the court, shall be reviewable on direct application by the court to which the appeal is taken. (Ga. L. 1973, p. 297, § 5.)

JUDICIAL DECISIONS

When bail may be denied generally. — A person convicted of an offense punishable by death has no constitutional right to bail pending appeal. Wilcox v. Carter, 545 F. Supp. 1043 (M.D. Ga. 1982).

RESEARCH REFERENCES

Am. Jur. 2d. — 8A Am. Jur. 2d, Bail and Recognizance, § 12 et seq.

C.J.S. — 8 C.J.S., Bail; Release and Detention Pending Proceedings, §§ 103 et seq., 340.

5-7-6. Construction of chapter.

This chapter shall be liberally construed to effectuate the purposes stated in this chapter. (Code 1981, § 5-7-6, enacted by Ga. L. 2013, p. 222, § 3/HB 349.)

Effective date. — This Code section became effective July 1, 2013. See editor's note for applicability.

Editor's notes. — Ga. L. 2013, p. 222, § 21/HB 349, not codified by the General Assembly, provides: "This Act shall become effective on July 1, 2013, and shall apply to offenses which occur on or after that date. Any offense occurring before July 1, 2013, shall be governed by the statute in effect at the time of such offense."

TITLE 6

AVIATION

Chap.

1. General Provisions, 6-1-1 through 6-1-2.
2. Regulation of Aeronautics, Aircraft, and Airports Generally, 6-2-1 through 6-2-12.
3. Powers of Local Governments as to Air Facilities, 6-3-1 through 6-3-28.
4. Georgia Airport Development Authority, 6-4-1 through 6-4-16.
5. Georgia Aviation Authority, 6-5-1 through 6-5-10.

Cross references. — Penalty for hijacking aircraft, § 16-5-44. Use of laser devices against aircraft, § 16-10-34. Ad valorem taxation of airline companies, § 48-5-540 et seq. Georgia Aviation Hall of Fame, T. 50, C. 12, A. 4, P. 3.

RESEARCH REFERENCES

Am. Jur. Trials. — Light Aircraft Accident Litigation, 13 Am. Jur. Trials 557.

Helicopter Accident Litigation, 22 Am. Jur. Trials 517.

Midair Breakup of V-Tail Bonanza Aircraft, 33 Am. Jur. Trials 561.

Malfunction and Loss of Spacecraft, 43 Am. Jur. Trials 293.

Deep Vein Thrombosis and Air Travel, 95 Am. Jur. Trials 1.

ALR. — Air navigation, 69 ALR 316.

Aeroplanes and aeronautics, 83 ALR 33; 99 ALR 173; 155 ALR 1026.

Liability of owner of wires, poles, or structures struck by aircraft for resulting injury or damage, 49 ALR5th 659.

CHAPTER 1

GENERAL PROVISIONS

Sec.
6-1-1. Powers and duties of Department of Transportation — Aviation and aviation facilities generally.
Sec.
6-1-2. Powers and duties of Department of Transportation — Establishment of air markers.

6-1-1. Powers and duties of Department of Transportation — Aviation and aviation facilities generally.

The Department of Transportation shall have the following powers and duties:

(1) To plan for and establish a long-term policy in regard to the establishment, development, and maintenance of aviation and aviation facilities in the state;

(2) To promote and encourage the use of aviation facilities of the state for air commerce in the state and between the state, other states, and foreign countries;

(3) To cooperate, counsel, and advise with the State Transportation Board in regard to the planning, construction, development, and maintenance of airports, landing fields, and air navigation facilities in the state;

(4) To cooperate, counsel, and advise with municipalities and other political subdivisions of the state and with other departments, boards, bureaus, commissions, agencies, or establishments, whether federal, state, or local, or public or private, for the purpose of promoting and obtaining coordination in the planning for and in the establishment of development, maintenance, and protection of a system of air routes, airports, landing fields, and other aviation facilities in the state. (Ga. L. 1949, p. 249, § 14; Ga. L. 1959, p. 262, § 15; Ga. L. 1962, p. 694, § 7; Ga. L. 1972, p. 1015, § 2005.)

Cross references. — Provisions regarding powers and duties of Department of Transportation regarding aviation, § 32-2-2. Department of Transportation aid for airport development, § 32-9-7. Licensing of airports by Department of Transportation, § 32-9-8.

OPINIONS OF THE ATTORNEY GENERAL

Department of Transportation qualifies as a "planning agency." 1972 Op. Att'y Gen. No. 72-45.

Integration of area airport system plans into comprehensive State Airport System Plan. — Department of Transportation has responsibility, in accordance with provisions of planning grant agreement between Federal Aviation Administration and Department of

Industry and Trade dated December 2, 1971, to integrate various area airport system plans into a comprehensive State Airport System Plan. 1974 Op. Att'y Gen. No. 74-39.

Authority of Department to make airport directory available to public. — One of the duties of the board (now Department of Transportation) being to encourage use of aviation facilities, it has authority to make available to the public an airport directory. 1960-61 Op. Att'y Gen. p. 444.

6-1-2. Powers and duties of Department of Transportation — Establishment of air markers.

(a) The Department of Transportation is authorized to establish air markers at appropriate locations throughout the state to facilitate air navigation within the state. Said markers shall consist of painting on appropriately located roofs of buildings the names of towns or cities within which such buildings are located, such names to be painted in sufficient size to be legible under good visibility conditions from a height of at least 3,000 feet.

(b) The department is authorized to obtain roof releases from the owners of buildings upon which air markers are to be painted, or otherwise to obtain permission from such owners to use such roofs for such purposes, and to pay the owners reasonable and nominal rentals therefor, if payment is necessary in order to obtain the appropriate permission for the use of such roofs for such purposes. (Ga. L. 1965, p. 105, §§ 1, 2; Ga. L. 1972, p. 1015, § 2005.)

Cross references. — Powers and duties of department as regards aviation, § 32-2-2.

CHAPTER 2

REGULATION OF AERONAUTICS, AIRCRAFT, AND AIRPORTS GENERALLY

Sec.
6-2-1. Legislative intent.
6-2-2. "Airman" defined.
6-2-3. Effect of contractual and other legal relations entered into aboard aircraft while in flight over state.
6-2-4. Laws governing crimes committed aboard aircraft while in flight over state.
6-2-5. Lawful flight over lands and waters of state.
6-2-5.1. Operation or physical control of aircraft while under the influence of alcohol or drugs; penalty.
6-2-5.2. Homicide by aircraft.
6-2-6. Rules for determination of liability for injury to or death of passengers.
6-2-7. Rules for determination of liability of owners of aircraft for damages caused by collisions.
6-2-8. Proof of injury to persons or property on ground deemed prima-facie evidence of negligence.
6-2-9. Requirements as to licensing of aircraft.
6-2-10. Requirements as to licensing of pilots.
6-2-11. Possession and display of licenses.
6-2-12. Penalty for violation of provisions of chapter.

Cross references. — Sale of distilled spirits, malt beverages, and wine by airline passenger carriers, §§ 3-9-1, 3-9-2.

Administrative rules and regulations. — Licensing of certain public airports, Official Compilation of Rules and Regulations of the State of Georgia, Rules of State Department of Transportation, Chapter 672-9.

JUDICIAL DECISIONS

Constitutionality of chapter. — Chapter not void as violative of Georgia Constitution provision forbidding the levy of taxes by a county for any purpose other than education, building, and repairing public buildings and bridges. Swoger v. Glynn County, 179 Ga. 768, 177 S.E. 723 (1934).

Cited in Thrasher v. City of Atlanta, 178 Ga. 514, 173 S.E. 817 (1934).

RESEARCH REFERENCES

ALR. — Air navigation, 69 ALR 316.

Aeroplanes and aeronautics, 83 ALR 333; 99 ALR 173; 155 ALR 1026.

Construction and effect of 49 U.S.C. § 1403 governing recordation of ownership, conveyances, and encumbrances on aircraft, 22 ALR3d 1270.

6-2-1. Legislative intent.

It is declared that the intent of this chapter is to coincide with the policies, principles, and practices established by the Federal Aviation

Act of 1958 and all amendments thereto. (Ga. L. 1933, p. 99, § 11; Code 1933, § 11-110.)

U.S. Code. — The Federal Aviation Act of 1958, referred to in this section, is codified as 49 U.S.C. § 1301.

RESEARCH REFERENCES

Am. Jur. 2d. — 8 Am. Jur. 2d, Aviation, § 12 et seq.

ALR. — Aircraft operated wholly within state as subject to federal regulation, 9 ALR2d 485.

Construction and application of § 105 Airline Deregulation Act (49 USCA § 41713), pertaining to preemption of authority over prices, routes, and services, 149 ALR Fed. 299.

Preemption by airline deregulation act, 49 USCS § 41713(b)(1), of state law labor-related claim. 41 ALR Fed. 2d 215.

6-2-2. "Airman" defined.

As used in this chapter, the term "airman" means any individual who engages, as the person in command or as pilot, mechanic, or member of the crew, in the navigation of aircraft while underway; and any individual who is directly in charge of the inspection, maintenance, overhauling, or repair of aircraft, aircraft engines, propellers, or appliances; or any individual who serves in the capacity of aircraft dispatcher or air traffic control tower operator.

6-2-3. Effect of contractual and other legal relations entered into aboard aircraft while in flight over state.

All contractual and other legal relations entered into by airmen or passengers while in flight over this state shall have the same effect as if entered into on the land or water beneath. (Ga. L. 1933, p. 99, § 8; Code 1933, § 11-108.)

RESEARCH REFERENCES

Am. Jur. 2d. — 8 Am. Jur. 2d, Aviation, § 113.

C.J.S. — 2A C.J.S., Aeronautics and Aerospace, § 1 et seq.

6-2-4. Laws governing crimes committed aboard aircraft while in flight over state.

Unless otherwise provided by law, all crimes committed by or against an airman or by or against a passenger or other person or on or by means of an aircraft while in flight over this state shall be governed by the laws of this state. (Ga. L. 1933, p. 99, § 9; Code 1933, § 11-109.)

Cross references. — Venue for criminal actions stemming from crimes committed upon aircraft traveling within state, § 17-2-2.

RESEARCH REFERENCES

Am. Jur. 2d. — 8 Am. Jur. 2d, Aviation, § 87 et seq.

C.J.S. — 2A C.J.S., Aeronautics and Aerospace, § 270 et seq.

6-2-5. Lawful flight over lands and waters of state.

Flight in aircraft over the lands and waters shall be lawful unless at such a low altitude as to interfere with the then existing reasonable use to which the land or water or space over the land or water is put by the owner of the land or water or unless so conducted as to be imminently dangerous to persons or property lawfully on the land or water beneath. (Ga. L. 1933, p. 99, § 1; Code 1933, § 11-101.)

Law reviews. — For note, "A Study of the Development and Current Status in Georgia of Inverse Condemnation Suits by a Landowner for Taking by Aerial Flights," see 2 Ga. St. B.J. 232 (1965).

JUDICIAL DECISIONS

Landowner is "preferred claimant" to airspace. — Owner of land is "preferred claimant" to airspace above land, and is entitled to redress for any use thereof which results in injury to the owner and the owner's property. Delta Air Corp. v. Kersey, 193 Ga. 862, 20 S.E.2d 245 (1942); Scott v. Dudley, 214 Ga. 565, 105 S.E.2d 752 (1958); Chronister v. City of Atlanta, 99 Ga. App. 447, 108 S.E.2d 731 (1959).

Owner's title and right to control airspace above buildings. — Owner of land has title to and a right to control airspace above the land to a distance of at least 75 feet above buildings thereon (but the title to airspace above land is not necessarily limited to altitude of that height). Scott v. Dudley, 214 Ga. 565, 105 S.E.2d 752 (1958).

Flights not interfering with owner's existing reasonable use of land. — Flights over lands at such height as not to interfere with then existing reasonable use thereof by owner cannot be said to constitute trespass or nuisance. Delta Air Corp. v. Kersey, 193 Ga. 862, 20 S.E.2d 245 (1942); Scott v. Dudley, 214 Ga. 565, 105 S.E.2d 752 (1958).

Frequent flights at altitudes of 50 to 75 feet constitute continuing nuisance. — When at least 75 flights were made over plaintiff's school building daily at altitudes of 50 to 75 feet, which was just over the treetops, and when the danger necessarily created thereby to the lives and safety of those occupying the premises, the noise and vibration caused thereby, and the distracting effect on the students made further operation of the plaintiff's school impracticable, such substantially lessened the right to enjoy freely the use of the property and a continuing nuisance was established which equity would enjoin. Scott v. Dudley, 214 Ga. 565, 105 S.E.2d 752 (1958).

RESEARCH REFERENCES

Am. Jur. 2d. — 8 Am. Jur. 2d, Aviation, §§ 1 et seq., 166.

Am. Jur. Pleading and Practice

Forms. — 4 Am. Jur. Pleading and Practice Forms, Aviation, § 2 et seq.

C.J.S. — 2A C.J.S., Aeronautics and Aerospace, § 1 et seq, § 8 et seq.

ALR. — Aeroplanes and aeronautics, 83 ALR 333; 99 ALR 173; 155 ALR 1026.

Airport operations or flight of aircraft as nuisance, 79 ALR3d 253.

Validity, construction, and application of state criminal statute prohibiting reckless operation of aircraft, 89 ALR3d 893.

Airport operations or flight of aircraft as constituting taking or damaging of property, 22 ALR4th 863.

Strict liability, in absence of statute, for injury or damage occurring on the ground caused by ascent, descent, or flight of aircraft, 73 ALR4th 416.

6-2-5.1. Operation or physical control of aircraft while under the influence of alcohol or drugs; penalty.

(a) A person shall not operate or be in actual physical control of an aircraft in this state:

(1) Within eight hours after the consumption of any alcoholic beverage;

(2) While under the influence of alcohol;

(3) While using any drug that affects such person's faculties in any way contrary to safety; or

(4) While there is 0.04 percent or more by weight of alcohol in his blood.

(b) Any person arrested for violation of this Code section shall, at the request of a law enforcement officer of the state or any political subdivision, be administered a test as provided by and subject to the restrictions of subsection (a) of Code Section 40-6-392.

(c) A person who violates this Code section shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined in an amount not to exceed $2,000.00. (Code 1981, § 6-2-5.1, enacted by Ga. L. 1989, p. 276, § 1.)

OPINIONS OF THE ATTORNEY GENERAL

Fingerprinting required for violators. — O.C.G.A. § 6-2-5.1 is an offense for which those charged with a violation are to be fingerprinted. 1989 Op. Att'y Gen. 89-52.

6-2-5.2. Homicide by aircraft.

Any person who, without malice aforethought, causes the death of another person through the violation of Code Section 6-2-5.1 commits the offense of homicide by aircraft and, upon conviction thereof, shall be punished by imprisonment for not less than two years nor more than 15 years. (Code 1981, § 6-2-5.2, enacted by Ga. L. 1992, p. 1443, § 1.)

6-2-6. Rules for determination of liability for injury to or death of passengers.

The liability of the operator of an aircraft carrying passengers, for injury to or death of such passengers, shall be determined by the rules of law applicable to torts on land arising out of similar relationships. (Ga. L. 1933, p. 99, § 7; Code 1933, § 11-107.)

Cross references. — Duties of carriers of passengers generally, § 46-9-132.

JUDICIAL DECISIONS

Degree of care owed guest by operator of aircraft. — Rules of law governing the degree of care owed by an operator of an aircraft to the operator's guest riding therein are the same as those governing the operator of a motor vehicle under similar circumstances, and in both cases the defendant operator is liable for injuries to the operator's guest only in cases of gross negligence. Osburn v. Pilgrim, 246 Ga. 688, 273 S.E.2d 118 (1980).

Duty owed a guest passenger riding by invitation in another's automobile is that of slight care; and the absence of such care is termed gross negligence. Sammons v. Webb, 86 Ga. App. 382, 71 S.E.2d 832 (1952).

Defenses of assumption of risk and avoidance of consequences are available to a defendant pilot of an aircraft. Osburn v. Pilgrim, 246 Ga. 688, 273 S.E.2d 118 (1980).

Family-purpose doctrine is applicable to aircraft. — Family-purpose doctrine, is to have broad application, and is applicable to aircraft as well as automobiles and watercraft. Kimbell v. DuBose, 139 Ga. App. 224, 228 S.E.2d 205 (1976).

Cited in Newman v. Fleming, 331 F. Supp. 973 (S.D. Ga. 1971).

RESEARCH REFERENCES

Am. Jur. 2d. — 8 Am. Jur. 2d, Aviation, § 107 et seq.

C.J.S. — 2A C.J.S., Aeronautics and Aerospace, §§ 128 et seq., 147 et seq., 240 et seq.

ALR. — Airplane as within terms "vehicle," "motor vehicle," 165 ALR 916.

Death of or injury to occupant of airplane from collision or near-collision with another aircraft, 12 ALR2d 677; 64 ALR5th 235.

Limitation of liability for personal injury by air carrier, 13 ALR2d 337.

Who constitutes member of "crew" of aircraft within clause of aviation accident policy or rider thereto covering injuries to such personnel, 14 ALR2d 1363.

Liability of operator of flight training school for injury or death of trainee, 17 ALR2d 557.

Duty and liability as to preflight inspection and maintenance of aircraft, 30 ALR2d 1172.

Proof, in absence of direct testimony by survivors or eyewitnesses, as to who, among occupants of plane, was piloting it at time of accident, 36 ALR2d 1290.

Duty and liability of carrier with respect to allowing passenger sufficient time for change of vehicles, 40 ALR2d 809.

Employer's liability for negligence of employee in piloting his own airplane in employer's business, 46 ALR2d 1050.

Liability of carrier to passenger injured by hurling of object through window by a third person, 46 ALR2d 1098.

Negligence in operation of airplane on take-off, 74 ALR2d 615.

Negligence in operation of airplane in landing, 74 ALR2d 628.

Liability for injury or damage from taxiing aircraft, 74 ALR2d 654.

Air carrier's liability for injury to passenger from changes in air pressure, 75 ALR2d 848.

Interference with airplane pilot or con-

trols as negligence or contributory negligence, 75 ALR2d 858.

Liability for personal injury or death based on overloading aircraft, 75 ALR2d 868.

Aviation: helicopter accidents, 35 ALR3d 707.

Liability for injury to guest in airplane, 40 ALR3d 1117.

Aviation law: liability of air carrier for injury to, or death of, passenger on charter flight, 41 ALR3d 455; 91 ALR Fed. 547.

Liability for alleged negligence of independent servicer or repairer of aircraft, 41 ALR3d 1320.

Liability of owner or operator of motor vehicle or aircraft for injury or death allegedly resulting from failure to furnish or require use of seat belt, 49 ALR3d 295.

Choice-of-law considerations in application of aviation guest statute, 62 ALR3d 1076.

Constitutionality of automobile and aviation guest statutes, 66 ALR3d 532.

Liability of air carrier for damage or injury sustained by passenger as result of hijacking, 72 ALR3d 1299.

Risks and causes of loss covered or excluded by aviation liability policy, 86 ALR3d 118.

Airport operations liability insurance, 92 ALR3d 1267.

Application of res ipsa loquitur doctrine to accident incurred by passenger while boarding or alighting from a carrier, 93 ALR3d 776.

Products liability: personal injury or death allegedly caused by defect in aircraft or its parts, supplies, or equipment, 97 ALR3d 627.

Res ipsa loquitur in aviation accidents, 25 ALR4th 1237.

Liability of land carrier to passenger who becomes victim of third party's assault on or about carrier's vehicle or premises, 34 ALR4th 1054.

Liability of land carrier to passenger who becomes victim of another passenger's assault, 43 ALR4th 189.

Limitation of liability of air carrier for personal injury or death, 91 ALR Fed. 547.

What constitutes accident under Warsaw Convention (49 USCA § 40105 note), 147 ALR Fed. 535.

6-2-7. Rules for determination of liability of owners of aircraft for damages caused by collisions.

The liability of the owner of one aircraft to the owner of another aircraft or to pilots on either aircraft for damage caused by collision on land or in the air shall be determined by the rules of law applicable to torts on land. (Ga. L. 1933, p. 99, § 6; Code 1933, § 11-106.)

JUDICIAL DECISIONS

Cited in Kimbell v. DuBose, 139 Ga. App. 224, 228 S.E.2d 205 (1976).

RESEARCH REFERENCES

Am. Jur. 2d. — 8 Am. Jur. 2d, Aviation, §§ 107 et seq., 158 et seq., 176 et seq.

C.J.S. — 2A C.J.S., Aeronautics and Aerospace, §§ 138 et seq., 240 et seq.

ALR. — Airplane as within terms "vehicle," "motor vehicle," 165 ALR 916.

Res ipsa loquitur in aviation accidents, 6 ALR2d 528.

Death of or injury to occupant of airplane from collision or near-collision with another aircraft, 12 ALR2d 677; 64 ALR5th 235.

Who constitutes member of "crew" of aircraft within clause of aviation accident policy or rider thereto covering injuries to such personnel, 14 ALR2d 1363.

Duty and liability as to preflight inspection and maintenance of aircraft, 30 ALR2d 1172.

Proof, in absence of direct testimony by

survivors or eyewitnesses, as to who, among occupants of plane, was piloting it at time of accident, 36 ALR2d 1290.

Employer's liability for negligence of employee in piloting his own airplane in employer's business, 46 ALR2d 1050.

Negligence in operation of airplane on take-off, 74 ALR2d 615.

Negligence in operation of airplane in landing, 74 ALR2d 628.

Liability for injury or damage from taxiing aircraft, 74 ALR2d 654.

Pilot's contributory negligence or assumption of risk as defense in action for his injuries or death resulting from airplane accident, 35 ALR3d 614.

Aviation: helicopter accidents, 35 ALR3d 707.

Choice of law in actions arising from airplane crash in territorial waters of state, 39 ALR3d 196.

Liability for alleged negligence of independent servicer or repairer of aircraft, 41 ALR3d 1320.

Risks and causes of loss covered or excluded by aviation liability policy, 86 ALR3d 118.

Airport operations liability insurance, 92 ALR3d 1267.

Res ipsa loquitur in aviation accidents, 25 ALR4th 1237.

What constitutes accident under Warsaw Convention (49 USCA § 40105 note), 147 ALR Fed. 535.

6-2-8. Proof of injury to persons or property on ground deemed prima-facie evidence of negligence.

Proof of injury inflicted to persons or property on the ground by the operation of any aircraft and contact therewith or by objects falling or thrown therefrom shall be prima-facie evidence of negligence on the part of the operator of such aircraft in reference to such injury. (Ga. L. 1933, p. 99, § 5; Code 1933, § 11-105.)

RESEARCH REFERENCES

Am. Jur. 2d. — 8 Am. Jur. 2d, Aviation, §§ 146 et seq., 165.

C.J.S. — 2A C.J.S., Aeronautics and Aerospace, §§ 128 et seq., 240 et seq.

ALR. — Res ipsa loquitur in aviation accidents, 6 ALR2d 528.

Defenses of fellow servant and assumption of risk in actions involving injury or death of member of airplane crew, ground crew, or mechanic, 13 ALR2d 1137.

Duty and liability as to preflight inspection and maintenance of aircraft, 30 ALR2d 1172.

Liability of air carrier to passenger injured while boarding or alighting, 61 ALR2d 1113.

Liability of municipality for torts in connection with airport, 66 ALR2d 634.

Negligence in operation of airplane on take-off, 74 ALR2d 615.

Negligence in operation of airplane in landing, 74 ALR2d 628.

Liability for injury or damage from taxiing aircraft, 74 ALR2d 654.

Statute imposing strict liability on aircraft owner as affecting liability under Federal Tort Claims Act, 74 ALR2d 867.

Pilot's contributory negligence or assumption of risk as defense in action for his injuries or death resulting from airplane accident, 35 ALR3d 614.

Aviation: helicopter accidents, 35 ALR3d 707.

Risks and causes of loss covered or excluded by aviation liability policy, 86 ALR3d 118.

Validity, construction, and application of state criminal statute prohibiting reckless operation of aircraft, 89 ALR3d 893.

Airport operations liability insurance, 92 ALR3d 1267.

Products liability: personal injury or death allegedly caused by defect in aircraft or its parts, supplies, or equipment, 97 ALR3d 627.

Res ipsa loquitur in aviation accidents, 25 ALR4th 1237.

6-2-9. Requirements as to licensing of aircraft.

Since the public safety requires, and the advantages of uniform regulation make it desirable in the interest of aeronautical progress, that aircraft operating within the state should conform, with respect to design, construction, and airworthiness, to the standards prescribed by the federal government with respect to navigation of civil aircraft subject to its jurisdiction, it shall be unlawful for any person to operate or navigate any aircraft unless such aircraft has an appropriate effective license issued by the Federal Aviation Administration and is registered by the Federal Aviation Administration; provided, however, that this restriction shall not apply to military aircraft of the United States or possessions thereof, to public aircraft of any state or territory, or to aircraft licensed by a foreign country with which the United States has a reciprocal agreement covering the operation of such licensed aircraft. (Ga. L. 1933, p. 99, § 2; Code 1933, § 11-102.)

RESEARCH REFERENCES

Am. Jur. 2d. — 8 Am. Jur. 2d, Aviation, §§ 12 et seq., 46 et seq.

C.J.S. — 2A C.J.S., Aeronautics and Aerospace, § 179 et seq.

ALR. — Aircraft operated wholly within state as subject to federal regulation, 9 ALR2d 485.

Duty of airplane owner or operator to furnish aircraft with navigational and flight safety devices, 50 ALR2d 898.

Products liability: modern cases determining whether product is defectively designed, 96 ALR3d 22.

Products liability: personal injury or death allegedly caused by defect in aircraft or its parts, supplies, or equipment, 97 ALR3d 627.

6-2-10. Requirements as to licensing of pilots.

Since the public safety requires, and the advantages of uniform regulation make it desirable in the interest of aeronautical progress, that a person engaging in navigating or operating aircraft in any form of navigation shall have the qualifications necessary for obtaining and holding a pilot's license issued by the Federal Aviation Administration, it shall be unlawful for any person to operate or navigate any aircraft unless such person is the holder of an appropriate effective pilot's license or permit issued by the Federal Aviation Administration; provided, however, that this restriction shall not apply to those persons operating military aircraft of the United States or possessions thereof, or operating public aircraft of any state or territory, or operating any aircraft licensed by a foreign country with which the United States has a reciprocal agreement covering the operation of such licensed aircraft. (Ga. L. 1933, p. 99, § 3; Code 1933, § 11-103.)

RESEARCH REFERENCES

Am. Jur. 2d. — 8 Am. Jur. 2d, Aviation, § 46 et seq.

C.J.S. — 2A C.J.S., Aeronautics and Aerospace, §§ 179 et seq., 203 et seq.

ALR. — Aircraft operated wholly within state as subject to federal regulation, 9 ALR2d 485.

Right to enjoin business competitor from unlicensed or otherwise illegal acts or practices, 90 ALR2d 7.

6-2-11. Possession and display of licenses.

The certificate of the license required for pilots shall be kept in the personal possession of the licensee when he is operating aircraft; the certificate of the license required for aircraft shall be kept in the aircraft at all times when the aircraft is being used; and either or both of the certificates must be presented for inspection upon the demand of any passenger, any peace officer, or any official, manager, or person in charge of any airport or landing field upon which the pilot or aircraft shall land. (Ga. L. 1933, p. 99, § 4; Code 1933, § 11-104.)

RESEARCH REFERENCES

Am. Jur. 2d. — 8 Am. Jur. 2d, Aviation, § 48 et seq.

C.J.S. — 2A C.J.S., Aeronautics and Aerospace, §§ 179 et seq., 203 et seq.

6-2-12. Penalty for violation of provisions of chapter.

Any person violating any provision of this chapter shall be guilty of a misdemeanor. (Ga. L. 1933, p. 99, § 10; Code 1933, § 11-9901.)

RESEARCH REFERENCES

ALR. — Validity, construction, and application of state criminal statute prohibiting reckless operation of aircraft, 89 ALR3d 893.

CHAPTER 3

POWERS OF LOCAL GOVERNMENTS AS TO AIR FACILITIES

Article 1

General Provisions

Sec.
6-3-1. Construction and maintenance of air facilities by Department of Transportation.

Article 2

Powers of Local Governments as to Air Facilities

6-3-20. Acquisition, construction, maintenance, and control of airports and landing fields by local governments authorized.
6-3-20.1. Management, ownership, or control of airports by foreign citizens or businesses with substantial foreign ownership prohibited.
6-3-21. Lands acquired, owned, leased, controlled, or occupied by local governments deemed for public purposes; effect on ad valorem taxation.
6-3-22. Methods of acquisition of property for airports and landing fields.
6-3-22.1. Acquisition of property outside territorial boundaries [Repealed].
6-3-23. Payment of costs of acquisition of property for airports or landing fields.
6-3-24. Appropriation of funds for development, operation, maintenance, or control of air facilities.
6-3-25. Powers and duties of counties, municipalities, and political subdivisions as to airports generally.
6-3-26. Acquisition of rights and easements for radios, lights, markers, and other equipment associated with airport.
6-3-27. Enforcement of police regulations at airports; powers of law enforcement officers.
6-3-28. Construction of article.

JUDICIAL DECISIONS

Broad powers conferred. — This chapter is a general law and confers broad and comprehensive powers upon municipalities, counties, and other political subdivisions to acquire (either separately or jointly) lands for construction and expansion of airports. City of Atlanta v. Murphy, 206 Ga. 21, 55 S.E.2d 573 (1949) (see O.C.G.A. Ch. 3, T. 6).

Chapter to become part of charter of all municipalities. — This chapter applies to all municipalities, counties, and other political subdivisions of the state, and would, in effect, become a part of the charter of all municipalities of the state. City of Atlanta v. Airways Parking Co., 225 Ga. 173, 167 S.E.2d 145 (1969) (see O.C.G.A. Ch. 3, T. 6).

No cause of action stated when no showing of arbitrary abuse of powers. — Petition by residents and taxpayers for injunction, which shows that closing and relocation of a section of state highway is for purpose of extending a municipal airport, fails to state a cause of action, when an arbitrary abuse of powers granted by this chapter is not shown. City of Atlanta v. Murphy, 206 Ga. 21, 55 S.E.2d 573 (1949) (see O.C.G.A. Ch. 3, T. 6).

Cited in Thrasher v. City of Atlanta, 178 Ga. 514, 173 S.E. 817 (1934); Miree v. United States, 526 F.2d 679 (5th Cir. 1976); Southern Airways, Inc. v. City of Atlanta, 428 F. Supp. 1010 (N.D. Ga. 1977).

RESEARCH REFERENCES

ALR. — Air navigation, 69 ALR 316.

Power to establish or maintain public airport, or to create separate public airport authority, 161 ALR 733.

Validity, construction, and operation of airport operator's grant of exclusive or discriminatory privilege or concession, 40 ALR2d 1060.

Liability of municipality for torts in connection with airport, 66 ALR2d 634.

ARTICLE 1

GENERAL PROVISIONS

Cross references. — Establishment and operation of bank offices and facilities within primary airport terminal facilities at municipal or county airport, § 7-1-602. Airport firefighters, § 25-4-30 et seq.

6-3-1. Construction and maintenance of air facilities by Department of Transportation.

(a) The Department of Transportation is authorized and empowered to construct and maintain airports, landing fields, air navigation facilities, and lighting and lighting fixtures and to contract with the counties and municipalities of the state for the construction and maintenance of such airports, landing fields, air navigation facilities, and lighting and lighting fixtures, all in accordance with the Federal Aviation Administration's specifications, regulations of the federal government, and upon such terms and conditions as the Department of Transportation may determine.

(b) The State Transportation Board is given the right of eminent domain to acquire sites for such airports, landing fields, and air navigation facilities. (Ga. L. 1941, p. 237, § 2; Ga. L. 1965, p. 449, § 1; Ga. L. 1972, p. 1015, § 2004.)

Cross references. — Department of Transportation aid for airport development, § 32-9-7. Licensing of airports by Department of Transportation, § 32-9-8.

OPINIONS OF THE ATTORNEY GENERAL

Funding requires specific legislative appropriation. — Department of Transportation is authorized to construct and maintain airports, but use of funds for that purpose, unless specifically appropriated by the legislature, would be unconstitutional. 1962 Op. Att'y Gen. p. 267.

Funding by motor fuel revenue. — Motor fuel revenue cannot be used for purpose of entering into contract with local political subdivision for installation of navigational aid equipment at local airport. 1967 Op. Att'y Gen. No. 67-461.

Leasing or permitting use of facilities by private individuals. — No authority is provided by statute for Highway Department (now Department of Transportation) to grant lease to or permit use of airport facilities by private individuals. 1970 Op. Att'y Gen. No. 70-98.

RESEARCH REFERENCES

Am. Jur. 2d. — 8 Am. Jur. 2d, Aviation, §§ 82 et seq., 88 et. seq. 26 Am. Jur. 2d, Eminent Domain, § 140.

C.J.S. — 2A C.J.S., Aeronautics and Aerospace, § 53 et seq. 29A C.J.S., Eminent Domain, § 57 et seq.

ARTICLE 2

POWERS OF LOCAL GOVERNMENTS AS TO AIR FACILITIES

JUDICIAL DECISIONS

Constitutionality of Ga. L. 1933, p. 102. — Swoger v. Glynn County, 179 Ga. 768, 177 S.E. 723 (1934) (see O.C.G.A. Art. 2, Ch. 3, T. 6).

6-3-20. Acquisition, construction, maintenance, and control of airports and landing fields by local governments authorized.

(a) Counties, municipalities, and other political subdivisions are authorized, separately or jointly, to acquire, establish, construct, expand, own, lease, control, equip, improve, maintain, operate, regulate, and police airports and landing fields for the use of aircraft, either within or without the geographical limits of such counties, municipalities, and other political subdivisions, and may use for such purpose or purposes any available property that is owned or controlled by such counties, municipalities, or other political subdivisions. Counties and municipalities may enter into cooperative agreements with community improvement districts for the improvement of airports and landing fields within such community improvement districts, and community improvement districts may enter into such cooperative agreements with counties and municipalities for such purposes, in accordance with Article IX, Section VII of the Constitution.

(b) All counties in the State of Georgia which are located on the boundary line between the State of Georgia and any other state, as well as all municipalities and other political subdivisions which are located in such boundary counties, are authorized, separately, jointly with each other, or jointly with any county, municipality, or political subdivision of any such border state, to acquire, establish, construct, expand, own, lease, control, equip, improve, maintain, operate, regulate, and police airports and landing fields for the use of aircraft, either within or without the geographical limits of such border counties and the municipalities and other political subdivisions therein contained in the State of Georgia or within the geographical limits of any county, municipality, or political subdivision of any such border state other than the State of Georgia. (Ga. L. 1933, p. 102, § 1; Code 1933, § 11-201; Ga. L. 1941, p. 380, § 1; Ga. L. 2012, p. 1342, § 1/SB 371.)

The 2012 amendment, effective July 1, 2012, added the last sentence in subsection (a).

Cross references. — Regulation and taxation of sale and storage of alcoholic beverages at county and municipal airports, § 3-8-1. Sale of distilled spirits, malt beverages, and wine by airline passenger carriers, §§ 3-9-1, 3-9-2.

Law reviews. — For article discussing extraterritorial condemnation of property by municipalities, see 12 Ga. L. Rev. 1 (1977).

For comment on Howard v. City of Atlanta, 190 Ga. 730, 10 S.E.2d 190 (1940), see 3 Ga. B.J. 57 (1940).

JUDICIAL DECISIONS

"Airports and landing fields." — Language of O.C.G.A. § 6-3-20, "airports and landing fields," encompasses all property reasonably and uniformly used for public convenience and welfare to facilitate effective operation of the air transportation facility. Clayton County Bd. of Tax Assessors v. City of Atlanta, 164 Ga. App. 864, 298 S.E.2d 544 (1982).

Territorial jurisdiction conferred upon municipalities. — Ga. L. 1933, p. 102 vests in each municipality the same general authority, that is, each is given power to condemn land within and without the municipality's boundaries, and accordingly each is by terms of statute vested with jurisdiction over every part of the state, including territory within limits of every other municipality. Howard v. City of Atlanta, 190 Ga. 730, 10 S.E.2d 190 (1940).

Grant of power to municipalities to condemn property within and without their geographical limits authorizes one municipality to condemn land within territorial limits of another municipality. Howard v. City of Atlanta, 190 Ga. 730, 10 S.E.2d 190 (1940).

Ga. L. 1933, p. 102 authorizes municipalities to condemn land beyond their limits for establishment or expansion of airports and landing fields. Howard v. City of Atlanta, 190 Ga. 730, 10 S.E.2d 190 (1940) (see O.C.G.A. Art. 2, Ch. 3, T. 6).

While Ga. L. 1933, p. 102 prima facie empowers one municipality to condemn land within another municipality, it does not follow that a municipality in one part of state would have right to establish airport in a municipality in a distant part of the state. This would manifestly be an abuse of power granted, which would be enjoined by courts. Howard v. City of Atlanta, 190 Ga. 730, 10 S.E.2d 190 (1940) (see O.C.G.A. Art. 2, Ch. 3, T. 6).

Effect of condemnation by municipality. — If condemning municipality acts in good faith within power granted under terms of statute, and there is a reasonable necessity for appropriation of property, fact that other municipality may be deprived of right to tax or police property so taken is merely express result of exercise of power so granted, and does not constitute reason why act should be construed as denying the power. Howard v. City of Atlanta, 190 Ga. 730, 10 S.E.2d 190 (1940).

Airports characterized as governmental institutions. — Law invested airports of the state with the character of governmental institutions. Mayor of Savannah v. Lyons, 54 Ga. App. 661, 189 S.E. 63 (1936).

Airport of City of Savannah was characterized under statutes (both local and general) authorizing its establishment and maintenance as a governmental institution in nature of a park and the city was not liable in damages to party sustaining personal injuries by reason of dangerous defect in pavement of a roadway inside of park, notwithstanding receipt by city of some incidental revenue from lessees or licensees of certain privileges therein, it not appearing that airport was operated primarily as a source of revenue. Mayor of Savannah v. Lyons, 54 Ga. App. 661, 189 S.E. 63 (1936).

Property leased to airline for airport facilities was public use. — Five parcels of property at a city-owned airport that were leased to an airline and used for hangars, flight kitchens, and air cargo were reasonably and uniformly used for

the public convenience and welfare to facilitate the effective operation of the airport, and were therefore exempt from ad valorem taxation under O.C.G.A. § 48-5-41(a)(1)(B)(i). City of Atlanta v. Clayton County Bd. of Tax Assessors, 306 Ga. App. 381, 702 S.E.2d 704 (2010), cert. denied, No. S11C0342, 2011 Ga. LEXIS 222 (Ga. 2011); overruled on other grounds by Gilmer County Bd. of Tax Assessors v. Spence, 309 Ga. App. 482, 711 S.E.2d 51 (2011).

Cited in Caroway v. City of Atlanta, 85 Ga. App. 792, 70 S.E.2d 126 (1952); City of Macon v. Powell, 133 Ga. App. 907, 213 S.E.2d 63 (1975).

RESEARCH REFERENCES

Am. Jur. 2d. — 8 Am. Jur. 2d, Aviation, §§ 12 et seq., 82 et seq.

Am. Jur. Pleading and Practice Forms. — 4 Am. Jur. Pleading and Practice Forms, Aviation, §§ 88 et seq., 104 et seq.

C.J.S. — 2A C.J.S., Aeronautics and Aerospace, §§ 11 et seq., 53 et seq.

ALR. — Aeroplanes and aeronautics, 99 ALR 173.

Power to establish or maintain public airport, or to create separate public airport authority, 161 ALR 733.

Airport operations or flight of aircraft as nuisance, 79 ALR3d 253.

Air carrier's liability for injury from condition of airport premises, 14 ALR5th 662.

6-3-20.1. Management, ownership, or control of airports by foreign citizens or businesses with substantial foreign ownership prohibited.

(a) As used in this Code section, the term:

(1) "Airport" means the real and personal property constituting an airport as a complete entity or unit, and the management, operation, or control of an airport means the overall management, operation, or control of the airport as a complete entity or unit.

(2) "Business entity with a substantial foreign ownership" means any business entity in which 25 percent or more of the equity in such business entity is owned by persons or other business entities that are not citizens of the United States.

(3) "Citizen of the United States" means any individual person who is a citizen of the United States and any business entity incorporated or having its principal place of business in the United States, but the term shall not include any business entity with a substantial foreign ownership.

(4) "Person" means an individual person.

(b) No county, municipality, or other political subdivision and no public authority owning or controlling an airport shall sell, lease, or otherwise contract with any person or business entity which is not a citizen of the United States or with any business entity with a substantial foreign ownership to have such person or business entity manage, operate, own, or control such airport.

(c) The provisions of subsection (b) of this Code section shall not prevent or be construed to prevent any person who is not a citizen of the United States or any business entity with a substantial foreign ownership from leasing or purchasing portions of any airport for the purpose of conducting such person's or entity's lawful business thereon or from leasing or subleasing portions of any airport for the purpose of allowing any other such person or entity to conduct its lawful business thereon. (Code 1981, § 6-3-20.1, enacted by Ga. L. 1988, p. 1845, § 1.)

Code Commission notes. — Pursuant to § 28-9-5, in 1988, the comma was deleted following "entity's lawful business thereon" near the end of subsection (c).

6-3-21. Lands acquired, owned, leased, controlled, or occupied by local governments deemed for public purposes; effect on ad valorem taxation.

Any lands acquired, owned, leased, controlled, or occupied by counties, municipalities, or other political subdivisions for the purpose or purposes enumerated in Code Section 6-3-20 shall be and are declared to be acquired, owned, leased, controlled, or occupied for public, governmental, and municipal purposes; provided, however, that with respect to facilities located on such lands, which lands are located outside of the territorial limits of the political subdivision that leases such lands and which are leased to, controlled, or occupied by private parties, the interests created in such private parties, for the purpose of ad valorem taxation only, are declared not to be used for public, governmental, or municipal purposes and said resulting interests, regardless of the extent of such interest, whether possessory or an estate in land, are subject to ad valorem taxation; provided, further, that the underlying fee interest in such property which remains vested in the county, municipality, or other political subdivision shall be deemed to be used for public, governmental, and municipal purposes. The municipality's interest in lands and the facilities located thereon located inside the territorial limits of a municipality which are owned by that municipality for the purposes enumerated in Code Section 6-3-20, are declared to be used for public, governmental, or municipal purposes and are not subject to ad valorem taxation. (Ga. L. 1933, p. 102, § 2; Code 1933, § 11-202; Ga. L. 1983, p. 647, § 1; Ga. L. 1985, p. 1649, § 1.)

JUDICIAL DECISIONS

Airports of state are invested with character of governmental institutions. Mayor of Savannah v. Lyons, 54 Ga. App. 661, 189 S.E. 63 (1936).

Lease of county property for use as airport is proprietary function. — When a county through the county's proper authority leases property which the county owns for use as an airport, it is engaging in a proprietary and not a gov-

ernmental function. Southern Airways Co. v. DeKalb County, 102 Ga. App. 850, 118 S.E.2d 234 (1960).

Binding nature of county's contract with private parties for operating airport. — County owning an airport may properly contract with private parties for operating the airport, in whole or in part. In so doing, the governing authority of the county is engaged in a proprietary function and may, by such contract, bind the authority's successors in office for a period of years. Southern Airways Co. v. DeKalb County, 102 Ga. App. 850, 118 S.E.2d 234 (1960).

Section not intended to totally immunize municipalities from suit. — This section, which provides that lands acquired, controlled, or occupied as landing fields for the use of aircraft shall be so acquired or controlled for public, governmental, and municipal purposes, was intended to be a declaration on the part of the legislature of the public purpose as to which the authorization was given, and not as a limitation immunizing such municipalities from suit regardless of circumstances. Southern Airways Co. v. DeKalb County, 102 Ga. App. 850, 118 S.E.2d 234 (1960).

Tort liability of municipality operating airport. — Airport of City of Savannah was characterized under statutes (both local and general) authorizing its establishment and maintenance as a governmental institution in nature of a park and the city was not liable in damages to party sustaining personal injuries by reason of dangerous defect in pavement of a roadway inside of park, notwithstanding receipt by city of some incidental revenue from lessees or licensees of certain privileges therein, it not appearing that airport was operated primarily as a source of revenue. Mayor of Savannah v. Lyons, 54 Ga. App. 661, 189 S.E. 63 (1936).

Municipality operating an airport is engaged in a proprietary function and is liable for tortious acts of its servants and agents in operation of an airport from which substantial revenue is derived. Southern Airways Co. v. DeKalb County, 102 Ga. App. 850, 118 S.E.2d 234 (1960).

Lease of airport property to corporation. — Airport property leased to corporation, which was used for provision of inflight meals, was subject to taxation since the provisions of lease did not preserve the public's "rightful, equal, and uniform use" of the property as required by O.C.G.A. § 6-3-25. Clayton County Bd. of Tax Assessors v. City of Atlanta, 164 Ga. App. 864, 298 S.E.2d 544 (1982).

Trial court erred in granting a county's motion to dismiss a lessee's action to recover a refund of ad valorem taxes on the ground that the lessee's claims that O.C.G.A. § 6-3-21 was unconstitutional were barred under the doctrine of collateral estoppel because in the previous litigation between the parties, the trial court only decided that O.C.G.A. § 6-3-21 applied to the lessee's interest and did not decide on the merits whether the statute was constitutional; untimeliness was the basis of the trial court's ruling on the lessee's constitutionality argument in the prior action. Host Int'l, Inc. v. Clayton County, 311 Ga. App. 414, 715 S.E.2d 805 (2011).

Airline's property in hangar on political subdivision's property. — Usufructs in hangar property and fuel tanks used by an airline were not subject to ad valorem taxes when the property taxed was owned by a political subdivision and located within that same political subdivision. Roberts v. Eastern Airlines, 257 Ga. 273, 357 S.E.2d 585 (1987).

Property leased to airline for airport facilities was public use. — Five parcels of property at a city-owned airport that were leased to an airline and used for hangars, flight kitchens, and air cargo were reasonably and uniformly used for the public convenience and welfare to facilitate the effective operation of the airport, and were therefore exempt from ad valorem taxation under O.C.G.A. § 48-5-41(a)(1)(B)(i). City of Atlanta v. Clayton County Bd. of Tax Assessors, 306 Ga. App. 381, 702 S.E.2d 704 (2010), cert. denied, No. S11C0342, 2011 Ga. LEXIS 222 (Ga. 2011); overruled on other grounds by Gilmer County Bd. of Tax Assessors v. Spence, 309 Ga. App. 482, 711 S.E.2d 51 (2011).

Cited in Howard v. City of Atlanta, 190 Ga. 730, 10 S.E.2d 190 (1940); Delta Air Corp. v. Kersey, 193 Ga. 862, 20 S.E.2d

245 (1942); Caroway v. City of Atlanta, 85 Ga. App. 792, 70 S.E.2d 126 (1952); Southern Airways Co. v. De Kalb County, 216 Ga. 358, 116 S.E.2d 602 (1960); City of Macon v. Powell, 133 Ga. App. 907, 213 S.E.2d 63 (1975).

RESEARCH REFERENCES

Am. Jur. 2d. — 8 Am. Jur. 2d, Aviation, §§ 12 et seq., 82 et seq.

C.J.S. — 2A C.J.S., Aeronautics and Aerospace, §§ 11 et seq., 53 et seq.

ALR. — Air carrier's liability for injury from condition of airport premises, 14 ALR5th 662.

6-3-22. Methods of acquisition of property for airports and landing fields.

Private property needed by a county, municipality, or other political subdivision for an airport or landing field or for the expansion of an airport or landing field may be acquired by grant, purchase, lease, or other means, if such county, municipality, or other political subdivision is able to agree with the owners of the property on the terms of such acquisition, and otherwise by condemnation in the manner provided by the law under which the county, municipality, or other political subdivision is authorized to acquire real property for public purposes; provided, however, that the power of condemnation may be exercised extraterritorially only with the consent of the governing authority of the county, municipality, or other political subdivision wherein the property is located, as expressed either in a resolution adopted by such governing authority, granting its consent to such condemnation, or by failure of such governing authority to adopt a resolution denying its consent to such condemnation within 60 days from the receipt of a resolution from the proposed condemnor requesting approval of such condemnation, or with the consent of the General Assembly, as expressed in a resolution enacted by the General Assembly, after denial of consent to such condemnation by the governing authority of the county, municipality, or other political subdivision wherein the property is located; provided, however, that for any proposed airport or airport expansion by a city into a county where such city is located, or by a county into a city located in such county, the decision of the governing body of the jurisdiction into which such proposed airport or airport expansion is to be located shall be final as to whether or not such power of condemnation may be exercised extraterritorially. (Ga. L. 1933, p. 102, § 3; Code 1933, § 11-203; Ga. L. 1992, p. 1434, § 1.)

Law reviews. — For note discussing the relation of airport zoning to the constitutional provision requiring just compensation for a taking of property, see 10 Ga. L. Rev. 218 (1975). For note on 1992 amendment of this Code section, see 9 Ga. St. U.L. Rev. 149 (1992).

JUDICIAL DECISIONS

Section authorizes condemnation of "private property," whether real or personal, for airport expansion. City of Atlanta v. Airways Parking Co., 225 Ga. 173, 167 S.E.2d 145 (1969).

Territorial scope of condemnation power of municipalities. — This article authorizes municipalities to condemn land beyond the municipalities' limits for establishment or expansion of airports and landing fields. Howard v. City of Atlanta, 190 Ga. 730, 10 S.E.2d 190 (1940).

This article vests in each municipality the same general authority, that is, each is given the power to condemn land within and without the municipality's boundaries, and accordingly each is by the terms of the article vested with jurisdiction over every part of the state, including the territory within the limits of every other municipality. Howard v. City of Atlanta, 190 Ga. 730, 10 S.E.2d 190 (1940) (see O.C.G.A. Art. 2, Ch. 3, T. 6).

Grant of power to municipalities to condemn property within and without their geographical limits authorizes one municipality to condemn land within territorial limits of another municipality. Howard v. City of Atlanta, 190 Ga. 730, 10 S.E.2d 190 (1940).

While this article prima facie empowers one municipality to condemn land within another municipality, it does not follow that a municipality in one part of state would have right to establish airport in a municipality in a distant part of the state. This would manifestly be an abuse of power granted, which would be enjoined by courts. Howard v. City of Atlanta, 190 Ga. 730, 10 S.E.2d 190 (1940) (see O.C.G.A. Art. 2, Ch. 3, T. 6).

Effect of condemnation by municipality. — If condemning municipality acts in good faith within power granted under statutory terms, and there is a reasonable necessity for appropriation of property, the fact that other municipality may be deprived of right to tax or police property so taken is merely express result of exercise of power so granted, and does not constitute reason why the article should be construed as denying the power. Howard v. City of Atlanta, 190 Ga. 730, 10 S.E.2d 190 (1940) (see O.C.G.A. Art. 2, Ch. 3, T. 6).

Delegation of condemnation authority. — Counties and municipalities have authority to condemn private property for airports and delegation of that authority to an office building authority was authorized. Savage v. Thomaston-Upson County Office Bldg. Auth., 205 Ga. App. 634, 422 S.E.2d 896, cert. denied, 205 Ga. App. 901, 422 S.E.2d 896 (1992).

Condemnation power not granted by section. — Absent any direct or implied legislative authority to exercise the power of eminent domain in the enabling legislation, a municipal airport commission was not authorized to condemn property under O.C.G.A. § 6-3-22. Lopez-Aponte v. Columbus Airport Comm'n, 221 Ga. App. 840, 473 S.E.2d 196 (1996).

Condemnation petitions of a municipal airport commission that failed to show the consent of the city to such actions should have been dismissed for failing to state a claim upon which relief could be granted. Lopez-Aponte v. Columbus Airport Comm'n, 221 Ga. App. 840, 473 S.E.2d 196 (1996).

RESEARCH REFERENCES

Am. Jur. 2d. — 8 Am. Jur. 2d, Aviation, § 82 et seq. 26 Am. Jur. 2d, Eminent Domain, § 140.

C.J.S. — 2A C.J.S., Aeronautics and Aerospace, § 53 et seq. 29A C.J.S., Eminent Domain, § 57 et seq.

ALR. — Exercise of eminent domain for purposes of airport, 135 ALR 755.

6-3-22.1. Acquisition of property outside territorial boundaries.

Repealed by Ga. L. 1991, p. 953, § 1, effective July 1, 1992.

Editor's notes. — This Code section was based on Code 1981, § 6-3-22.1 [repealed], enacted by Ga. L. 1991, p. 953, § 1.

6-3-23. Payment of costs of acquisition of property for airports or landing fields.

Costs of acquisition of real property, in accordance with this article, for an airport or landing field may be paid for by appropriation of moneys available therefor or wholly or partly from the proceeds of the sale of bonds of the county, municipality, or other political subdivision, as the legislative body of such political subdivision shall determine; subject however, to the adoption of a proposition therefor at a regular or special election, if the adoption of such a proposition is a prerequisite to the issuance of bonds of such county, municipality, or other political subdivision for public purposes generally. (Ga. L. 1933, p. 102, § 4; Code 1933, § 11-204.)

6-3-24. Appropriation of funds for development, operation, maintenance, or control of air facilities.

The local public authorities having power to appropriate moneys within the counties, municipalities, or other public subdivisions acquiring, establishing, developing, operating, maintaining, or controlling airports or landing fields under this article are authorized to appropriate and cause to be raised, by taxation or otherwise, in such counties, municipalities, or other political subdivisions, moneys sufficient to carry out therein the provisions of this article and to use for such purpose or purposes moneys derived from said airports or landing fields. (Ga. L. 1933, p. 102, § 6; Code 1933, § 11-206.)

6-3-25. Powers and duties of counties, municipalities, and political subdivisions as to airports generally.

Counties, municipalities, or other political subdivisions which establish airports or landing fields or which acquire, lease, or set apart real property for such purpose or purposes are authorized to:

(1) Construct, equip, improve, maintain, and operate the same or vest authority for the construction, equipment, improvement, maintenance, and operation thereof in an officer, board, or body of the county, municipality, or other political subdivision. The expense of such construction, equipment, improvement, maintenance, and operation shall be a responsibility of the county, municipality, or other political subdivision;

(2) Adopt regulations and establish charges, fees, and tolls for the use of such airports or landing fields, fix penalties for the violation of

said regulations, and establish liens to enforce payment of said charges, fees, and tolls, subject to existing contracts;

(3) Lease such airports or landing fields to private parties for operation or lease or assign to private parties for operation, space, area, improvements, and equipment on such airports or landing fields, provided in each case that in so doing the public is not deprived of its rightful, equal, and uniform use thereof; and

(4) Lease portions of such property lying within any county having a population of 550,000 or more persons according to the United States decennial census of 1980 or any future such census for an initial term of up to 50 years, and to extend such leases, to private parties for development of such property for hotels and related facilities, conference centers, office buildings, commercial and retail uses, and other similar airport and travel related purposes, provided that:

(A) A lease under this paragraph shall expressly grant and convey to the lessee a taxable estate for years in both the property and any improvements upon such property as may be constructed and shall not grant or convey a nontaxable usufruct in either the property or the improvements upon such property; and

(B) The leasing authority granted under this paragraph shall not extend to property acquired for airport noise mitigation purposes pursuant to the former Airport and Airway Development Act of 1970 (49 U.S.C. Section 1701, et seq.), as amended, or the Airport and Airway Improvement Act of 1982 (49 U.S.C. Section 2201, et seq.), as amended. (Ga. L. 1933, p. 102, § 5; Code 1933, § 11-205; Ga. L. 1987, p. 631, § 1.)

JUDICIAL DECISIONS

"Airports and landing fields." — Language of O.C.G.A. § 6-3-25, "airports and landing fields", encompasses all property reasonably and uniformly used for public convenience and welfare to facilitate effective operation of the air transportation facility. Clayton County Bd. of Tax Assessors v. City of Atlanta, 164 Ga. App. 864, 298 S.E.2d 544 (1982).

Lease to private corporation. — Airport property leased to corporation, which was used for provision of inflight meals, was subject to taxation when provisions of lease did not preserve the public's "rightful, equal, and uniform use" of the property as required by O.C.G.A. § 6-3-25. Clayton County Bd. of Tax Assessors v. City of Atlanta, 164 Ga. App. 864, 298 S.E.2d 544 (1982).

County subject to suit for breach or interference with performance. — Under this article, which expressly extends the statute's coverage to counties, the county owning an airport is authorized to contract with a private party for the airport's operation; the logical inverse inference of the article is that to the extent the county is authorized to contract, it also may be sued upon contract for breach or for interference with performance. Southern Airways Co. v. DeKalb County, 102 Ga. App. 850, 118 S.E.2d 234 (1960) (see O.C.G.A. Art 2., Ch. 3, T. 6).

Binding nature of county's contract

with private parties for operating airport. — County owning an airport may properly contract with private parties for its operation, in whole or in part. In so doing, governing authority of county is engaged in a proprietary function and may, by such contract, bind its successors in office for a period of years. Southern Airways Co. v. DeKalb County, 102 Ga. App. 850, 118 S.E.2d 234 (1960).

Fulton County is not excused from accepting performance from a bankruptcy trustee's assignee, despite O.C.G.A. § 6-3-25, which authorizes counties to establish airports and to lease such airports, and Fulton County Code, § 29-3-74(i), which provides that "[l]eases may be assigned or sublet to qualified fixed base operators only with the approval of the Fulton County Commission." Abney v. Fulton County (In re Fulton Air Serv., Inc.), 34 Bankr. 568 (Bankr. N.D. Ga. 1983).

Cited in Caroway v. City of Atlanta, 85 Ga. App. 792, 70 S.E.2d 126 (1962).

OPINIONS OF THE ATTORNEY GENERAL

City or county cannot create an authority to control and operate airport under this section. — While this section authorizes cities and counties to construct, maintain, and operate airports or to vest such authority in an officer, board, or body of such political subdivision, the section does not authorize a city or county to create an authority to control and operate the city or county airport. 1960-61 Op. Att'y Gen. p. 13.

RESEARCH REFERENCES

Am. Jur. 2d. — 8 Am. Jur. 2d, Aviation, §§ 12 et seq., 82 et seq.

C.J.S. — 2A C.J.S., Aeronautics and Aerospace, §§ 11 et seq., 53 et seq.

6-3-26. Acquisition of rights and easements for radios, lights, markers, and other equipment associated with airport.

Counties, municipalities, and other political subdivisions are authorized to acquire the right or easement for a term of years, or perpetually, to place and maintain radio and other equipment, and suitable marks for the daytime, and to place, operate, and maintain suitable lights for the nighttime marking of buildings, or other structures or obstructions, for the safe operation of aircraft utilizing airports and landing fields acquired or maintained under this article. Such rights or easements may be acquired by grant, purchase, lease, or condemnation in the same manner as is provided in Code Section 6-3-22 for the acquisition of the airport or landing field itself or the expansion thereof. (Ga. L. 1933, p. 102, § 7; Code 1933, § 11-207.)

RESEARCH REFERENCES

ALR. — Airport operator's rights and remedies as to uses of adjoining land interfering with aircraft operation, 25 ALR2d 1454.

6-3-27. Enforcement of police regulations at airports; powers of law enforcement officers.

(a) Counties, municipalities, or other political subdivisions acquiring, establishing, developing, operating, maintaining, or controlling airports or landing fields under this article outside the geographical limits of such subdivisions are specifically granted the right to enforce police regulations on such airports or landing fields.

(b) A law enforcement officer of the county, municipality, or other political subdivision operating an airport or landing field outside the geographical limits of such political subdivision shall, when authorized by the county, municipality, or other political subdivision operating said airport or landing field, have the same law enforcement powers, including the powers of arrest, within such airport or landing field and on any public property within one-quarter mile of such airport or landing field as a law enforcement officer of the political subdivision in which such airport or landing field is located.

(c) Nothing in this Code section shall be construed as limiting the authority of any law enforcement agency of the county, municipality, or other political subdivision in which such airport or landing field is located. (Ga. L. 1933, p. 102, § 8; Code 1933, § 11-208; Ga. L. 2002, p. 1094, § 2.)

Cross references. — Regulation and taxation of sale and storage of alcoholic beverages at county and municipal airports, § 3-8-1. Sale of distilled spirits, malt beverages, and wine by airline passenger carriers, §§ 3-9-1, 3-9-2. Transportation passenger safety, § 16-12-121 et seq.

Editor's notes. — Ga. L. 2002, p. 1094, § 1, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Transportation Security Act of 2002.'"

JUDICIAL DECISIONS

Cited in Howard v. City of Atlanta, 190 Ga. 730, 10 S.E.2d 190 (1940).

RESEARCH REFERENCES

Am. Jur. 2d. — 8 Am. Jur. 2d, Aviation, §§ 12 et seq., 82 et seq.

C.J.S. — 2A C.J.S., Aeronautics and Aerospace, §§ 11 et seq., 53 et seq.

6-3-28. Construction of article.

It is the intent and purpose of this article that all provisions relating to the issuance of bonds and the levying of taxes for airport purposes and the condemnation for airports and airport facilities shall be construed in accordance with general provisions of the law governing

the right and procedure of municipalities to condemn, issue bonds, levy taxes, etc. (Ga. L. 1933, p. 102, § 9; Code 1933, § 11-209.)

CHAPTER 4

GEORGIA AIRPORT DEVELOPMENT AUTHORITY

Sec.
6-4-1. Short title.
6-4-2. Authority created; purposes.
6-4-3. Definitions.
6-4-4. Corporate existence; status as political subdivision.
6-4-5. Appointment of members; terms; filling of vacancies; officers; quorum; reimbursement for expenses; compensation of employees; legal services.
6-4-6. Members accountable as trustees; conflict of interests; books and records.
6-4-7. General powers.
6-4-8. Requirements for issuance of revenue bonds, notes, or other obligations.
6-4-9. Additional provisions governing issuance of bonds, notes, or other obligations.
6-4-10. Development of air transportation projects.
6-4-11. Liberal construction of chapter.
6-4-12. Obligations or indebtedness not to constitute indebtedness of state or political subdivisions.
6-4-13. Tax exemption.
6-4-14. Police powers.
6-4-15. Other authorities unaffected by provisions of chapter.
6-4-16. Venue and jurisdiction of actions.

Editor's notes. — Ga. L. 1992, p. 1615, § 3, not codified by the General Assembly, provides: "This Act shall not be effective until such time as the 'State Airport System Plan' has been completed by the Department of Transportation."

The State Airport System plan referred to in Ga. L. 1992, p. 1615, § 3, was completed by 1995. A subsequent Aviation System Plan was completed and approved by the Federal Aviation Administration on July 15, 2003.

Law reviews. — For note on 1992 amendment of this chapter, see 9 Ga. St. U.L. Rev. 149 (1992).

RESEARCH REFERENCES

Am. Jur. 2d. — 8A Am. Jur. 2d, Aviation, § 82 et seq.

6-4-1. Short title.

This chapter shall be known and may be cited as the "Georgia Airport Development Authority Law." (Code 1981, § 6-4-1, enacted by Ga. L. 1992, p. 1615, § 1.)

6-4-2. Authority created; purposes.

There is created the Georgia Airport Development Authority for the purposes of determination of location, construction, financing, acquisition of property, operation, and development of any new airports that are planned to accommodate aircraft operating under the provisions of

14 C.F.R. Part 121 within and outside the State of Georgia. (Code 1981, § 6-4-2, enacted by Ga. L. 1992, p. 1615, § 1.)

6-4-3. Definitions.

As used in this chapter, the term:

(1) "Authority" means the Georgia Airport Development Authority.

(2) "Cost of the project" or "cost of any project" means and shall include: all costs of acquisition, by purchase or otherwise, construction, assembly, installation, or the subsequent modification, renovation, or rehabilitation incurred in connection with any project or any part of any project; the cost of all lands, properties, rights, easements, fees, franchises, permits, approvals, licenses, and certifications acquired; the cost of all machinery and equipment necessary for the operation of the project; financing charges; interest prior to and during construction and for such period of time after completion of construction as shall be deemed necessary to allow the earnings of the project to become sufficient to meet the requirements of the bond issue; the cost of engineering, legal expenses, plans and specifications, and other expenses necessary or incident to determining the feasibility or practicability of the project; administrative expenses; and such other expenses as may be necessary or incident to the financing authorized in this chapter; the construction of any project, and the placing of same in operation. Any obligation or expense incurred for any of the foregoing purposes shall be regarded as a part of the cost of the project and may be paid or reimbursed as such out of the proceeds of revenue bonds issued for such project under this chapter.

(3) "Governing body" means the elected or duly appointed officials constituting the governing authority of the State of Georgia.

(4) "Project" means the construction, installation, operation, or lease of any new airports in the state that are planned to be certificated under 14 C.F.R. Part 139 or any appurtenance thereto or the subsequent renovation or rehabilitation of such facility. A project may also include any fixtures, machinery, or equipment used on or in connection with any airport facilities.

(5) "Revenue bonds" and "bonds" means any bonds of the authority which are authorized to be issued under the Constitution and laws of the State of Georgia, including refunding bonds but not including notes or other obligations of an authority.

(6) "Self-liquidating" means that, in the judgment of the authority, the revenues and earnings to be derived by the authority from any project or combination of projects, together with any maintenance,

repair, operational services, funds, rights of way, engineering services, and any other in-kind services to be received by the authority from appropriations of the General Assembly, other state agencies or authorities, the United States government, or any county or municipality shall be sufficient to provide for the maintenance, repair, and operation and to pay the principal and interest of revenue bonds which may be issued for the cost of such project, projects, or combination of projects.

(7) "Service area" means the geographical area of operations of the authority and shall consist of the State of Georgia and, with the consent of the appropriate governing authorities thereof, nearby states. (Code 1981, § 6-4-3, enacted by Ga. L. 1992, p. 1615, § 1.)

6-4-4. Corporate existence; status as political subdivision.

The Georgia Airport Development Authority shall continue to be a body corporate and politic and an instrumentality and public corporation of the state known as the "Georgia Airport Development Authority." It shall have perpetual existence. In said name it may contract and be contracted with, sue and be sued, implead and be impleaded, and complain and defend in all courts of this state, subject to the limitations of Code Section 6-4-15. The authority shall constitute a political subdivision within the meaning of Code Section 6-3-22 as enacted by the Georgia General Assembly in its 1992 regular session in Senate Bill 173. (Code 1981, § 6-4-4, enacted by Ga. L. 1992, p. 1615, § 1.)

6-4-5. Appointment of members; terms; filling of vacancies; officers; quorum; reimbursement for expenses; compensation of employees; legal services.

(a) The authority shall consist of eight members as follows:

(1) Five members to be appointed by the Governor, at least three of whom shall have expertise in the field of aviation;

(2) One member to be appointed by the Speaker of the House of Representatives, who shall not be a member of the General Assembly;

(3) One member to be appointed by the President of the Senate, who shall not be a member of the General Assembly; and

(4) The commissioner of transportation, who shall serve as chairman.

Two members appointed by the Governor and the members appointed by the Speaker of the House of Representatives and the President of the Senate shall serve for initial terms of two years and until their successors are appointed and qualified. The remaining members ap-

pointed by the Governor shall serve for initial terms of four years and until their successors are appointed and qualified. Thereafter, all members shall serve for terms of four years and until their successors are appointed and qualified. Any vacancy among the members so appointed, whether caused by expiration of term, death, resignation, or otherwise, shall be filled in the same manner as the membership position so vacated was last regularly filled. When the vacancy occurs other than by expiration of term, it shall be filled for the unexpired term and until a successor is appointed and qualified.

(b) The authority shall elect a secretary and a treasurer, who need not necessarily be members of the authority. A majority of the members of the authority shall constitute a quorum necessary for the transaction of business, and a majority vote of those present at any meeting at which there is a quorum shall be sufficient to do and perform any action permitted to the authority by this chapter. The chairman shall vote only in the event of a tie.

(c) No vacancy on the authority shall impair the right of the quorum to transact any and all business as stated in this Code section. If any member of the authority has any pecuniary interest in a project, the fact of such interest shall be disclosed by such member and recorded in the minutes of the authority. The member shall abstain from urging the approval of or voting on any project in which the member has a pecuniary interest.

(d) The members of the authority shall receive no compensation for their services but all members shall be entitled to the expense allowance and travel cost reimbursement provided for members of certain boards and commissions pursuant to Code Section 45-7-21 while in the performance of their duties. Employees of the authority shall receive reasonable compensation for their services, the amount to be determined by the members of the authority.

(e) The Attorney General shall provide legal services for the authority. In connection therewith, Code Sections 45-15-13 through 45-15-16 shall be fully applicable. (Code 1981, § 6-4-5, enacted by Ga. L. 1992, p. 1615, § 1.)

6-4-6. Members accountable as trustees; conflict of interests; books and records.

(a) The members of the authority shall be accountable in all respects as trustees.

(b) Every member of the authority and every employee of the authority who knowingly has any interest, direct or indirect, in any contract to which the authority is or is about to become a party, or in

any other business of the authority, or in any firm or corporation doing business with the authority, shall make full disclosure of such interest to the authority. Failure to disclose such an interest shall constitute cause for which an authority member may be removed or an employee discharged or otherwise disciplined at the discretion of the authority.

(c) Provisions of Article 1 of Chapter 10 of Title 16 and Code Sections 16-10-21 and 16-10-22, regulating the conduct of officers, employees, and agents of political subdivisions, municipal and other public corporations, and other public organizations, shall be applicable to the conduct of members, officers, employees, and agents of the authority.

(d) Any contract or transaction of the authority involving a conflict of interest not disclosed under subsection (b) of this Code section, or involving a violation of Article 1 of Chapter 10 of Title 16 and Code Sections 16-10-21 and 16-10-22, or involving a violation of any other provision of law regulating conflicts of interest which is applicable to the authority or its members, officers, or employees shall be voidable by the authority.

(e) The authority shall keep suitable and proper books and records of all receipts, income, and expenditures of every kind and shall submit for inspection all of such books, together with a proper statement of the authority's financial position, on or about December 31 of each year, to the state auditor. (Code 1981, § 6-4-6, enacted by Ga. L. 1992, p. 1615, § 1.)

6-4-7. General powers.

The authority shall have all of the powers necessary, proper, or convenient to carry out and effectuate the purposes and provisions of this chapter. The powers enumerated in this Code section are cumulative of and in addition to each other and other powers granted elsewhere in this chapter and no such power limits or restricts any other power of the authority. Without limiting the generality of the foregoing, the powers of the authority shall include the powers:

(1) To bring and defend actions;

(2) To adopt and amend a corporate seal;

(3) To make and execute contracts, agreements, and other instruments necessary, proper, or convenient to exercise the powers of the authority and to further the public purpose for which the authority is created, including, but not limited to, contracts for construction of projects, leases of projects, operation of projects, sale of projects, agreements for loans to finance projects, and contracts with respect to the use of projects, including negotiated contracts with air carriers for the use of projects;

(4) To plan, survey, subdivide, improve, administer, construct, erect, acquire, own, repair, remodel, maintain, add to, extend, improve, equip, operate, and manage projects, as defined in Code Section 6-4-3, to be located on property owned or leased by the authority; the cost of any such project shall be paid from its income, from any grant from the United States government or any agency or instrumentality thereof, or from any grant from this state;

(5) In connection with any project, to acquire by purchase, lease, condemnation, or otherwise and to hold, lease, and dispose of real and personal property of every kind and character or any interest therein in furtherance of its corporate purposes;

(6) In connection with any project, to acquire in its own name by purchase, on such terms and conditions and in such manner as it may deem proper or by condemnation in accordance with any and all existing laws applicable to the condemnation of property for public use, real property or rights or easements therein or franchises necessary or convenient for its corporate purposes; and to use the same so long as its corporate existence shall continue and to lease or make contracts with respect to the use of or to dispose of the same in any manner it deems to the best advantage of the authority, the authority being under no obligation to accept and pay for any property condemned under this chapter or under Code Section 6-2-20 except from the funds provided under the authority of this chapter; and, in any proceedings to condemn, such order may be made by the court having jurisdiction of the action or proceedings as may be just to the authority and to the owners of the property to be condemned; and no property shall be acquired under this chapter upon which any lien or other encumbrance exists unless at the time such property is so acquired a sufficient sum of money be deposited in trust to pay and redeem such lien or encumbrance in full;

(7) To adopt regulations and fix, alter, charge, negotiate, and collect fares, rates, fees, tolls, and other charges for the use of such projects; fix penalties for the violation of said regulations; and establish liens to enforce payment of said charges, fees, and tolls, subject to existing contracts; to make such contracts, leases, or conveyances as the legitimate and necessary purposes of this chapter shall require, including, but not limited to, contracts with private parties for the operation or lease or assignment to private parties for operation, space, area, improvements, and equipment on such projects, provided in each case that in so doing the public is not deprived of its rightful, equal, and uniform use thereof;

(8) To finance, by loan, grant, lease, or otherwise, and to construct, erect, assemble, purchase, acquire, own, repair, remodel, renovate, rehabilitate, modify, maintain, extend, improve, install, sell, equip,

expand, add to, operate, or manage projects and to pay the cost of any project from the proceeds of revenue bonds, notes, or other obligations of the authority or any other funds of the authority or from any contributions or loans by persons, corporations, partnerships, limited or general, or other entities, all of which the authority is empowered to receive, accept, and use;

(9) To borrow money to further or to carry out its public purpose and to execute revenue bonds, notes, other obligations, leases, trust indentures, trust agreements, agreements for the sale of its revenue bonds, notes, or other obligations, loan agreements, mortgages, deeds to secure debt, trust deeds, security agreements, assignments, and such other agreements or instruments as may be necessary or desirable, in the judgment of the authority, to evidence and to provide security for such borrowing;

(10) To accept loans and grants, either or both, of money, materials, or property of any kind from the United States government or the State of Georgia or any political subdivision, authority, agency, or instrumentality of either of them, upon such terms and conditions as the United States government or the State of Georgia or such political subdivision, authority, agency, or instrumentality of either of them shall impose;

(11) To hold, use, administer, and expend such sum or sums as may hereafter be received as income or gifts or as may be appropriated by authority of the General Assembly for any of the purposes of the authority;

(12) To issue revenue bonds, notes, or other obligations of the authority and use the proceeds thereof for the purpose of paying or loaning the proceeds thereof to pay all or any part of the cost of any project and otherwise to further or carry out the public purpose of the authority and to pay all costs of the authority incident to, or necessary and appropriate to, furthering or carrying out such purpose;

(13) To make application directly or indirectly to any federal, state, county, or municipal government or agency or to any other source, public or private, for loans, grants, guarantees, or other financial assistance in furtherance of the authority's public purposes and to accept and use the same upon such terms and conditions as are prescribed by such federal, state, county, or municipal government or agency or other source;

(14) To enter into agreements with the federal government or any agency or corporation thereof to use the facilities of the federal government or agency or corporation thereof in order to further or carry out the public purposes of the authority;

(15) To extend credit or make loans to any person, corporation, partnership, limited or general, or other entity for the costs of any project, which credit or loans may be evidenced or secured by loan agreements, notes, mortgages, deeds to secure debt, trust deeds, security agreements, assignments, or other instruments or by rentals, revenues, fees, or charges, upon such terms and conditions as the authority shall determine to be reasonable in connection with such extension of credit or loans, including provision for the establishment and maintenance of reserve funds, and, in the exercise of powers granted in connection with any project, the authority shall have the right and power to require the inclusion in any such loan agreement, note, mortgage, deed to secure debt, trust deed, security agreement, assignment, or other instrument of such provisions or requirements for guarantee of any obligations, insurance, construction, use, operation, maintenance, and financing of a project and such other terms and conditions as the authority may deem necessary or desirable;

(16) As security for repayment of any revenue bonds, notes, or other obligations of the authority, to pledge, mortgage, convey, assign, hypothecate, or otherwise encumber any property of the authority, including, but not limited to, real property, fixtures, personal property, and revenues or other funds; and to execute any lease, trust indenture, trust agreement, agreement for the sale of the authority's revenue bonds, notes, or other obligations, loan agreement, mortgage, deed to secure debt, trust deed, security agreement, assignment, or other agreement or instrument as may be necessary or desirable in the judgment of the authority to secure any such revenue bonds, notes, or other obligations, which instruments or agreements may provide for foreclosure or forced sale of any property of the authority upon default in any obligation of the authority, either in payment of principal, premium, if any, or interest or in the performance of any term or condition contained in any such agreement or instrument. The State of Georgia on behalf of itself and each county, municipal corporation, political subdivision, or taxing district therein waives any right the state or such county, municipal corporation, political subdivision, or taxing jurisdiction may have to prevent the forced sale or foreclosure of any property of the authority upon such default and agrees that any agreement or instrument encumbering such property may be foreclosed in accordance with law and terms thereof;

(17) To receive and use the proceeds of any tax levied by the State of Georgia or any county or municipality thereof to pay the costs of any project or for any other purpose for which the authority may use its own funds pursuant to this chapter;

(18) To receive and administer gifts, grants, and devises of money and property of any kind and to administer trusts;

(19) To use any real property, personal property, or fixtures or any interest therein; to rent or lease such property to or from others or make contracts with respect to the use thereof; or to sell, lease, exchange, transfer, assign, pledge, or otherwise dispose of or grant options for any such property in any manner as it deems to be to the best advantage of the authority and the public purpose thereof;

(20) To acquire, accept, or retain equitable interests, security interests, or other interests in any real property, personal property, or fixtures by loan agreement, note, mortgage, deed to secure debt, trust deed, security agreement, assignment, pledge, conveyance, contract, lien, loan agreement, or other consensual transfer in order to secure the repayment of any moneys loaned or credit extended by the authority;

(21) To appoint, select, and employ officers, agents, and employees, including engineers, surveyors, architects, urban or city planners, construction experts, fiscal agents, attorneys, and others and to fix their compensation and pay their expenses;

(22) To make, contract for, or otherwise cause to be made long-range plans or proposals for projects authorized in Code Section 6-4-2 within the service area, in cooperation with those political subdivisions within which such projects are located or are proposed to be located;

(23) By or through its authorized agents or employees, to enter upon any lands, waters, and premises in the state for the purpose of making surveys, soundings, drillings, and examinations as the authority may deem necessary or convenient for the purposes of this chapter; and such entry shall not be deemed a trespass. The authority shall, however, make reimbursement for any actual damages resulting from such activities;

(24) To make reasonable regulations for installation, construction, maintenance, repairs, renewal, and relocation of pipes, mains, conduits, cables, wires, towers, poles, and other equipment and appliances of any public utility in, on, along, over, or under any project;

(25) To exercise any power granted by laws of the State of Georgia to public or private corporations which is not in conflict with the Constitution and laws of Georgia; and

(26) To do all things necessary, proper, or convenient to carry out the powers conferred by this chapter, including the adoption of rules and regulations. (Code 1981, § 6-4-7, enacted by Ga. L. 1992, p. 1615, § 1.)

6-4-8. Requirements for issuance of revenue bonds, notes, or other obligations.

Revenue bonds, notes, or other obligations issued by an authority shall be paid solely from the property, including, but not limited to, real property, fixtures, personal property, revenues, or other funds pledged, mortgaged, conveyed, assigned, hypothecated, or otherwise encumbered to secure or to pay such bonds, notes, or other obligations. All revenue bonds, notes, and other obligations shall be authorized by resolution of the authority, adopted by a majority vote of the members of the authority at a regular or special meeting. Such revenue bonds, notes, or other obligations shall bear such date or dates, shall mature at such time or times not more than 40 years from their respective dates, shall bear interest at such rate or rates, which may be fixed or may fluctuate or otherwise change from time to time, shall be subject to redemption on such terms, and shall contain such other terms, provisions, covenants, assignments, and conditions as the resolution authorizing the issuance of such bonds, notes, or other obligations may permit or provide. The terms, provisions, covenants, assignments, and conditions contained in or provided or permitted by any resolution of the authority authorizing the issuance of such revenue bonds, notes, or other obligations shall bind the members of the authority then in office and their successors. The authority shall have the power from time to time and whenever it deems refunding expedient to refund any bonds by the issuance of new bonds, whether the bonds to be refunded have or have not matured, and may issue partly to refund bonds then outstanding and partly for any other purpose permitted under this chapter. The refunding bonds may be exchanged for the bonds to be refunded with such cash adjustments as may be agreed upon or may be sold and the proceeds applied to the purchase or redemption of the bonds to be refunded. There shall be no limitation upon the amount of revenue bonds, notes, or other obligations which the authority may issue. Any limitations with respect to interest rates or any maximum interest rate or rates found in the usury laws of the State of Georgia, or any other laws of the State of Georgia, shall not apply to revenue bonds, notes, or other obligations of the authority. (Code 1981, § 6-4-8, enacted by Ga. L. 1992, p. 1615, § 1.)

6-4-9. Additional provisions governing issuance of bonds, notes, or other obligations.

(a) Subject to the limitations and procedures provided by this Code section, the agreements or instruments executed by the authority may contain such provisions not inconsistent with law as shall be determined by the members of the authority.

(b) The proceeds derived from the sale of all bonds, notes, and other obligations issued by the authority shall be held and used for the

ultimate purpose of paying, directly or indirectly as permitted in this chapter, all or part of the cost of any project or for the purpose of refunding any bonds, notes, or other obligations issued in accordance with the provisions of this chapter.

(c) Issuance by the authority of one or more series of bonds, notes, or other obligations for one or more purposes shall not preclude it from issuing other bonds, notes, or other obligations in connection with the same project or with any other projects, but the proceeding wherein any subsequent bonds, notes, or other obligations shall be issued shall recognize and protect any prior loan agreement, mortgage, deed to secure debt, trust deed, security agreement, or other agreement or instrument made for any prior issue of bonds, notes, or other obligations unless in the resolution authorizing such prior issue the right is expressly reserved to the authority to issue subsequent bonds, notes, or other obligations on a parity with such prior issue.

(d) The authority shall have the power and is authorized, whenever bonds of the authority shall have been validated as provided in this chapter, to issue from time to time its notes in anticipation of such bonds as validated and to renew from time to time any such notes by the issuance of new notes, whether the notes to be renewed have or have not matured. The authority may issue such bond anticipation notes only to provide funds which otherwise would be provided by the issuance of the bonds as validated. Such notes may be authorized, sold, executed, and delivered in the same manner as bonds. As with its bonds, the authority may sell such notes at public or private sale. Any resolution or resolutions authorizing notes of the authority or any issue thereof may contain any provisions which the authority is authorized to include in any resolution or resolutions authorizing bonds of the authority or any issue thereof and which the authority is authorized to include in any bonds. Validations of such bonds shall be a condition precedent to the issuance of such notes, but it shall not be required that such notes be judicially validated. Bond anticipation notes shall not be issued in an amount exceeding the par value of the bonds in anticipation of which they are to be issued.

(e) All bonds issued by the authority under this chapter shall be issued and validated under and in accordance with Article 3 of Chapter 82 of Title 36, the "Revenue Bond Law," as heretofore and hereafter amended, except as provided in this chapter, provided that notes and other obligations of the authority may be, but shall not be required to be, so validated.

(f) The authority shall determine the form of the bonds, including any interest coupons to be attached thereto, and shall fix the denomination or denominations of the bonds and the place or places of payment of principal and interest thereof, which may be at any bank or

trust company within or outside the state. The bonds may be issued in coupon or registered form or both, as the authority may determine, and provision may be made for the registration of any coupon bond as to principal alone and also as to both principal and interest.

(g) All bonds shall be signed by the chairman of the authority, and the official seal of the authority shall be affixed thereto and attested by the secretary of the authority, and any coupons attached thereto shall bear the signature or facsimile signature of the chairman of the authority. Any coupon may bear the facsimile signature of such person, and any bond may be signed, sealed, and attested on behalf of the authority by such person as at the actual time of the execution of such bonds shall be duly authorized to hold the proper office although at the date of such bonds such person may not have been so authorized or shall not have held such office. In case any officer whose signature shall appear on any bonds or whose facsimile signature shall appear on any coupon shall cease to be such officer before the delivery of such bonds, such signature shall nevertheless be valid and sufficient for all purposes the same as if such officer had remained in office until such delivery.

(h) In lieu of specifying the rate or rates of interest which bonds to be issued by the authority are to bear, the notice to the district attorney or the Attorney General, the notice to the public of the time, place, and date of the validation hearing, and the petition and complaint for validation may state that the bonds when issued will bear interest at a rate not exceeding a maximum per annum rate of interest, which may be fixed or may fluctuate or otherwise change from time to time, specified in such notices and petition and complaint or that, in the event the bonds are to bear different rates of interest for different maturity dates, that none of such rates will exceed the maximum rate which may be fixed or may fluctuate or otherwise change from time to time so specified; provided, however, that nothing contained in this subsection shall be construed as prohibiting or restricting the right of the authority to sell such bonds at a discount, even if in so doing the effective interest cost resulting therefrom would exceed the maximum per annum interest rates specified in such notices and in the petition and complaint.

(i) The authority may also provide for the replacement of any bond which becomes mutilated or which is destroyed or lost.

(j) The issuance of any bond, revenue bond, note, or other obligation or the incurring of any debt by the authority must, prior to such occurrence, be approved by the Georgia State Financing and Investment Commission established by Article VII, Section IV, Paragraph VII of the Constitution of the State of Georgia of 1983 or its successor. (Code 1981, § 6-4-9, enacted by Ga. L. 1992, p. 1615, § 1.)

6-4-10. Development of air transportation projects.

The implementation of new air transportation projects that are planned to accommodate 14 C.F.R. Part 121 aircraft operations within the State of Georgia develops and promotes for the public good and general welfare, trade, commerce, tourism, industry, and employment opportunities and promotes the general welfare of the state by creating a favorable climate for the location of new industry, trade, and commerce and the development of existing industry, trade, and commerce within the State of Georgia. It is therefore in the public interest and is vital to the public welfare of the people of Georgia and it is declared to be the public purpose of this chapter to so develop such air transportation projects within this state. No bonds, notes, or other obligations, except refunding bonds, shall be issued by the authority pursuant to this chapter unless its membership adopts a resolution finding that the project for which such bonds, notes, or other obligations are to be issued will promote the foregoing objectives. (Code 1981, § 6-4-10, enacted by Ga. L. 1992, p. 1615, § 1.)

6-4-11. Liberal construction of chapter.

The provisions of this chapter shall be liberally construed to effect its stated purpose. The offer, sale, or issuance of bonds, notes, or other obligations by the authority shall not be subject to regulation under the laws of the State of Georgia regulating the sale of securities, as heretofore and hereafter amended. No notice, proceeding, or publication except those required by this chapter shall be necessary to the performance of any act authorized by this chapter nor shall any such act be subject to referendum. (Code 1981, § 6-4-11, enacted by Ga. L. 1992, p. 1615, § 1.)

6-4-12. Obligations or indebtedness not to constitute indebtedness of state or political subdivisions.

No bonds, notes, or other obligations of and no indebtedness incurred by the authority shall constitute an indebtedness or obligation of the State of Georgia or any county, municipal corporation, or political subdivision thereof nor shall any act of the authority in any manner constitute or result in the creation of an indebtedness of the state or any such county, municipal corporation, or political subdivision. No holder or holders of any such bonds, notes, or other obligations shall ever have the right to compel any exercise of the taxing power of the state or any county, municipal corporation, or political subdivision thereof nor to enforce the payment thereof against the state or any such county, municipal corporation, or political subdivision; and all such bonds shall contain recitals on their face covering substantially the foregoing

provisions of this Code section. (Code 1981, § 6-4-12, enacted by Ga. L. 1992, p. 1615, § 1.)

6-4-13. Tax exemption.

It is found, determined, and declared that the creation of the Georgia Airport Development Authority and the carrying out of its corporate purposes are in all respects for the benefit of the people of this state and constitute a public purpose and that the authority will be performing an essential governmental function in the exercise of the power conferred upon it by this chapter. The authority shall be required to pay no taxes or assessments upon any of the property acquired by it or under its jurisdiction, control, possession, or supervision or upon its activities in the operation or maintenance of the facilities erected, maintained, or acquired by it nor upon any fees, rentals, or other charges for the use of such facilities or other income received by the authority. The state covenants with the holders from time to time of the bonds, notes, and other obligations issued under this chapter that the authority shall not be required to pay any taxes or assessments imposed by the state or any of its counties, municipal corporations, political subdivisions, or taxing districts on any property acquired by the authority or under its jurisdiction, control, possession, or supervision or leased by it to others or upon its activities in the operation or maintenance of any such property or on any income derived by the authority in the form of fees, recording fees, rentals, charges, purchase price, installments, or otherwise, and that the bonds, notes, and other obligations of the authority, their transfer, and the income therefrom shall at all times be exempt from taxation within the state. (Code 1981, § 6-4-13, enacted by Ga. L. 1992, p. 1615, § 1.)

6-4-14. Police powers.

The authority is empowered to exercise such of the police powers of the state as may be necessary to maintain peace and order and to enforce any and all restrictions upon its properties and facilities, to the extent that such is lawful under the laws of the United States and this state; however, the authority may delegate the exercise of this function for a time or permanently to the state or to the county in which its projects are located. (Code 1981, § 6-4-14, enacted by Ga. L. 1992, p. 1615, § 1.)

6-4-15. Other authorities unaffected by provisions of chapter.

This chapter shall not affect any other authority now or hereafter existing under general or local constitutional amendment or general or local law. (Code 1981, § 6-4-15, enacted by Ga. L. 1992, p. 1615, § 1.)

6-4-16. Venue and jurisdiction of actions.

Any action to protect or enforce any rights under this chapter and any action pertaining to validation of any bonds issued under this chapter brought in the courts of this state shall be brought in the Superior Court of Fulton County, which shall have exclusive jurisdiction of such actions. (Code 1981, § 6-4-16, enacted by Ga. L. 1992, p. 1615, § 1.)

CHAPTER 5

GEORGIA AVIATION AUTHORITY

Sec.
6-5-1. Short title.
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6-5-3. Georgia Aviation Authority created; membership and personnel; administrative purposes.
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6-5-9. Liberal construction.
6-5-10. Termination [Repealed].

Cross references. — Georgia Aviation Hall of Fame, T. 50, C. 12, A. 4, P. 3.

6-5-1. Short title.

This chapter shall be known and may be cited as the "Georgia Aviation Authority Act." (Code 1981, § 6-5-1, enacted by Ga. L. 2009, p. 848, § 1/SB 85.)

6-5-2. Definitions.

As used in this chapter, the term:

(1) "Authority" means the Georgia Aviation Authority.

(2) "State aircraft" means any aircraft, including equipment, owned, leased, rented, chartered, or otherwise obtained by the authority. (Code 1981, § 6-5-2, enacted by Ga. L. 2009, p. 848, § 1/SB 85.)

6-5-3. Georgia Aviation Authority created; membership and personnel; administrative purposes.

(a) There is created a body corporate and politic to be known as the Georgia Aviation Authority which shall be deemed to be an instrumentality of the state and a public corporation, and by that name, style, and title the body may contract and be contracted with, implead and be impleaded, and bring and defend actions in all courts. The authority shall consist of the Governor or his or her designee, the Lieutenant Governor or his or her designee, the Speaker of the House of Representatives or his or her designee, the commissioner of transportation, the commissioner of public safety, the commissioner of economic develop-

ment, the commissioner of natural resources, the director of the State Forestry Commission, and two persons from the aviation business community with one such member of the aviation business community to be appointed by the Speaker of the House of Representatives, and the other such member of the aviation business community to be appointed by the President of the Senate. The chairperson of the authority shall be a member of the authority elected for a two-year term by a majority vote of the members of the authority. A chairperson may not serve more than two consecutive terms as chairperson. The authority shall make rules and regulations for its own governance. It shall have perpetual existence.

(b) The authority is assigned to the Department of Administrative Services for administrative purposes only as prescribed in Code Section 50-4-3.

(c) The authority may in its discretion employ an executive director and other personnel. The authority may also by agreement with any department or agency of state government make use of personnel of such department or agency.

(d) The authority shall be subject to Chapter 13 of Title 50, the "Georgia Administrative Procedure Act."

(e) The authority may designate personnel positions employed by the authority as peace officers who shall be required by the terms of their employment to give their full time to the preservation of public order, the protection of life and property, the detection of crime, and such other duties as may be specified by the authority. Personnel in such positions shall comply with the requirements of Chapter 8 of Title 35, the "Georgia Peace Officer Standards and Training Act," and shall have the power of arrest in the performance of their duties. (Code 1981, § 6-5-3, enacted by Ga. L. 2009, p. 848, § 1/SB 85; Ga. L. 2011, p. 409, § 1/HB 414.)

The 2011 amendment, effective May 11, 2011, inserted "the commissioner of economic development," in the second sentence in subsection (a).

6-5-4. Purpose of the authority; powers; support; annual audits.

(a)(1)(A) The general purpose of the authority shall be to acquire, operate, maintain, house, and dispose of all state aviation assets, to provide aviation services and oversight of state aircraft and aviation operations to ensure the safety of state air travelers and aviation property, to achieve policy objectives through aviation missions, and to provide for the efficient operation of state aircraft.

(B) This Code section shall not diminish those powers and duties of the Department of Natural Resources under Code Section

12-2-11, the State Forestry Commission under Code Section 12-6-22.1, or the Department of Public Safety under Code Section 35-2-140.

(2)(A) All aircraft previously transferred to the authority by the Department of Public Safety and associated parts and equipment and a percentage of the budgeted operating funds associated with such aircraft shall be transferred on September 1, 2011, back to the custody and control of the Department of Public Safety; provided, however, that this chapter shall have no application to aircraft owned or operated by the Department of Defense.

(B) All aircraft under the custody and control of the authority as of June 30, 2012, which were previously transferred to the authority by the Department of Natural Resources and associated parts and equipment and any budgeted operating funds associated with such aircraft shall be transferred on July 1, 2012, back to the custody and control of the Department of Natural Resources.

(C) All aircraft under the custody and control of the authority as of June 30, 2012, which were previously transferred to the authority by the State Forestry Commission and associated parts and equipment and any budgeted operating funds associated with such aircraft shall be transferred on July 1, 2012, back to the custody and control of the State Forestry Commission.

(D) For purposes of aerial aviation photography, the King Air 90 aircraft that was specially equipped and adapted to perform essential aerial photography under the custody and control of the authority as of June 30, 2012, which was previously transferred to the authority by the Department of Transportation, and associated parts and equipment specific to that aircraft shall be transferred on July 1, 2012, back to the custody and control of the Department of Transportation. The Department of Transportation shall have the authority to own, operate, maintain, and dispose of aircraft to support the aerial photography mission needs of the department.

(3) On and after July 1, 2009, or a later date determined by the Governor, no entity of state government shall acquire, lease, or charter any aircraft other than through the authority.

(4)(A) Any person who is employed by an entity of state government as a pilot and who is required by the terms of his or her employment to comply with the requirements of Chapter 8 of Title 35, the "Georgia Peace Officer Standards and Training Act," may remain in the employment of the employing agency but shall be transferred for administrative purposes only to the authority on July 1, 2009, in compliance with subsection (c) of Code Section 6-5-3.

(B) The provisions of subparagraph (A) of this paragraph notwithstanding:

(i) Those persons who are employed by the Department of Public Safety who are assigned for administrative purposes only to the authority shall be transferred back to the Department of Public Safety on September 1, 2011, and shall no longer be under the administration or direction of the authority;

(ii) Any persons who as of June 30, 2012, were employed by the authority pursuant to previous transfer from the Department of Natural Resources to the authority shall be transferred back to the Department of Natural Resources on July 1, 2012, and shall no longer be under the administration or direction of the authority; and

(iii) Any persons who as of June 30, 2012, were employed by the authority pursuant to previous transfer from the State Forestry Commission to the authority shall be transferred back to the State Forestry Commission on July 1, 2012, and shall no longer be under the administration or direction of the authority.

(5)(A)(i) All state aircraft required for the proper conduct of the business of the several administrative departments, boards, bureaus, commissions, authorities, offices, or other agencies of Georgia and authorized agents of the General Assembly, or either branch thereof, and department owned airfields and their appurtenances shall be managed and maintained by the authority.

(ii) The provisions of division (i) of this subparagraph notwithstanding:

(I) All airfields and appurtenances, including hangars, previously transferred by the Department of Public Safety to the authority shall be transferred back to the Department of Public Safety on September 1, 2011;

(II) All airfields and appurtenances, including hangars, previously transferred by the Department of Natural Resources to the authority shall be transferred back to the Department of Natural Resources on July 1, 2012; and

(III) All airfields and appurtenances, including hangars, previously transferred by the State Forestry Commission to the authority shall be transferred back to the State Forestry Commission on July 1, 2012.

(B) The cost for the use of such state aircraft shall be charged by the authority to the using state entity. The amount of such charge shall be determined by the authority.

(6)(A) The authority shall be authorized to dispose of any state aircraft and apply the proceeds derived therefrom to the purchase of replacement aviation assets.

(B) This paragraph shall not apply to state aircraft assigned to the Department of Public Safety, the Department of Natural Resources, or the State Forestry Commission.

(b) In the furtherance of its purpose, the authority shall have the power to:

(1) Hire, organize, and train personnel to operate, maintain, house, purchase, and dispose of aviation assets;

(2) Purchase, maintain, develop, and modify facilities to support aviation assets and operations;

(3) Develop operating, maintenance, safety, security, training, education, and scheduling standards for state aviation operations and conduct inspections, audits, and other similar oversight to determine practices and compliance with such standards;

(4) Develop an accountability system for state aviation operations and activities;

(5) Identify the costs associated with the training, education, and purchase, operation, maintenance, and administration of state aircraft and aviation operations and related facilities; develop an appropriate billing structure; and charge agencies and other state entities for the costs of state aircraft and aviation operations; provided, however, that any billing to an agency by the authority shall be suspended whenever the Governor declares a state of emergency on any cost associated with aircraft used during and in response to the state of emergency;

(6) Retain appropriate external consulting and auditing expertise;

(7) Engage aviation industry representatives to ensure best practices for state aviation assets;

(8) Delegate certain powers pursuant to this chapter to other state entities; and

(9) Otherwise implement appropriate and efficient management practices for state aviation operations.

(c)(1) The authority shall provide priority support for those state agencies and departments, including local and state public safety and law enforcement entities, whose operations require aviation operations when requested.

(2)(A) No state entity other than the authority shall be authorized without the approval of the authority to expend state funds to

purchase, lease, rent, charter, maintain, or repair state aircraft to be used in connection with state business or to employ a person whose official duties consist of piloting state aircraft.

(B) This paragraph shall not apply to the Department of Public Safety, the Department of Natural Resources, or the State Forestry Commission.

(d) The funds and assets of the authority, as well as the performance of the authority, its services, and equipment, shall be audited annually by the state auditor. The results of such audit shall be open to inspection at reasonable times by any person. A copy of the audit report shall be sent to the state accounting officer. The authority shall also provide the Governor, the Speaker of the House, the President of the Senate, the chairperson of the House Committee on Public Safety and Homeland Security, the chairperson of the Senate Public Safety Committee, the chairperson of the Senate Veterans, Military and Homeland Security Committee, the chairperson of the House Committee on Transportation, and the chairperson of the Senate Transportation Committee with a copy of the state audit report which shall include a full report of the activities and services of the authority. The performance audit report shall be provided no later than December 31, 2013.

(e) On September 1, 2011, the six aviation mechanic positions that were previously transferred by the Department of Public Safety to the authority shall be returned to the Department of Public Safety along with the funds budgeted for such positions. (Code 1981, § 6-5-4, enacted by Ga. L. 2009, p. 848, § 1/SB 85; Ga. L. 2011, p. 409, § 2/HB 414; Ga. L. 2012, p. 1082, § 1/SB 339.)

The 2011 amendment, effective May 11, 2011, in subsection (a), inserted ", except those aviation assets of the Department of Public Safety" in the first sentence, rewrote the second sentence, which read: "All aircraft owned or operated as of July 1, 2009, or a later date determined by the Governor, by any other entity of state government shall be transferred on that date to the custody and control of the authority; provided, however, that this chapter shall have no application to aircraft owned or operated by the Department of Defense.", inserted ", other than the Department of Public Safety," in the third sentence, substituted "may remain in the employment" for "shall remain in the employment" in the fourth sentence, and added the provisos in the fourth and fifth sentences; in subsection (c), added "when requested" at the end of the first sentence, and inserted "and the Department of Public Safety" in the last sentence; and added subsection (e).

The 2012 amendment, effective July 1, 2012, rewrote this Code section.

Cross references. — State aviation operations, § 35-2-140.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2012, "Code Section 12-6-22.1" was substituted for "Code Section 12-6-25" in subparagraph (a)(1)(B); a period was added at the end of subparagraph (a)(4)(A); a semicolon was substituted for a period at the end of division (a)(4)(B)(i) and subdivision (a)(5)(A)(ii)(I); and "; and" was substituted for a period at the end of division (a)(4)(B)(ii) and subdivision (a)(5)(A)(ii)(II).

OPINIONS OF THE ATTORNEY GENERAL

Primary purpose of the Georgia Aviation Authority (GAA) as mandated by the General Assembly is to operate and maintain the state's aviation assets and "to provide aviation services and oversight of state aircraft and aviation operations." Neither subsection (a) nor subsection (b) of O.C.G.A. § 6-5-4, which describes the powers of the GAA, grants the GAA the authority to exercise general law enforcement powers. Although the GAA provides valuable assistance to various agencies with law enforcement responsibility, that does not make the authority a de facto law enforcement agency in and of itself. 2011 Op. Att'y Gen. No. 11-3.

6-5-5. Additional powers of the authority.

In addition to the powers specified in Code Section 6-5-4, the authority shall have the powers:

(1) To have a seal and alter the same at its pleasure;

(2) To acquire by purchase, lease, or otherwise and to hold, lease, and dispose of real and personal property of every kind and character for its corporate purposes;

(3) To acquire in its own name by purchase, on such terms and conditions and in such manner as it may deem proper real property or rights of easements therein or franchises necessary or convenient for its corporate purposes and to use the same so long as its corporate existence shall continue and to lease or make contracts with respect to the use of or disposal of the same in any manner it deems to the best advantage of the authority. No property shall be acquired under this chapter upon which any lien or other encumbrance exists unless at the time such property is so acquired a sufficient sum of money is deposited in trust to pay and redeem the fair value of the lien or encumbrance; and if the authority shall deem it expedient to construct any project on lands which are a part of the real estate holdings of the state, the Governor is authorized to execute for and on behalf of the state a lease of the lands to the authority for such parcel or parcels as shall be needed for a period not to exceed 50 years. If the authority shall deem it expedient to construct any project on any other lands the title to which shall then be in the state, the Governor is authorized to convey, for and in behalf of the state, title to such lands to the authority;

(4) To appoint and select officers, agents, and employees, including pilots, maintenance workers, engineering, architectural, aviation, and construction experts, fiscal agents, and attorneys, and fix their compensation and otherwise adopt policies that establish a system of sound personnel management;

(5) To make contracts and leases and to execute all instruments necessary or convenient, including contracts for construction of

projects and leases of projects or contracts with respect to the use of projects which it causes to be erected or acquired; and any and all political subdivisions, departments, institutions, or agencies of the state are authorized to enter into contracts, leases, or agreements with the authority upon such terms and for such purposes as they deem advisable. Without limiting the generality of the above, authority is specifically granted to any department, board, commission, or agency of the state to enter into contracts and lease agreements for the use or concerning the use of any structure, building, or facilities or a combination of any two or more structures, buildings, or facilities of the authority for a term not exceeding 50 years; and any department, board, commission, or agency of the state may obligate itself to pay an agreed sum for the use of the property so leased and also to obligate itself as part of the lease contract to pay the cost of maintaining, repairing, and operating the property leased from the authority;

(6) To accept loans or grants of money or materials or property of any kind from the United States or any agency or instrumentality thereof upon such terms and conditions as the United States or the agency or instrumentality may impose;

(7) To exercise any power usually possessed by private corporations performing similar functions, which is not in conflict with the Constitution and laws of this state; and

(8) To do all things necessary or convenient to carry out the powers expressly given in this chapter. (Code 1981, § 6-5-5, enacted by Ga. L. 2009, p. 848, § 1/SB 85.)

6-5-6. Moneys received deemed trust funds.

All moneys received pursuant to the authority of this chapter shall be deemed trust funds to be held and applied solely as provided in this chapter. (Code 1981, § 6-5-6, enacted by Ga. L. 2009, p. 848, § 1/SB 85.)

6-5-7. Public purpose of authority; responding to emergencies.

(a) It is found, determined, and declared that the creation of the authority and the carrying out of its corporate purpose are in all respects for the benefit of the people of this state and are a public purpose and the authority will be performing an essential governmental function in the exercise of the power conferred upon it by this chapter.

(b) In order to ensure that addressing emergency law enforcement needs is the authority's first priority, the authority, in coordination with the Board of Public Safety, shall adopt policies and procedures to ensure

that responding to emergencies, imminent threats to individual and public safety, natural disasters, or other emergency law enforcement needs is met. The authority shall be exempt from all sales and use tax on property purchased, leased, or used by the authority. (Code 1981, § 6-5-7, enacted by Ga. L. 2009, p. 848, § 1/SB 85.)

6-5-8. Jurisdiction for action.

Any action to protect or enforce any rights under this chapter shall be brought in the Superior Court of Fulton County. (Code 1981, § 6-5-8, enacted by Ga. L. 2009, p. 848, § 1/SB 85.)

6-5-9. Liberal construction.

This chapter, being for the welfare of the state and its inhabitants, shall be liberally construed to effect the purposes hereof. (Code 1981, § 6-5-9, enacted by Ga. L. 2009, p. 848, § 1/SB 85.)

6-5-10. Termination.

Reserved. Repealed by Ga. L. 2011, p. 409, § 3/HB 414, effective May 11, 2011.

Editor's notes. — This Code section was based on Code 1981, § 6-5-10, enacted by Ga. L. 2009, p. 848, § 1/SB 85.